



Oregon

Kate Brown, Governor

Department of Agriculture
635 Capitol St NE
Salem, OR 97301-2532

December 1, 2015

Laura K. Wilke
Oregon Water Resources Department
725 Summer St NE, Suite A
Salem, OR 97301-1271



Re: Comments on the Deschutes Ground Water Mitigation Program: House Bill 3623 Report [February 2016 (Draft 11-5-2015)]. Sent via e-mail.

Dear Laura,

ODA appreciates the opportunity to review and provide comments on the Deschutes Ground Water Mitigation Program: House Bill 3623 Report [February 2016 (Draft 11-5-2015); the Report]. The Deschutes Groundwater Mitigation Program (the Mitigation Program) could potentially become a useful element in effective water resources use and management in the Deschutes Basin.

Comments are first summarized and then specific comments are provided in the section to follow.

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General Comments

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1. The fundamental assumptions and approach of the conceptual model, as described in the report, may be overly simplistic for the fairly complex, interconnected, and nonstationary hydrologic system in the Deschutes Basin.
2. The one-to-one ratio for groundwater extraction to streamflow mitigation may not be entirely appropriate.
3. Loss of water for agricultural lands is a valid concern, thus it is important to have a variety of sources for mitigation water, such as from storage, to meet mitigation needs under a range of evolving hydrologic and climate conditions.
4. A key weakness of the conceptual model is that it does not include effects of climate variability and change on surface water and groundwater resources.

Specific Comments

1. The fundamental assumptions and approach of the conceptual model, as described in the report, may be overly simplistic for a groundwater pumping mitigation plan in the Deschutes Basin. For example, the conceptual model assumes

that groundwater pumping draws water from a stream but does not appear to consider or include substantive contributions, or drawdown, from the aquifer.

The model also omits significant sources of recharge to the groundwater system, such as from melting snowpack in headwater or higher elevation regions.

2. Relatedly, the one-to-one ratio for groundwater extraction to streamflow mitigation may not be appropriate in all cases. As discussed above, significant sources of groundwater recharge are absent from consideration in the conceptual model. Plus the model may overgeneralize hydraulic connectivity between groundwater and surface water resources so that pumping draws directly from the stream rather than including aquifer contributions.

The Report also assumes that potential impacts of groundwater pumping are uniformly distributed throughout the year (e.g., pages 14, 15 and 16). The logic of the assumption is unclear. For instance: (a) if a permit limits pumping to the irrigation season or less than 12 months/year (e.g., municipal supply); (b) the pumping rate is balanced with recharge; and (c) significant sources of groundwater recharged are factored into impact evaluations, then potential effects will vary spatially and temporally, including within a year and on an interannual basis.

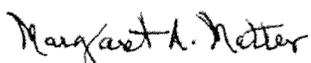
3. Loss of water for agricultural lands is a valid concern, thus it is important to have a variety of sources for mitigation water, such as from storage, to meet mitigation needs under a range of evolving hydrologic and climate conditions.

Correspondingly, incorporating adaptive strategies for extreme events (e.g., prolonged dry or drought conditions) may be useful to permit apportioning water between mitigation needs and out of stream uses, such as for relieving water stressed crops and livestock, or for municipalities during extreme events.

4. The absence of any evaluation of influences of climate variability and change on surface water and groundwater resources is an important weakness in the long-term of the conceptual model approach.

Thank you for the opportunity to provide feedback on the draft Report. Please contact me at 503-986-4561 or mmatter@oda.state.or.us if you have questions.

Best Regards,


Margaret Matter

cc: Ray Jaindl



Oregon

Kate Brown, Governor

Department of Fish and Wildlife
Fish Division
4034 Fairview Industrial Drive SE
Salem, OR 97302
(503) 947-6201
FAX (503) 947-6202
www.dfw.state.or.us/

December 2, 2015

Laura Wilke
Flow Restoration Program Coordinator
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271



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DEC 03 2015

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RE: ODFW's Comments on the draft HB 3623 Report

Dear Ms. Wilke,

The Oregon Department of Fish and Wildlife (ODFW) appreciates the opportunity to provide comments on the November 5, 2015 draft House Bill 3623 Report. ODFW thanks the Oregon Water Resources Department (OWRD) for recognizing our past comments in the draft and for recently presenting those concerns to the Water Resources Commission. Overall, ODFW is pleased that the program has been successful in maintaining and improving flows in the Middle and Lower Deschutes River during the irrigation season. However, as the intent of this review is to improve the Program, ODFW would like to see WRD propose working solutions to our continued concerns beyond recognizing that discussions with stakeholders may be necessary. ODFW has submitted consistent concerns during each annual review, yet solutions have not been integrated into the Program. Specifically, ODFW would like to see tangible improvements to the Program in the following areas:

Impacts During the Non-Irrigation Season

As currently designed, the Deschutes Groundwater Mitigation Program mitigates year-round groundwater withdrawals with irrigation season water. This type of mitigation does provide for more instream water during the irrigation season, but also will eventually reduce flows in the lower river during the non-irrigation season. Critical fish life history components occur outside of the irrigation season, particularly during "shoulder months" at the beginning and end of the irrigation season (March/April and October/November).

In addition, the Mitigation Program poses potential impacts to the recently ESA-listed Oregon Spotted Frog (OSF) outside of the irrigation season. Improving winter flows on the upper Deschutes River below Wickiup Reservoir and on Crescent Creek is essential to the

survival of the OSF, and freshwater spring habitats in the upper Deschutes Basin have been determined to be critical to overwinter survival.

The continual detrimental impact to streamflow during the non-irrigation season is now a greater concern for more than just the “shoulder months.” All stakeholders recognize that non-irrigation flow concerns still need to be addressed for the Deschutes basin as a whole. In the draft report, WRD recognizes this concern as well. However, rather than addressing the problem through improvements to the Program, the proposed solution is to rely on other restoration efforts in the basin to provide flow during the non-irrigation season. ODFW would like OWRD and program partners to work with us to seek options for year-round mitigation to offset year-round impacts. One option would be to forgo some stored water in Wickiup, Crane Prairie, Crescent, and other reservoirs during the non-irrigation season. This would better mitigate for the impacts of groundwater withdrawal on a true 1:1 basis.

Impacts to Springs

ODFW continues to have concerns with the localized impacts of groundwater pumping on local springs. Springs provide very important cold water inputs to streams by providing cold water refugia and other habitat benefits for fish and by helping cool stream temperatures during the summer in streams with depleted flows. Over time, ODFW assumes that continued and increased groundwater withdrawal for agricultural, residential, and municipal needs will further affect springs when there is a surface/groundwater connection. Impacts to springs from current and future groundwater withdrawals are exacerbated by the increasing trend to convert area irrigation canals to piped delivery systems. While this is positive in that it generates conserved water that results in improved instream flows in the middle Deschutes River, it also eliminates seepage, which recharges the aquifer and contributes to spring recharge of cold water. The result is an exchange (loss) of cold spring water for warmer water upstream. The fisheries impacts of this inconsistency is likely to become more pronounced in future years as climate change continues to be increasingly more influential. Cold water refugia could likely become critical to long term persistence of many fish species and populations.

ODFW requests that OWRD consider implementing a program to monitor key springs/spring complexes in the basin to determine ecological impacts to spring flow, including temperature and nutrient changes resulting from groundwater pumping. The current update to the groundwater flow model by the U.S. Geological Survey should include information to address this concern, where appropriate.

ODFW will participate in seeking solutions and is willing to work with other agencies to seek funding, coordinate efforts for research, and develop and implement a strategy to address these concerns. Thank you for the chance to comment. If you have any questions, please contact me (503-947-6092) or Brett Hodgson (541-388-6363).

Sincerely,



Danette Faucera
Water Policy Coordinator

Brett Hodgson
Deschutes District Fish Biologist

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December 2, 2015

Laura Wilke
Oregon Water Resources Department
725 Summer Street NE, STE A
Salem, OR 97301

Re: Comments Deschutes Groundwater Mitigation Program, Final Draft HB 3623 Report to the Legislature

Dear Laura,

Thank you for this opportunity to supply additional comments to the final draft HB 3623 Report to the Legislature. These comments supplement our earlier comments on previous drafts.

In general, the Report appears comprehensive in nature; however we do have some concerns with some of the additional material included since the last iteration, including, but not limited to, the following points:

Cancellation for failure to provide mitigation, pg. 46-47: WaterWatch strongly opposes the inclusion of the discussion on pages 46-47 that indicates that the WRD believes that its authority to cancel permits for failing to provide mitigation is limited. We do not believe the WRD's preliminary legal analysis on this issue is accurate.

Under statute, the WRD has broad authority to condition permits to protect the public interest under ORS 537.190(1). In the Deschutes, key conditions include a requirement that mitigation be provided for the life of the permit and that failure to provide mitigation can result in cancellation of the permit. These conditions are required because, as you know, in the Deschutes basin the WRD cannot issue a groundwater permit absent mitigation because to do so would violate the Scenic Waterway Act, would injure instream water rights and would violate the state's permitting requirement that water be available for use. See ORS 390.835(9), ORS 537.153. Permit conditions requiring mitigation for the life of the permit are central to the Department's decision to issue a groundwater permit; the Department could not issue the permit were it not for mitigation. Conditions ensure that a proposed water use will meet the legislative standard for water use in the Deschutes basin, in this case that the use will not measurably reduce scenic waterway flows, will not injure instream water rights and will not impair the public interest or otherwise harm the public health, welfare and safety. Thus, it is anomalous that the Legislature would give the WRD the authority to impose any conditions, but then not allow the WRD to enforce those conditions. Again, all groundwater permits issued under the Deschutes Groundwater Mitigation Rules are conditioned to allow cancellation as one of the remedies for non-compliance with mitigation requirements. These cancellation conditions are supported by ORS 537.190(1) and consistent with mandates of the Scenic Waterway Act. Moreover, in the

case of groundwater, the statutes are incredibly clear, whenever the Commission finds that the holder of any permit is willfully violating any provision of the permit the Commission can cancel the permit. ORS 537.720. As such, the new language starting in paragraph 5 on page 46 and going through to the end of this section, that indicates the WRD's ability to cancel permits for lack of mitigation is limited, should be struck in whole and replaced with a clear message from the Department that if the permits and/or certificates do not provide the required mitigation, the state will immediately regulate the use off and proceed with the cancellation of the permit/certificate.

Mitigation terminating at Lake Billy Chinook, pg. 28: While we appreciate that the WRD was attempting to address WaterWatch's earlier comments that mitigation needs to be protected to the mouth to ensure that the groundwater pumping impacts to protected lower river flows are mitigated, the narrative on page 28 confuses the issue. In our reading, the narrative on page 28 seems to imply that impacts to scenic waterway reaches and/or instream water rights below Pelton Round Butte somehow don't need to be mitigated. We think this is in error and recommend that the WRD strike this from the final report.

Scenic waterway flows and instream water rights in the lower Deschutes are not met year round. Groundwater pumping is reducing spring flows that feed this section of the river in an amount equal to the consumptive use. These protected flows are at the bottom of the system and were the driver for the requirement for mitigation for the entire upper basin. There is not a futile call between waters upstream and downstream of the Pelton Round Butte Project (this point was specifically agreed to as a condition of the Pelton Round Butte Reauthorization). As such, mitigation must be supplied for the entire river reach, to the mouth of the Deschutes River. The WRD's narrative on this point is directly contrary to the longstanding building blocks of the program, is contrary to findings in the USGS, does not make hydrologic sense and is inconsistent with statute. Mitigation is required for the lower river under the Scenic Waterway Act, a point that has never before been disputed by the WRD. Thus, the WRD can and must protect mitigation upstream of the project through to the lower Deschutes River¹. If the WRD is not doing this presently, then all groundwater rights issued under the program are in violation of the Scenic Waterway Act and thus are in jeopardy.

Exempt wells, page 45: The discussion of exempt wells on page 45 should be expanded to include the point that while the Scenic Waterway Act specifically exempts exempt wells from the Act's requirement to supply mitigation, other statutory mandates do not. Specifically, statutes are clear that exempt groundwater wells are subject to regulation and/or conditioning if they interfere with surface water rights. See e.g. ORS 537.545(4), ORS 537.775. In 1998 the WRD found that there was the potential for substantial interference with surface water. The USGS found that there was a one to one impact from groundwater pumping on surface water. Surface waters in the Deschutes basin are protected not only by the Scenic Waterway Act, but also by instream water rights. Scenic waterway issues aside, exempt uses are injuring instream water rights, which is prohibited by law. As such, the WRD should be requiring mitigation of exempt wells junior to the instream water rights and/or regulating these uses off.

¹ There is no statutory authority for the premise that instream transfers cannot be protected into a receiving stream unless they are measurable.

Conclusion: WaterWatch has been an active stakeholder in the development of the Deschutes Groundwater Mitigation Program, dating back to the mid 1990's. The first two points noted above jeopardize foundational principles of the program. These should be thoroughly vetted before including in an official report to the Legislature. In the immediate future, they should be deleted from the final draft that the WRD will be submitting to the Legislature. In conclusion, we respectfully request that you address the aforementioned points before finalizing your report that will be submitted to the Legislature.

Thank you for your consideration.

Sincerely,



Kimberley Priestley
Senior Policy Analyst

cc: Dwight French

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November 27, 2015

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Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301

Director Bylar and OWRD Commissioners:

Thank you for your service and ongoing work to ensure Oregonians have access to clean water and responsible resource management. You recently heard from a Central Oregon Cities Organization (COCO) delegation about groundwater mitigation in our area. I would like to offer a few points of clarification from my perspective as a Bend City Councilor that may not have been shared.

As you know, groundwater management is a tricky business and the hydrodynamics of the Deschutes basin are not yet well understood. The City of Bend has an abundance of drinking water from Tumalo Creek surface diversions and from supplemental groundwater pumping. While I certainly think an efficient and well regulated groundwater mitigation program is important, we should not rush to implement something prematurely that could degrade our aquifer and natural resources in the area.

Specifically, limiting groundwater analysis to a single impact zone for mitigation banking as mentioned in several comment letters to OWRD is illogical. It is in the interest of Bend and surrounding areas that groundwater mitigation considers basin wide impacts rather than a single zone. If mitigation credits result in greater pumping in one area, we could experience significant depression cones in the aquifer that decrease base flow to surface streams and dry up existing wells. Bend has an interest in preventing either of those situations. I do not support limiting mitigation analysis to a single zone.

Using stored water for mitigation credits is also problematic. Groundwater recharge from reservoirs is not the same as that which occurs from streams and rainfall. Using stored water for mitigation credits would require analysis of the individual reservoir in question to determine how groundwater behaves at the site.

Finally, and most importantly, using irrigation piping projects to justify groundwater mitigation credits has a double negative impact on our aquifer. Piping and efficiency measures can free up allocated water that can then be left for in stream use, assuming an irrigation district is willing. However, water infiltrating from irrigation canals contributes to groundwater recharge in our area. A misguided piping project could even inadvertently lead to decreased surface stream flow if base flow is decreased. Were piped water savings then applied toward obtaining new groundwater pumping rights, the aquifer would take a double impact from both loss of recharge and increased pumping, the opposite intent of the mitigation credit program.

I look forward to more discussion about water policy on Council in the future and a close working relationship with OWRD to ensure protection for our valuable water resources in Bend and Central Oregon. Please do not hesitate to contact me with any questions or for further discussion.

Respectfully,

Nathan K. Boddie, M.D., M.S.
Councilor, City of Bend



United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Prineville District Office
3050 N.E. 3rd Street
Prineville, Oregon 97754

IN REPLY REFER TO:
8351 (ORP060)

NOV 30 2015

Laura Wilke
Flow Restoration Program Coordinator
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1270

Dear Ms. Wilke:

Thank you for the opportunity to comment on the "Deschutes Ground Water Mitigation Program: House Bill 3623 Report." In reading the updated draft (November 2015) we were pleased to see that it:

- Addressed Bureau of Land Management's (BLM) previous concerns about consistent use of instream flow terminology;
- More clearly documented how the Department determines if rivers meet instream flows;
- Explained that the Department cannot regulate the flows associated with the BLM's Wild and Scenic River (federal reserve rights) unless the BLM obtains a state water right; and
- Included the Lower Crooked River below River Mile 13.8 in the General Zone of Impact.

In reviewing the draft we did find one thing of note. Figure B's depiction of "springs" may inaccurately display the portion of the General Zone of impact with significant seeps and springs. This could be remedied if the delineation of springs and seeps followed the descriptive text provided on page 17, General Zone of Impact, first paragraph.

Again, thank you for involving the BLM as a stakeholder in water rights and ground water issues. Please continue to involve us in stakeholder discussions and rule making, including but not limited to, the Department's discussion of time extensions for permits. Please feel free to contact myself at (541) 416-6766 or jhkitch@blm.gov, or Anna Smith, Hydrologist at (541) 416-6747 or aksmith@blm.gov if you any questions regarding our input.

Sincerely,

Jeff Kitchens
Field Manager, Deschutes Resource Area

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