



Oregon
Kate Brown, Governor

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**Joint Ways and Means Subcommittee on Public Safety
Senator Jackie Winters and Representative Carla Piluso, Co-Chairs**

**Information in Support of Department of Justice Request
Tom Byler, Director**

The Oregon Water Resources Department (Department) supports Policy Option Package (POP) 356 of the Department of Justice's (DOJ) request for additional resources within its Natural Resources Section.

Over the past few years, the Department has experienced a need for increased legal support, while also witnessing other agencies have similarly challenging legal workloads. The result has been long waiting times for Department of Justice advice, and our attorney regularly working extra hours and on the weekends to try to keep up. From our perspective, this is not sustainable and DOJ needs additional resources.

Oregon's Water Code was adopted in 1909, but its foundations predate that going back to the common law doctrine of prior appropriation practiced in the 1800s, as miners sought to develop their claims and needed water to do so. Over time the laws have grown increasingly more complex and in some cases, difficult to understand, often times based on a whole body of 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 is lost with time. Meanwhile, 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. These challenges increase the likelihood of disputes and litigation, requiring significant time from DOJ to research the laws and provide the Department with advice. While the Department prefers to resolve issues through collaboration and cooperation, as water becomes scarcer, we anticipate that there will be more disputes relating to water management and an increased willingness by water users and others to litigate.

In recent years, the Water Resources Department has experienced a rise in DOJ costs. Monthly expenses for general advice and water right adjudication have grown slightly; however, litigation expenses have surged over the last three biennia as new court filings have increased. Between July 2011 and June 2013, 4 new cases were filed. In contrast, 13 new cases were filed between July 2013 and June 2015, while an additional 25 new cases were filed between July 2015 and June 2017. Between July 2017 and December 2018, 19 new cases were filed. It can take several years for litigation to be resolved, meaning that increases in new filings have significant long-term effects on the Department's budget and staff workloads across the agency. The greatest increases in litigation are occurring related to enforcement and water transactions.

Enforcement actions generally result from the regulation of junior water rights to meet the needs of a senior water right holder, or using water illegally or inconsistent with the conditions and limitations contained in a water right. They may also include violations of well construction and maintenance standards.

Transactions include decisions made on water right applications, requests for extensions of time, water right transfer applications, limited licenses, and other water right related actions. Most water supplies have been fully allocated, making it more difficult to approve new water right applications, leading to more creative proposals from applicants, stakeholders and the public to allow for or restrict further appropriations.

Legal costs associated with the Klamath Adjudication are also projected to increase. In 2013, the Klamath Adjudication has moved from the administrative phase to the judicial phase with the filing of the Adjudicator's Finding of Fact and Order of Determination for review in the Klamath County Circuit Court. Representing the State in hearings will require extensive Assistant Attorney General time. Given the number and complexity of issues, the size of the legal record, and the number of parties involved, it is estimated the circuit court review may take another 10 years to complete.

The Department's base budget to cover the costs of legal services for the 2017-2019 biennium was \$835,628. For the months of July 2017 through July 2018, the Department's DOJ billings totaled \$1,076,917. This resulted in the Department going to the Emergency Board in September 2018 requesting an additional \$1,352,526 general fund to meet the anticipated legal costs for the remainder of the biennium.

In recognition of these trends, the Governor's Recommended Budget for the Water Resources Department includes POP 105, which provides \$1,000,000 in General Funds for legal expenses. Increasing funds for legal expenses would reduce the uncertainty for the Department, and allow for work to proceed as expected and authorized. Providing additional resources to DOJ through POP 356 would help to address the associated workload impacts and ensure that state agencies are making timely decisions with sound legal advice.