DOUG WHITSETT
State Senator
DISTRICT 28
KLAMATH, LAKE, CROOK & PORTIONS
OF JACKSON & DESCHUTES COUNTIES

900 Court St NE S-311
Salem, OR 97301
(503) 986-1728

GAIL WHITSETT
State Representative
DISTRICT 56
KLAMATH & LAKE COUNTIES

900 Court St NE H-474
Salem, OR 97301
(503) 986-1456

Monday, March 23, 2015

Sen. Chris Edwards, Chairman
Sen. Alan Olsen, Vice Chair
Members, Senate Environment and Natural Resources Committee

Committee Members,

Both SB 206 and SB 264 address the Klamath Basin Restoration Agreement and the Upper Klamath Basin Comprehensive Agreement. The latter Agreement largely serves to expand the provisions of Section 16 of the former agreement.

These bills are before the Committee today to help alleviate the effects of alleged water shortages in the Klamath River Basin.

Make no mistake, last year the Basin did suffer through a severe meteorological drought. The prospects for water delivery are even more dismal this year, even though precipitation in the Basin has been above average.

The reason for the dismal outlook is because the long-term water shortage in the Upper Klamath River Basin is man-caused.

The water shortage has been created by the actions of federal and state agencies that have reallocated surface and groundwater, for alleged higher and more important uses, in support of the public trust. Most, if not all, of the reallocated water was previously legally-certificated to water users, for the specific purpose of irrigating their crops.

The Oregon Supreme Court has ruled that a certificated water right is a property right.

Virtually all of this reallocation of water for the "public trust" has been made through state and federal agency administrative actions. In short, the property rights of Klamath Basin landowners are being taken by state and federal administrative action!

In my opinion, most, if not all, of those administrative actions have been implemented by federal and state agencies in conflict with established scientific methodology, contrary to fairness and private property rights, and arguably in conflict with established law.

For instance, the Ninth Circuit Court of Appeals ruled in USA v Adair (1983) that the Klamath Tribes were entitled to a water right sufficient to support their retained Treaty rights to hunt, fish and gather within the area of their former reservation. The Court further confirmed the "time immemorial" priority date of the Tribal water right.

However, the Court stated that the amount of water the Tribes should receive in the adjudication *must be no more, no more less* than the Tribes were using for a moderate standard of living at the time the Court made their ruling.

The Court further opined that it was not their intent to recreate a wilderness-servitude in the Upper Basin.

Inexplicably, in its entirely administrative Finding of Fact and Final Order of Determination, the Oregon Water Resources Department gave the Tribes virtually all the surface water tributary to Upper Klamath Lake, as well as a minimum water level in Upper Klamath Lake that is arguably not achievable, without the Link River Dam constructed in 1921.

Moreover, the Department insists that it must conjunctively manage the abundant groundwater in the area aquifers subject to Tribal calls under the surface water adjudication. A close review of statutory provisions contained in ORS Chapter 539 would demonstrate the process spelled out was intended to adjudicate surface water rights. Additionally, it should be recognized that we maintain a distinct and separate process with respect to the adjudication of groundwater rights that can be reviewed at ORS 537.670 et seq.) Groundwater Act of 1955.

The Ninth Circuit Court of Appeals appears to belie the Department's alleged requirement in their USA v Oregon (1994) decision.

The Court notes that the Oregon Water Resources Department initiated adjudication of "all claims to SURFACE water in the Klamath River Basin." In this suit, attorneys for the United States and the Klamath Tribes argued their claims to water should not be subjected to Oregon adjudication as required under the McCarran Amendment.

The attorneys claimed the state adjudication process was not sufficiently "judicial" in nature, and that it was insufficiently "comprehensive," because it failed to include previously adjudicated water, as well as groundwater.

The Ninth Circuit Court Appeals rejected the argument the process is "insufficiently judicial" primarily because Oregon circuit courts are charged with making the final judgement, regarding the priority date and amount of water, for each adjudicated claim. No Oregon adjudication is complete until a circuit court has issued a decree and all pending appellate actions completed.

The Court rejected the argument that the adjudication is not comprehensive, because water rights determined in previous adjudications were not subject to redetermination in the current

adjudication. The Appellate Court specifically declined to reopen water claims settled by previous adjudications.

Finally, the Court rejected the Federal attorney's argument, allegedly based on case law, that groundwater must be included in the surface water adjudication. The Court further stated that "the United States can point to no other case law, statutory text or legislative history that specifically requires groundwater to be adjudicated as part of the comprehensive adjudication of a 'river system.'" The Court refused to "infer that Congress intended to require comprehensive stream adjudication under the McCarran Amendment to include the adjudication of groundwater rights as well as rights to surface waters."

It bluntly stated, "the law is otherwise."

Nevertheless, the Oregon Water Resources Department took direct regulatory action on its own initiative in 2014, to shut down more than 200 irrigation wells, subject to Tribal calls to protect their determined rights to instream flows.

In addition to irrigation wells, the Department actively regulated a Klamath Falls City Municipal well, located only a few feet LESS than a mile from Upper Klamath Lake, allegedly to protect Upper Klamath Lake levels! Had the well been located only a few feet MORE than a mile from Upper Klamath Lake, it could not have been regulated without the creation of a critical groundwater area.

That well is the primary source of domestic water for Sky Lakes Medical Center, the area's only hospital, and the entire Oregon Tech campus.

Further, the Department has now completed and adopted administrative rules authorizing its regulation of groundwater, subject to the Klamath River surface water adjudication. This action appears to be in direct conflict with the Ninth Circuit Court of Appeals USA v Oregon decision wherein they determined that no case law or legislative intent could be cited requiring the inclusion of groundwater in a stream adjudication.

I urge the Committee to actively seek the answers to several questions regarding these two bills:

1.) Under what statutory authority is the Oregon Water Resources Department subjecting groundwater to regulation under its Finding of Fact and Final Order of Determination in the Klamath River Adjudication?

2.) Under Oregon statutes, a water right holder is not allowed to transfer the place of use or the type of use of the water right until the adjudication has been decreed by a circuit court and all pending appeals have been settled. Does any precedent exist for the transfers proposed in SB 206 and SB 264 under the Department's Finding

of Fact and Final Order of Determination? If not, what makes the Klamath River adjudication unique?

3.) Will creating temporary place of use and instream transfers of rights determined under the FFOD, prior to Court decree of water rights, create the opportunity for the federal government, or anyone else, to attempt to take over the adjudication by claiming that the process is "not sufficiently judicial" under the provisions of USA v Oregon?

4.) Will adoption of the -2 amendment to SB 206 create an instream water right, with 1905 priority, in the Klamath River that would allow the Oregon Water Resources Department to regulate the Klamath Falls City Municipal Conger Wells located next to the Link River?

5.) Would establishing such 1905 priority temporary instream water rights also "compel" the Department to regulate irrigation wells located within one mile of the Klamath River and its tributaries?

6.) It appears and will be noted, as drafted, that SB 206 and SB 264 serve to "memorialize" the agreements. Such agreements, absent of federal and state authorizations, are not effective. Both agreements were negotiated and drafted behind closed doors among a select number of interested parties that were required to sign strict, contractual confidentiality contracts prohibiting any public discussion of any part of the discussions and deals made behind those closed doors. If not illegal, it certainly does not demonstrate the "open & transparent" process known as the Oregon Way.

How did this process that included the Oregon Water Resources Department, the Oregon Department of Justice and the Office of the Oregon Governor not violate Oregon's open meeting laws?

Will the passage of either of these bills serve to statutorily establish "authorization" of either the Klamath Basin Restoration Agreement or the Upper Klamath Basin Comprehensive Agreement by the state of Oregon?

7.) ORS Chapter 540 prohibits the use of a supplemental water right on land from which the primary water right has been transferred and requires the Department to cancel the supplemental water right in the event that the supplemental water right is used on that land.
Will temporary transfer of the place of use of a water right under the provisions of either bill prohibit the land owner from using a supplemental groundwater right to

irrigate the land to which the temporarily transferred surface water right is appurtenant? If so, then would the Department be compelled to cancel the supplemental groundwater right in the event that an owner violated that prohibition?

8.) ORS Chapter 537 regulates instream transfers. Will the temporary instream transfer of a surface water right under the provisions of either bill prohibit the landowner from using a supplemental groundwater right to irrigate the land to which the temporarily transferred surface water right is appurtenant? If so, would the Department be authorized to cancel the supplemental groundwater right in the event that an owner violated that prohibition?

Thank you for your consideration. Feel free to contact either of our offices if you have any questions or need any additional information.

Sincerely,

Senator Doug Whitsett, SD 28

Doug Whitsett

Representative Gail Whitsett, HD 56

Gail Whitsett