

## Analysis

### Item 24: Water Resources Department

#### Legal Costs

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**Analyst:** Matt Stayner

**Request:** Allocate \$656,279 General Fund from the Emergency Fund to Water Resources Department for anticipated legal costs of the 2019-21 biennium.

**Analysis:** Legal costs for the Water Resources Department sharply increased beginning with the 2011-13 biennium, but most substantially in the 2015-17 biennium with a 48% biennium over biennium increase. The major change driving the increase was the quantification of determined claims in the Klamath Basin in 2013 that allowed the Department to begin to take regulatory action on determined claims in the basin.

Although legal expenses continue to exceed base budget capacity, the biennial expenditures have decreased over the past two biennia from their high of \$1.8 million in the 2015-17 biennium. During the previous biennium, a \$1.35 million allocation of General Fund was made by the Emergency Board during the September 2018 meeting to meet projected legal expenditures of \$2.19 million. Actual expenditures for the 2017-19 biennium were \$1.77 million; \$418,936 reverted to the General Fund.

#### Growth of Water Resources Legal Costs

	2011 - 2013	2013 - 2015	2015 - 2017	2017 - 2019	2019-21
Legislatively Adopted Budget	\$ 766,606	\$ 739,561	\$ 803,502	\$ 835,628	\$ 952,038
Legislatively Approved Budget	\$ 766,606	\$ 739,591	\$ 803,502	\$ 2,188,154	\$ 952,038
Actual Expenditures (includes projected amounts for 2019-21)	\$ 943,958	\$ 1,217,297	\$ 1,804,872	\$ 1,769,218	\$ 1,608,317
Biennial Growth Rate	21.5%	29.0%	48.3%	-2.0%	-9.1%
Over (Under) Adopted Budget	\$ 177,352	\$ 477,736	\$ 1,001,370	\$ 933,590	\$ 656,279

Although the possibility of a budgetary shortfall due to legal expenses was anticipated by the agency and the Legislative Fiscal Office (LFO) during the development of the 2019-21 budget, the magnitude of the shortfall was unknown and therefore it was determined that it was prudent that the agency wait until it had significant actual expenditure information before requesting additional funding. The projected funding shortfall has been calculated using a monthly average expenditure rate based on the first fifteen months of the biennium.

The total projected legal costs for the biennium show a reduction in the biennium over biennium growth rate compared to the 2011 to 2017 period, and it is anticipated that the growth rate of legal costs will trend towards the long-term average following the spike in costs stemming from the Klamath Basin regulatory change.

**Legislative Fiscal Office Recommendation:** The Legislative Fiscal Office recommends that the Emergency Board allocate \$656,279 from the Emergency Fund to Water Resources Department for anticipated legal costs of the 2019-21 biennium.

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Department of Water Resources  
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**Request:** Allocate \$656,279 from the State Emergency Fund for increased legal costs.

**Recommendation:** Approve the request.

**Discussion:** The Water Resources Department seeks an additional \$656,279 General Fund for the 2019-2021 biennium to address increased legal expenses for the remainder of the biennium. Over the past several biennia, the Department has seen a substantial increase in legal expenses for services provided by the Oregon Department of Justice.

The Department's 2019-2021 Legislatively Approved Budget includes \$952,038 to cover the costs of legal services. As of the September 2020 invoice, legal costs have totaled \$1,005,198, which is 106 percent of the Department's total biennial budget for that line item.

Based on current biennium's invoices, the Department is spending on average \$67,013 per month on legal expenses. If this current average continues, the total cost for legal expenses would be \$1,608,317, which is \$656,279 over the Department's 2019-2021 funds budgeted for legal expenses.

Historical Legal Expenses			
Biennium	Budget	Actual	Shortfall
2011 - 2013	\$ 766,606	\$ 943,958	\$ (177,352)
2013 - 2015	\$ 739,561	\$ 1,217,297	\$ (477,736)
2015 - 2017	\$ 803,502	\$ 1,804,872	\$ (1,001,370)
2017 - 2019*	\$ 2,188,154	\$ 1,769,218	\$ 418,936
2019 - 2021	\$ 952,038	\$ 1,608,317	\$ (656,279)

\*Includes additional funds granted by Emergency Board request.

**Legal Reference:** Allocation of \$656,279 from the State Emergency Fund to supplement the appropriation made by chapter 535, section 1(5), Oregon Laws 2019, for the Water Resources Department, Legal Expenses for the 2019-21 biennium.



**November 4, 2020**

The Honorable Senator Peter Courtney, Co-Chair  
The Honorable Representative Tina Kotek, Co-Chair  
Joint Emergency Board  
900 Court Street NE  
H-178 State Capitol  
Salem, OR 97301-4048

Dear Co-Chairs,

**Nature of the Emergency/Request**

In recent years the Oregon Water Resources Department (Department) has seen a substantial increase in legal expenses for services provided by the Oregon Department of Justice (DOJ). As of the September 2020 invoice, legal costs have totaled \$1,005,198 which is 106 percent of the Department’s total biennial budget for that line item. The Department seeks an additional \$656,279 in General Fund dollars for the 2019-2021 biennium to address current and anticipated increased expenses for the remainder of the biennium.

The Department’s 2019-2021 budget includes \$952,038 to cover the costs of legal services. This equates to an average monthly budget of \$39,668, whereas the Department’s average monthly expenditures for the first 15 months of the biennium have been \$67,013 per month.

If the Department projects 24 months at the average cost of \$67,013 per month, the total cost for legal expenses would be \$1,608,317, which is \$656,279 over the Department’s 2019-2021 funds budgeted for legal expenses. The Department exceeded its entire biennial budget with the August invoice, paid in mid-September 2020.

The current projections for legal expenses are consistent with the trajectory in the Department’s costs over the last four biennia. As shown in Table 1, the Department’s legal costs have exceeded the allotted budget since the 2011-2013 biennium. The Department has provided quarterly updates on this issue to the Legislative Fiscal Office and Department of Administrative Services since March 2018.

**Table 1 - Water Resources Department Line Item Budget and Costs for Department of Justice Services through September 2020**

Biennium	Average Monthly		Biennial		
	Budget	Expenses	Budget	Expenses	Budget Shortfall
2011-2013	\$31,942	\$39,332	\$766,606	\$943,958	(\$177,352)
2013-2015	\$30,815	\$50,721	\$739,561	\$1,217,297	(\$477,736)
2015-2017	\$33,479	\$75,203	\$803,502	\$1,804,872	(\$1,001,370)
2017-2019	\$91,173	\$71,717	\$2,188,154*	\$1,769,218	\$418,936**
2019-2021	\$39,668	\$67,013	\$952,038	\$1,608,317	(\$656,279)***

\* Includes E Board request. LAB base budget was \$835,628.

\*\* General Fund reverted due to final costs coming in lower than projected. Expenses exceeded LAB by \$933,590.

\*\*\* Projections for the remainder of the biennium are based on the average spend of \$67,013/month.

### **Agency Action**

The Department has experienced significant increases in legal costs in recent years, particularly in the Klamath Basin, where water disputes continue. For three of the last four biennia, the Department has achieved savings administratively to address litigation expenses, primarily by holding vacant General Fund positions open for long periods of time. However, as the expenses have increased, the impacts on the Department's programs and services have also increased.

The Department's 2017-2019 Legislatively Approved Budget already contained a one-time personal services reduction requirement and a ten percent travel reduction, which limited the Department's capacity to address the shortfall with administrative savings. Consequently, the Department submitted a budget request to the September 2018 Emergency Board in the amount of \$1,352,526, which was approved. Prior to the request, the Department also made modifications to non-essential travel and implemented a 180-day vacancy requirement for all General Fund positions. At the close of the 2017-2019 biennium, the Department's legal costs totaled \$1,769,218 and the Department reverted \$418,936 of unused General Fund Emergency Board appropriation.

Pursuant to a 2019 budget note, the Department completed a report on litigation and contested cases, which provides more insight into the drivers of the Department's legal expenses. The report is available here: [https://www.oregon.gov/owrd/wrdreports/2019\\_Report\\_on\\_Contested\\_Cases\\_and\\_Litigation.pdf](https://www.oregon.gov/owrd/wrdreports/2019_Report_on_Contested_Cases_and_Litigation.pdf)

The Department fully understands the severe impacts the COVID-19 pandemic is having on Oregon's economy and state revenues. The Department's General Fund budget was reduced by ten percent during the 2020 second Special Session, essentially removing most of the Department's ability to address this matter administratively without layoffs. In addition, if the Department is directed to address this administratively, layoffs will be needed to fill the budget gap, resulting in severe impacts on agency services.

### **Action Requested**

The Department requests an increase of \$656,279 general fund to appropriation 81070 (Director's Office, DCR 010-07) to meet the anticipated legal costs for the 2019-2021 biennium.

### **Legislation Affected**

Amend Oregon Laws 2019, Chapter 535 (House Bill 5043), Section 1, Subsection 5, "Director's Office," increasing the budget by \$656,279.

If you have questions, please do not hesitate to contact me at 503-986-0910 or Racquel Rancier at 503-302-9235.

Sincerely,



Thomas M. Byler  
Director

c: Jason Miner, Governor's Natural Resources Policy Advisor  
Matt Stayner, Legislative Fiscal Office  
Linnea Wittekind, Department of Administrative Services