

ANALYSIS

Item 21: Department of Justice General Counsel Division

Analyst: John Borden

Request: Increase the Other Funds expenditure limitation by \$2,310,592 and establish nine permanent full-time Senior Assistant Attorney General positions (4.74 FTE) for legal services to state agencies.

Analysis: The Department of Justice (DOJ) - General Counsel Division (GCD) provides a broad range of legal services to over 100 state agencies, boards, and commissions. The GCD is divided into the following sections: Business Transactions; Business Activities; Government Services; Health and Human Services; Tax and Finance; Natural Resources; and Labor and Employment.

The Division has a 2021-23 legislatively adopted budget of \$76.6 million Other Funds and 170 positions (167.68 FTE), of which 119 are budgeted attorney positions. The revenue to support the Division's budget comes from the Legal Services Fund and legal service billings to state agencies.

GCD is requesting a supplemental increase of \$2.3 million in Other Funds expenditure limitation and the establishment of nine permanent full-time Senior Assistant Attorney General positions (4.74 FTE). The request includes personal services cost of \$1.9 million and associated service and supplies of \$452,727. Seven of the positions have a May 1, 2022 start date with the remaining two positions slated to start on November 1, 2022. The request includes the following:

- Natural Resources Section - Provides legal services and advice, including representation in administrative hearings, for environmental and natural resource agencies. The section is requesting one permanent full-time Senior Assistant Attorney General position (0.58 FTE) for work related to the Water Resources Department and that agency's contested case backlog.
- Government Services Section - Provides a range of general legal services and advice to state agencies, including capital construction and information technology. The section is requesting four permanent full-time Senior Assistant Attorney General positions (1.83 FTE) for work related to the Department of Transportation and the federal Infrastructure Investment and Jobs Act of 2021.
- Tax and Finance Section - Advises state agencies regarding state revenue and finance (banking, investments, borrowing, loan negotiations, and other financial transactions), economic development, and employee benefits. This section also represents the state's interest in certain administrative hearings. The section is requesting four permanent full-time Senior Assistant Attorney General positions (2.33 FTE) for work related to the Housing and Community Services Department work related to state and federal housing initiatives and the Oregon Health Authority (OHA) for general work related to an increase in federal grant funding.

The revenue to support this request would come from billings to state agencies, which will total \$3.6 million at \$242 per hour (\$1.3 million above the limitation request to account for agency overhead costs). The 2023-25 biennial cost of the request in terms of Other Funds expenditure limitation totals \$4.7 million and nine positions (9.00 FTE) and estimated billings totaling \$6.8 million at \$242 per hour

(\$2 million above the limitation request to account for agency overhead costs). DOJ billings may require budget adjustments on behalf of billed agencies.

GCD's requests as related to the Natural Resources and Government Services Sections are reasonably supported. The Tax and Finance Section request, however, is lacking in specificity, which could have easily been remedied through a better engagement with client-agencies (e.g., OHA).

The Legislature in 2019 and 2021 undertook concerted efforts to right size the resourcing of the GCD and each of the division's various sections, due to the division's pivotal role in state government; however, concern continues to exist that communication between GCD and billing agencies, and billing agencies and GCD, related to funding initiatives and legislatively approved projects, requires improved coordination when it comes to the proper provisioning of legal services.

The Legislature in 2021 also expressed concern over the growth of legal costs as well as GCD's support of state agencies by adopting a budget note directing DOJ to report on a proposed pilot program detailing how the Department can more effectively and directly support state agencies that incur high legal costs and that pose heightened litigation risk to the state. The anticipated report by GCD will be an important indication of the division's plan to address the issues of client-agency coordination, effective service delivery, and cost control. While such a plan is long overdue, this is also an opportune time for such a plan given the number of major state initiatives that, if well managed now from a legal perspective, could avoid significant future legal costs.

Recommendation: The Legislative Fiscal Office recommends that the Joint Interim Committee on Ways and Means recommend including an increase of \$2,310,592 in the Other Funds expenditure limitation and authorizing the establishment of nine permanent full-time Senior Assistant Attorney General positions (4.74 FTE) for the Department of Justice, General Counsel Division, in a budget reconciliation bill during the 2022 legislative session to provide legal services to state agencies.

Request: Increase Other Funds expenditure limitation by \$2.3 million and establish nine permanent Senior Assistant Attorney General positions (4.74 FTE) to address the increased workload demands for water resources, transportation, and housing needs from respective Executive Branch agencies.

Recommendation: Approve the request during the February 2022 Legislative Session.

Discussion: The Department of Justice (DOJ), General Counsel Division is anticipating workload increases in the Natural Resources, General Government, and Tax and Finance Sections. DOJ is requesting position authority to establish nine new, permanent Senior Assistant Attorney General (Sr. AAG) positions (4.74 FTE) and an increase in Other Funds expenditure limitation to address these workload increases. The revenue source associated with this request comes from the Legal Services Fund, which is comprised of billable legal services charged to state agencies.

The demands for legal services continually increase as state agencies develop and implement new programs requiring the need for legal consultation, negotiation, and contracting services from the General Counsel Division. These legal services are one of the state's primary risk management tools. To provide services in a timely and adequate manner, DOJ is requesting the following additional positions to meet state agencies' demands:

- One Sr. AAG position (0.58 FTE) for the Natural Resources Section to address the continued backlog of administrative cases related to increased water rights applications and contested hearings. The Water Resources Department received funding during the 2021-23 Legislative Adopted Budget (LAB) to address costs for additional legal services from DOJ.
- Four Sr. AAG positions (1.83 FTE) for the General Government Section to address the increase in demand for services from the Oregon Department of Transportation (ODOT) related to the Federal Infrastructure Investment and Jobs Act (2021).
- Four Sr. AAG positions (2.33 FTE) for the Tax and Finance Section to address increased demands associated with the Oregon Housing and Community Services' affordable housing programs as well as grant programs within the Oregon Health Authority and Oregon Department of Human Services.

Legal Reference: Increase the Other Funds expenditure limitation established by chapter 427, section 2(6), Oregon Laws 2021, for the Department of Justice, General Counsel Division, by \$2,310,592 million for the 2021-23 biennium.



DEPARTMENT OF JUSTICE

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December 6, 2021

Senator Elizabeth Steiner Hayward, Co-Chair
Representative Dan Rayfield, Co-Chair
Interim Joint Committee on Ways and Means
900 Court Street NE
H-178 State Capitol
Salem, OR 97301

Re: DOJ – General Counsel Division – Increase in Workload

Dear Co-Chairpersons:

Nature of the Request

The Department of Justice – General Counsel Division requests \$2,310,592 in Other Funds expenditure limitation and position authorization for nine permanent Senior Assistant Attorney General (Sr. AAG) positions (4.74 FTE). The funding source is the DOJ Legal Fund with the Oregon Water Resources Department (OWRD), Oregon Department of Transportation (ODOT), Oregon Housing and Community Services (OHCS) and the Oregon Housing Authority (OHA) as the client agencies.

Agency Action

1) Natural Resources Section – One Sr. AAG position (0.58 FTE)

The Oregon Water Resources Department (OWRD) is the agency charged with administration of the state's water resources and water rights in Oregon. The agency depends on DOJ for litigation services as well as other, equally important legal services necessary to run the agency, such as representation at Oregon Water Resources Commission meetings and advice in rulemaking, administration of public laws and on the administration of the state's water laws.

Administration of water rights is contentious. Water is a scarce public resource, and we face ever more frequent drought. The agency issues proposed orders that approve or deny

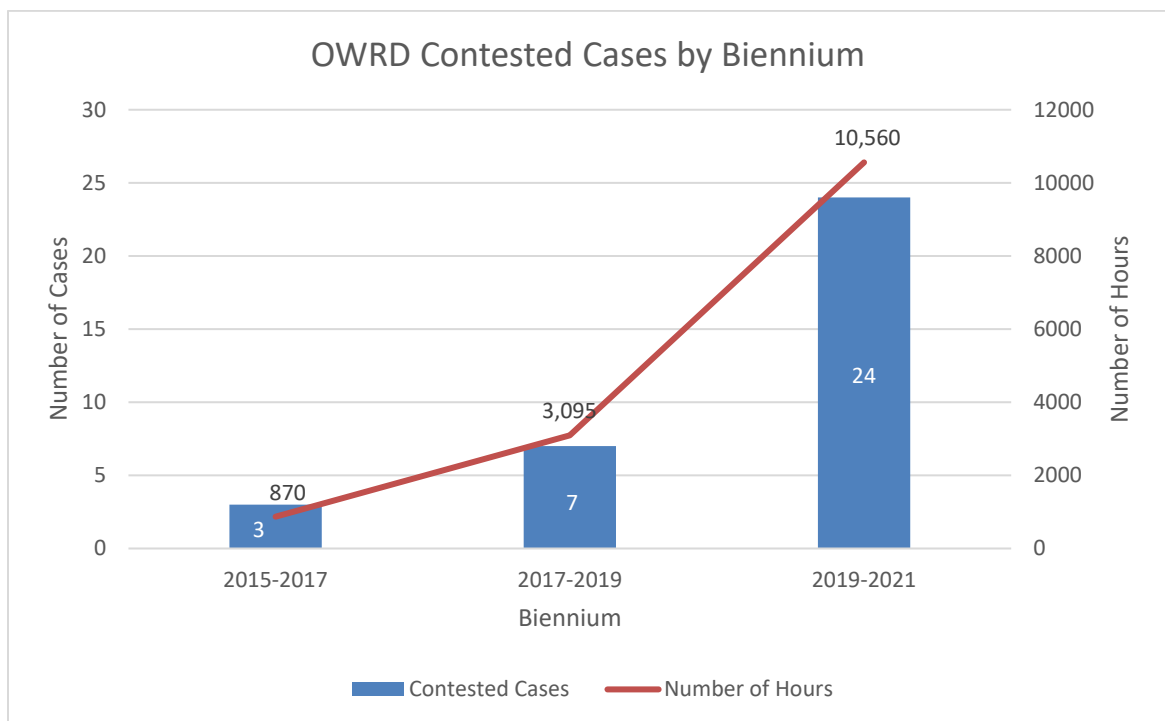
applications for new water rights, water right transfers, and extensions of time to develop permits and forfeiture proceedings. Because water is a public resource, each of the agency's decisions is subject to protest by any person and protests are frequently waged.

The OWRD settles about 90% of the protests it receives, but the rest only resolve after a contested case hearing and subsequent review of agency orders at the Oregon Court of Appeals. Since the early 1990's the OWRD has accrued a significant contested case backlog, caused in large part by a lack of resources and in part by a large influx of new water right applications. During the 2021 regular session, the Oregon Legislature approved an appropriation of about \$2 million dollars to address the contested case backlog.

The Current Caseload Constitutes an Exponential Increase

In September 2021, the OWRD referred 27 contested cases to the Office of Administrative Hearings for a contested case. It is currently expected that seven of those cases will be handled by a lay representative at the OWRD (with the assistance of DOJ) but 20 contested cases will be handled exclusively by DOJ. Even if no more contested cases are referred, this additional caseload presents an exponential increase in the number of contested cases that DOJ will handle for OWRD and the number of legal service hours DOJ will need to provide to address this additional work. (Figure 1.)

Figure 1.



In terms of number of hours spent, during the 2015-2017 biennium, DOJ spent approximately 870 hours defending OWRD contested cases, or nearly 300 hours per case. During the 2017-2019 biennium, DOJ spent approximately 3,095 hours defending OWRD contested cases, or just over 440 hours per case. Based on this data, we expect DOJ attorneys will need to spend between 7,200 (24 x 300) – 10,560 (24 x 440) hours on OWRD contested case work, to move the 24 cases along at the same pace as cases have been moved in the last two biennia. It is anticipated that one Sr. AAG will produce approximately 1,578 billable hours per year. This means, to keep pace with this additional work, DOJ would need to hire at least six new lawyers, or contract out much of this work. The funding awarded to date does not support either option. Recognizing the current funding, we are requesting one additional Sr. AAG with the anticipation that the work will continue even well after the immediate funding is exhausted.

The contested case backlog now addressed by the legislature's funding does not represent the full caseload DOJ carries on behalf of the agency. Each year additional cases are referred to DOJ for resolution as recipients of OWRD's enforcement notices contest civil penalties or license suspensions and revocations. While the number of these enforcement cases is difficult to predict, the urgency of their resolution is high as contested notices must be timely resolved. At the same time, the client continues to require daily counsel, advice and work product to meet its day-to-day non-litigation related needs. In short, the combination of litigation and non-litigation workload, short-term push and long-term sustained client needs are sufficient to require one additional Sr. AAG position to provide the NRS with two AAG positions for this work.

The attorney appointed to address the backlog will, in the course of their work, obtain the training necessary to assume the role of contact counsel. We expect the position we are now requesting will fill the role of primary contact counsel when the current contact counsel retires. At that time, in order to maintain the level of service the agency requires, DOJ plans to recruit a replacement Sr. AAG to fill the vacancy and continue the contested case work. The transition will be managed to assure continuity in a manner that does not prejudice the client and is necessary to sustain the level of client services required.

Presently the OWRD is represented by one contact counsel whose responsibilities also include representing the Oregon Department of Agriculture and duties associated with her role as an Assistant Attorney in Charge of the Natural Resources Section, General Counsel Division. Contact counsel and the section lack capacity to timely address the expanded contested case workload. The hiring of one additional permanent full time Sr. AAG will facilitate meeting the agency's and the legislature's expectations to timely resolve this significant case backlog and to continue client services in a manner that is unaffected by DOJ staff transition.

The requested Sr. AAG position will be tasked with representing the OWRD in the 20 contested cases presently before the OAH and also assisting the OWRD's lay representative with the additional seven cases as necessary. Given that OWRD's present contact counsel is close to

retirement age, the Sr. AAG will also be tasked with other advisory responsibilities appropriate for succession planning. Representation of the OWRD before the OAH will require:

- Development of the evidentiary record including the retention of necessary expert witnesses, management of discovery and witness preparation.
- Briefing of all legal issues both pre and post hearing.
- Representing the agency at the contested case hearing and subsequently before the Oregon Water Resources Commission.
- Drafting of a Final Order including responses to exceptions filed to both the administrative law judge's proposed order and the OWRD Director's final order.
- Assistance with appeals of final orders as directed by the Appellate Division.

As mentioned above, the need for the additional position will be permanent to address the backlog of administrative cases and to handle the increased caseload on an ongoing basis.

2) Government Services Section – Four Sr. AAG positions (1.83 FTE)

The Oregon Department of Transportation (ODOT) reports the federal Infrastructure Investment and Jobs Act 2021 (IIJA) will result in a substantial increase in its funding. Specifically, ODOT reports an expected increase of 35% over five years for Public Transportation programs and an expected 38% increase over five years for Highway and Special Programs, as follows:

The Act includes a five-year reauthorization of existing federal highway, transit, safety and rail programs as well as new programs and increased funding. This is coupled with one-time dollars to substantially increase funding for projects and programs. In total, Oregon will receive at least \$4.5 billion over the next five years. This includes over \$1 billion in additional federal funding from 2022-26 — a 38% increase, and an additional \$200 million in transit funding over that same period — a 35% increase.

These federal funds will help ODOT address many of our most pressing transportation challenges in Oregon. There is new money for electric vehicle charging, active transportation, transit operations and basic maintenance and preservation of our transportation system.

Oregon Department of Transportation, *Infrastructure Investment and Jobs Act 2021*, <https://www.oregon.gov/odot/Pages/IIJA.aspx> (accessed November 24, 2021).

Expected Increased Demand for DOJ Services to ODOT

The DOJ General Counsel Division provides legal services at virtually every phase of ODOT's federal highway, transit, safety and rail programs and new programs. These legal services generally include legal sufficiency review, contract drafting, and legal advice and assisting the agency in areas such as contracting and procurement, intergovernmental agency agreements, public records, environmental issues, financing and rulemaking. For efficiency and due to recent change in management, attorney positions performing ODOT work formerly assigned to General Counsel's Business Transactions Section (BTS) have been consolidated into GSS. As a result, all the listed services will be provided to ODOT by GSS. GSS expects an increase in ODOT work correlating to the increase in ODOT funding described above.

Historical Perspective Regarding ODOT Funding Increases

In 2017, the Oregon Legislature passed House Bill 2017 which significantly increased funding for ODOT transportation projects and programs. DOJ General Counsel Division saw a corresponding increase in contract workload for at least the two years following the funding increase contained in HB 2017. As one example, in 2017, DOJ General Counsel Division opened 169 contract matters for ODOT Oregon Procurement Office (ODOT/OPO). In the following year, DOJ General Counsel Division opened 229 ODOT/OPO contract matters (35.5% increase) and 309 contract matters in 2019 (82.8% increase from 2017). Similar increases in contract workload were discovered for each of the five ODOT regions.

In response to the HB 2017 funding increase, however, DOJ General Counsel Division received two additional FTEs, which were dedicated to the Business Transaction Section (BTS). While dedicated ODOT FTE staffing levels within the Government Services Section (GSS) slightly dipped during that two-year period, GSS also assumed the increased workload during that timeframe. DOJ attorneys dedicated to ODOT workloads are currently operating at maximum capacity.

Current Projections for Increased ODOT Work: 4 Positions Total

Currently, DOJ estimates an additional increase in ODOT workload due to the federal funding increase that will require four additional Sr. AAG positions. Below we provide information from ODOT regarding the additional anticipated work due to the increased funding and our estimates regarding the additional attorney FTEs such work will require.

ODOT's Public Transportation Work: 35% Increase Expected/2 Positions

ODOT anticipates that its Public Transportation Work will receive a federal funding increase of 35%. With this money, ODOT plans to increase their Public Transportation work projects, such as surface transportation block grants, transit, transportation alternatives, and carbon reduction. This work also includes Statewide Transportation Programs performed at the local level, such as

ARTS (All Roads Transportation Safety) program, Local Bridge work, community paths, CMAQ (Congestion Mitigation and Air Quality) programs, MPO (Metropolitan Planning Organizations) planning, and STBG (Surface Transportation Block Grant) fund sharing with cities, counties, and small MPOs that allows local cities and counties to exchange federal Surface Transportation Block Grant dollars for State Highway Fund dollars.

The DOJ legal work typically generated by ODOT's Public Transportation work, at its current level requires at least five Senior Assistant Attorneys General (Sr. AAG). With a 35% increase in funding for this work, we assume the DOJ legal work will likely increase by a corresponding 35%. A team of five Sr. AAG positions for ODOT Public Transportation work with an increased workload of 35% will require two additional Sr. AAG positions.

ODOT's Highways and Special Projects: 38% Increase Expected/ 2 Positions

We understand the body of ODOT work for which funding will increase by 35% includes Highways and Special Project work. This increase in ODOT funding and ODOT work is in addition to the 35% increase in ODOT Public Transportation funding and work described above. Highways and Special Projects work includes architectural, engineering, and design and construction. The ODOT Highways and Special Projects work at its current level requires at least five Sr. AAG positions. This is in addition to the five Sr. AAG positions addressing the entirely different ODOT Public Transportation work identified above. If ODOT funding for this work is increased by 38%, we expect the DOJ legal work will likely increase by a corresponding 38%. Five Sr. AAG positions increased by 38% is approximately two additional Sr. AAG positions.

ODOT's Additional \$40 Million

In addition to the work anticipated to come from the increased funding above, DOJ also expects workload increases from a separate \$40 million increase in ODOT funding, which must be spent in the immediate future (approximately over the next four months). This money may be spent on implementing significant changes to currently planned projects, such as the highway work in the Rose Quarter (including possibly highway lids).

Nature and Timing of Increased Work

As for timing of this increase in work, in a recent presentation to the media, ODOT revealed a timeline for public comment and final approval for use of this funding concluding in March 2022. Therefore, we expect DOJ work will ramp up around that time and continue to increase as new ODOT work comes online, throughout the biennium.

Also, the workload discussed above is largely new work, as opposed to additional funding toward projects with legal work completed or planned, as we understand it. Considering the newness of the work, the quick pace which ODOT intends to move the work and anticipating at

least one retirement of an experienced attorney handling ODOT work, we request four total Sr. AAG positions, phased in during the biennium (Two – May 1, 2022 and two November 1, 2022).

3) Tax and Finance (T&F) Section – Four Sr. AAG positions (2.33 FTE)

The Tax and Finance Section represents OHCS in the varied and expansive work it is doing to address Oregon's housing crisis, including negotiations and transactions related to its complex affordable housing finance programs. The finance attorneys also assist many state agencies in negotiating loans, grants or other financial transactions and drafting the documents for those transactions, including advising agencies and providing other legal services related to the many state agency grant programs, including those of OHA and ODHS, as well as those programs funded by bonds and other special payments. This section is one of General Counsel's sections hardest hit by increased state spending.

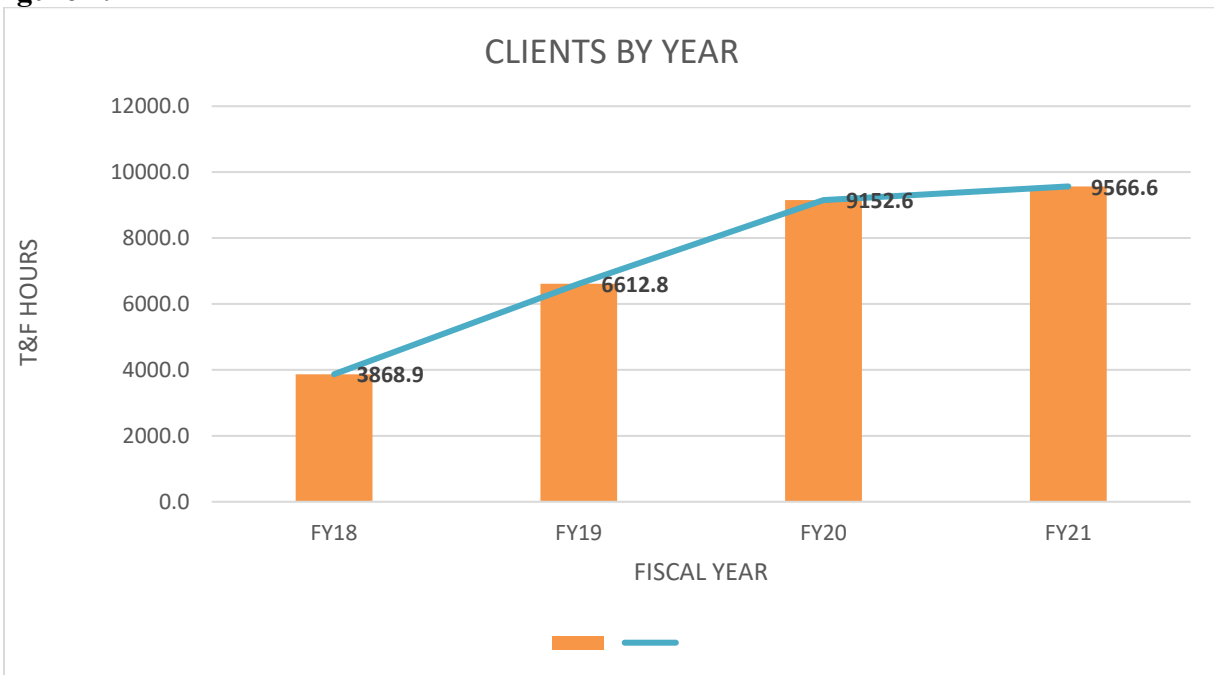
Overall Client Budget Growth

During the 2019-2021 biennium, the state increased emergency response and economic investment spending to address COVID-19 and wildfire emergency and economic support demands. We understand from the Department of Administrative Services that in the 2019-21 biennium the overall state budget grew 31% from the Legislatively Adopted to the Legislatively Approved budgets. State spending increases result in corresponding increases in demand for DOJ legal services.

Recent history shows that demand for these services necessarily increase with increased state funding for new programs and grants. A review of hours billed for the Tax and Finance Section's largest clients (in terms of workload) shows that the section experienced a 2,540 hour increase in billable hours from FY 2019 – FY 2020 (which corresponds directly to the substantial increase in emergency relief funding for early in the pandemic and the Labor Day fires of 2020) and an additional 414 hour increase in billable hours from FY 2020 – FY 2021 (which is a continued increase in emergency relief related and new program funding). As stated above, it is anticipated that one Sr. AAG will produce approximately 1,578 billable hours per year. Therefore, the workload increase for the T&F Section's largest clients alone (other clients have also experienced increases) represents the work of approximately two Sr. AAG positions.

Figure 2 shows the total T&F billable hours for work done for OHCS, OHA, DHA, DAS and Business Oregon for FY18, 19, 20 and 21.

Figure 2.



To date, the T&F Section has managed the significant increase in demand for its services by borrowing support from other sections and by filling positions in the T&F section that were originally allocated for other work but that has been significantly delayed due to the COVID-19 delay in certain court and regulatory processes (these delays have largely corrected and we expect the delayed work to move to the T&F Section very soon). Even with the additional help, the T&F Section is managing a workload that puts it beyond capacity. With the higher spending for emergency response and other new programs and projects funded into the 2021-2023 biennium and beyond, the T&F Section will require additional attorney staffing to continue to manage through the continued anticipated increase.

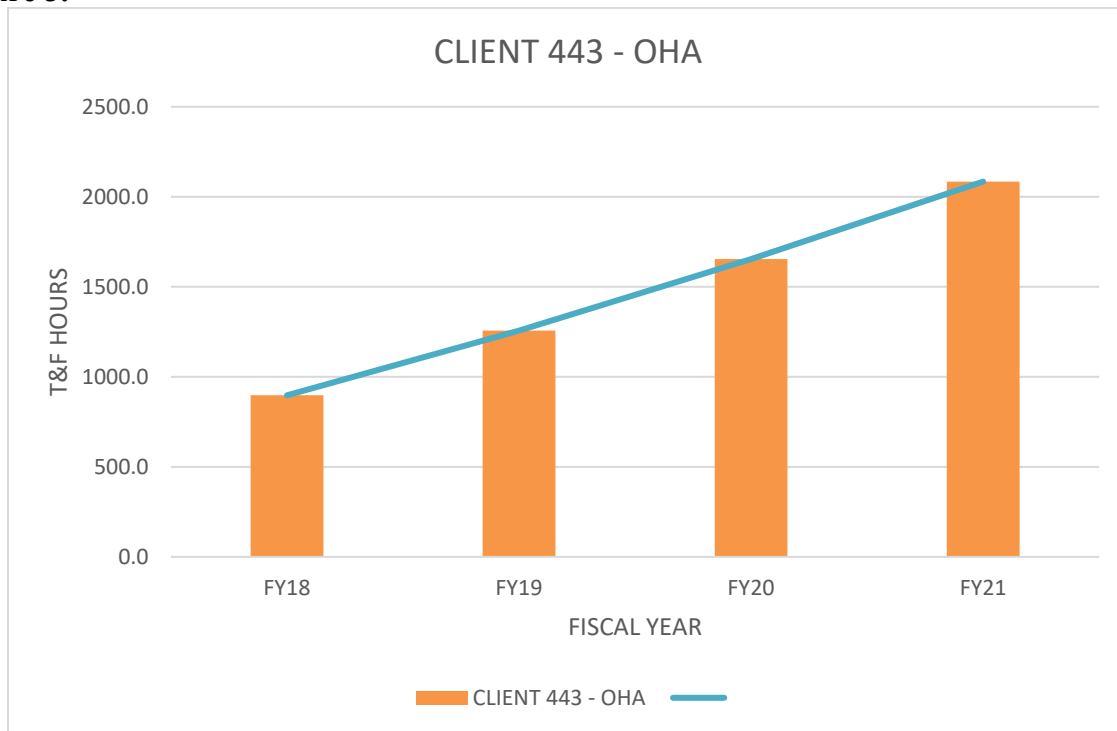
Oregon Housing and Community Services

OHCS reports a substantial increase in funding for the upcoming biennium. For the 2021-23 biennium, the OHCS's Legislatively Approved Budget (LAB) was more than double what it was for the 2019-21 biennium, increasing to over \$896 million. In addition, OHCS has now received approval from the federal Housing and Urban Development (HUD) agency to receive over \$422 million in federal grants. In its 2019-21 LAB, the agency received authority for approximately 230 positions and in the 2021-23 LAB the agency received authorization for approximately 330 positions, an increase of 30%. The T&F Section makes this request for new positions in the 2021-23 budget to handle the significantly increased workload that will be generated due to the more than doubling of OHCS's budget and the 30% increase in agency staff.

Oregon Health Authority

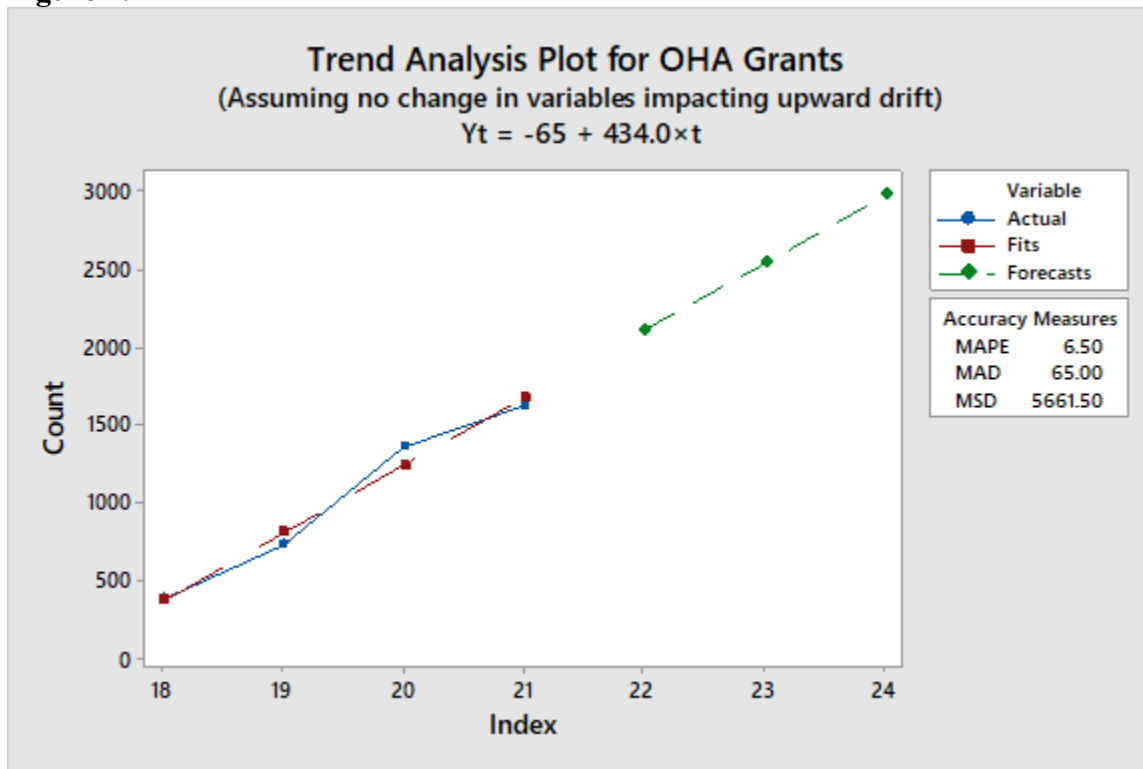
The T&F Section supports OHA in development and funding of its grant programs. OHA saw a marked rise in federal dollars in the 2019-2021 biennium and the current 2021-2023 biennium. The T&F Section's hours worked for OHA has correspondingly increased. See Figure 3.

Figure 3.



In a recent [report](#) to the Human Services subcommittee, OHA had an additional \$642 million in increased federal dollars during the last biennium. OHA fully expects to continue to see this increased amount into the future, meaning that future workload for DOJ to provide legal sufficiency and other reviews on OHA grant documents has increased and will continue to increase. A recent projection provided by OHA is set out below.

Figure 4.



The T&F work to support OHA’s grant programs is anticipated to correspondingly increase.

DOJ has struggled to absorb this additional workload during the pandemic and needs additional (attorney) staff to support OHA’s continued work to fight the COVID-19 pandemic, transform Oregon’s behavioral health system, and help Oregon eliminate health inequities in Oregon by 2030.

Action Requested

The Department of Justice – General Counsel Division requests \$2,310,592 in Other Funds expenditure limitation and position authorization for nine permanent Senior Assistant Attorney General (Sr. AAG) positions (4.74 FTE). The funding source is the DOJ Legal Fund with the Oregon Water Resources Department (OWRD), Oregon Department of Transportation (ODOT),

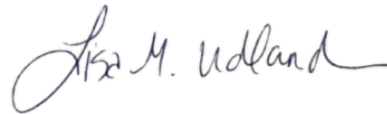
Oregon Housing and Community Services (OHCS) and the Oregon Housing Authority (OHA) as the client agencies.

Senator Elizabeth Steiner Hayward, Co-Chair
Representative Dan Rayfield, Co-Chair
December 6, 2021
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Legislation Affected

Oregon Laws 2021, chapter 427, sections 2(6).

Sincerely,

A handwritten signature in black ink that reads "Lisa M. Udland". The signature is fluid and cursive, with the first name "Lisa" being the most prominent.

LISA M. UDLAND
Deputy Attorney General

cc: Renee Stineman, Chief Counsel, General Counsel Division
William O'Donnell, DOJ Chief Financial Officer
Jennifer Friesen, DOJ Senior Budget Analyst
Melanie Ryburn, DOJ Budget Analyst
John Borden, Principal Legislative Analyst, LFO
Michelle Lisper, Policy and Budget Analyst, BAM