

October 2015 Newsletter for Oregon State Senator Doug Whitsett, District 28



Senator Doug Whitsett R-Klamath Falls - District 28

I represent the citizens of Senate District 28, which includes Klamath, Lake and Crook, as well as parts of Jackson and Deschutes Counties.

As Senator of one of the largest Senate districts in the state, it is extremely important that my constituents remain in contact with me about the issues and concerns that affect their lives. You and I must work together to protect the common interests of rural Oregonians.

I encourage you to contact my office by either email or telephone so that I can know how to best serve you. I look forward to hearing from you soon.

Best Regards,
Senator Doug Whitsett

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IT'S REALLY ABOUT TAKING PRIVATE PROPERTY BY ADMINISTRATIVE FIAT

Recent articles in the local news have alleged that Commissioner Tom Mallams was illegally using irrigation water this summer. Print media, as well as some political opponents, have gone so far as to allege he has been stealing water from his neighbors. The claims appear to be biased, inflammatory and politically motivated. Moreover, the accusations do not appear to be based in fact.

Following receipt of a valid final order issued by the Oregon Water Resources Department (OWRD) to stop using his irrigation well, Mallams "timely exercised" his statutory authority to petition for judicial review. The Marion County Circuit Court granted Mallams' judicial review, thereby automatically staying the OWRD's final order.

Mallams is now authorized, by the Court order, to use the well for irrigation, up to the limits of his water right, until the Court completes its review. At least four other Upper Basin irrigators have followed the same legal procedures. They too have petitioned for, and received, judicial stays and continue to irrigate from their wells.

State regulation of groundwater and of surface water is authorized under separate and distinct chapters of Oregon statutes. A third chapter describes the process for the state adjudication of "surface" water rights. The statutory language creates a distinctive "bright line," regarding the different limits and methodology, for regulating the use of surface and groundwater.

Several accomplished water attorneys have shared their concern regarding how the OWRD is intentionally attempting to "blur" that distinction. Although OWRD has obtained an Attorney General opinion supporting certain conjunctive management activity, the attorneys question both the opinion and the statutory authority of the agency's recent policy to manage surface and groundwater as a single resource.

Nevertheless, the Department is in the process of actively attempting to regulate the use of irrigation wells under their authority to regulate adjudicated surface water. If not successfully challenged, OWRD will undoubtedly extend the unprecedented regulatory authority they are claiming to wells located in the Klamath Project and to wells in other watersheds across the state.

Moreover, the attorneys point out the Department neither solicited, nor accepted, claims for groundwater irrigation rights during the recently concluded surface water adjudication procedure. OWRD does not contest that undeniable fact. Nevertheless, the Department is claiming authority, by their own administrative rule, to shut off the same irrigation wells whose owners were denied standing to make a claim to protect their ground water right during their adjudication procedure.

The attorneys rightly question the Department's legal authority to regulate those groundwater rights through their adjudication process. They point out that the precedent OWRD is attempting to establish should frighten the owners of all irrigation wells in Oregon. Attorneys also claim that OWRD has failed to provide supportive hydro-geologic data that is specific to the wells that it has issued

final orders to shut down. OWRD claims that the data derived from its computer modeling of the regional aquifers and of individual wells is sufficient to deny irrigators the use of their irrigation water rights.

Those computer models appear to be based on several specious assumptions regarding the regional aquifers that have little, if any, basis in fact. Their lack of empirical data on individual wells is nothing short of ludicrous. OWRD readily admits that in most cases it is unable to measure the amount of interference caused by a single well.

Several of the irrigators, including Mallams and the City of Klamath Falls, who have all received final orders to shut off their wells pursuant to the OWRD's modelled data claims, have paid for private hydro-geologic studies on their wells. Each of those professional studies appears to categorically refute OWRD's computer modelled-based assumptions.

Nevertheless, OWRD continues its attempt to regulate the wells by authority of its own administrative rules. The rules have not been approved by either the state legislature or by the courts. In my opinion, OWRD's action represent the taking of private property irrigation rights by administrative fiat.

Significant other facts were omitted from the "above the fold" front page Herald and News report regarding Mallams. For instance, the article claimed that he delayed in complying with an OWRD "final order" to cease using his irrigation well. Minimal investigative effort reveals an unreported side to their story.

Mallams' attorney claims he was not required to comply with the Department's initial "final order" to stop using his irrigation well. That order was allegedly invalid, because it egregiously cited the wrong authorizing statute.

The OWRD Director attempted to correct that mistake by using his statutory authority to issue a "reconsidered" final order. His new order did correct the "authorizing statute" error. However, it retained the same "effective date" as the original final order.

Mallams' attorneys claims the reconsidered order was also invalid. They allege he was not required to comply, because no statutory authority exists for the Director to "backdate" the effective date of a final order. Further, this order was arguably unconstitutional because it would have retroactively made illegal an act that was legal at the time it was committed.

The OWRD Director apparently agreed. He subsequently issued a "third" and competent final order citing the correct statute and the appropriate effective date when the use of the well must cease. At that time, Mallams exercised his legal right to petition for the judicial review that was granted by the Marion County Circuit Court.

The Oregon Supreme Court has ruled that water rights are constitutionally protected private property rights. For that reason, the use of water rights cannot be taken by government without just compensation.

In my opinion, the OWRD's attempted regulation of Upper

Klamath Basin irrigation wells has been heavy handed, arguably not authorized by Oregon law, and possibly unconstitutional. The agency is claiming authority to deny the use of irrigation wells by many of the same irrigators who lost virtually all use of their surface water irrigation rights in the OWRD's 2013 administrative Final Order of Determination in its Klamath River Adjudication. Many of those water rights dated back to 1864 priority.

OWRD's Upper Basin regulatory efforts are resulting in the administrative taking of virtually all surface and groundwater private property irrigation rights from a number of Upper Basin irrigators. To date, no court of law has validated those administrative actions. Isn't it time for the courts to weigh in?

Regardless of the media accusations and name calling, it appears that Tom Mallams has remained within his statutory rights. Even the OWRD has conceded on several factual legal points. The Agency continues to oppose other legal points before the court, likely because by conceding those points, OWRD would admit to unauthorized and illegal expansion of their administrative authority.

Tom Mallams is effectively using the law to contest the State's ongoing efforts to dewater much of the farm and pasture ground in the Upper Basin. He has willingly placed his reputation and finances in jeopardy to protect his property rights, as well as the property rights of his neighbors in the Upper Basin. Others with more courage might be emboldened to follow his example rather than attack his selfless efforts.

I believe Tom should be congratulated for his leadership in opposing the government taking of private property by administrative fiat. Unlike many of his cohorts, he has refused to change or modify his core values. He has stood alone in not succumbing to threats, coercion or promised financial gain. He has steadfastly repudiated the concept that extortion can result in a good business decision.

An effort to recall Commissioner Mallams, apparently based on these allegations as well as his leadership in opposing the sale of marijuana in Klamath County, has also been unusually well-publicized in local print media. It is my hope that the citizens of Klamath County will continue to support this man, who finds himself in jeopardy by standing up for the peoples' rights.

I applaud Tom's courage in "taking the point" and the political heat.

Please remember—if we do not stand up for rural Oregon, no one will.

Best regards,
Doug

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