

Deschutes Ground Water Mitigation Program: House Bill 3494 Report

Executive Summary

House Bill 3494 (Chapter 669, 2005 Oregon Laws) directs the Oregon Water Resources Department (OWRD) to report to the 75th Legislative Assembly, no later than January 31, 2009, on the implementation and operation of the Deschutes River Basin Ground Water Mitigation and Mitigation Bank Programs.

In the Deschutes Basin above Lake Billy Chinook, there is a hydraulic connection between ground water and surface water flows. Because of this connection, ground water withdrawals affect surface water flows. Since scenic waterway flows and instream water rights are not always satisfied, OWRD may not approve new ground water permits unless the impacts are mitigated. The Deschutes Mitigation Program provides a set of tools that applicants for new ground water permits can use to establish mitigation and, thereby, obtain new permits from OWRD. These programs are implemented under Oregon Administrative Rules (OAR) Chapter 690, Divisions 505 and 521.

Since adoption of the Deschutes Mitigation rules in September 2002, OWRD has issued 67 new ground water permits with associated mitigation, totaling 52 cubic feet per second (cfs) of water. The amount of ground water use that can be approved under the program is limited to a total of 200 cfs. Currently, the amount of ground water use approved under final orders and requested in pending applications totals 148 cfs. The Department maintains an accounting record of new ground water permits and mitigation projects and mitigation credits with links between the ground water permits and their associated source of mitigation. Overall, there has been sufficient mitigation in place to meet the needs of the ground water permits issued under the program. However, there are areas of the basin where mitigation has not been available or where there may not be sufficient supplies of mitigation to satisfy the mitigation needs of all currently pending ground water use requests.

To assist with development of the report to the Legislative Assembly, in May 2008 the Department convened the Deschutes Group, a broad range of water users and organizations with an interest in water use in the Basin. This group was convened to review the implementation and operation of the Deschutes Mitigation Program. The Group met four times over five months and focused their discussions on the following six issue areas:

- The zones of impact in which mitigation is provided;
- What is counted under the 200 cfs allocation cap on new ground water uses in the Deschutes Basin;

- Off-set of impacts on surface water flows resulting in reduced mitigation requirements and incremental mitigation provided by Municipal and Quasi-municipal ground water permit holders;
- Potential water quality impacts of the mitigation program;
- Non-irrigation season mitigation and;
- Water right permits that were issued prior to rule adoption with a condition on their use to allow regulation to protect scenic waterway flows (called “7(j) conditioned water right permits”).

Small work groups defined or “framed” these issues between meetings to provide context and background so that the Group could have an informed discussion of the issues at subsequent meetings.

Zones of Impact

Issue Statement: Some stakeholders are concerned about OWRD requiring mitigation only in the “primary” zone of impact when groundwater pumping may impact more than one zone of impact.

Recommendation: Recommend that the Department improve their analytical tools to be able to better assess the zones of impact.

What is Counted Under the 200 cfs Allocation Cap

Issue Statement: A requirement to count all final orders issued under the mitigation rules (even zero mitigation obligation, non-consumptive, and offset) appears to be an unintended consequence of the current rules. The issue is whether zero mitigation obligation or non-consumptive uses, such as a closed loop heat exchange, or permits issued under an offset, should be counted under the 200 cfs cap.

Recommendation: Water allocated under the 200 cfs cap should be restored to the cap if the amount of water use authorized in the permit or final certificate is less than the amount originally approved in the final order.

Offset and Incremental Mitigation

Issue Statement: The mitigation rules allow municipal or quasi-municipal permit holders to meet a mitigation obligation by incrementally obtaining and providing mitigation using a combination of current and future instream leases, permanent instream transfers and the purchase of mitigation credits to satisfy the required mitigation over time. However, as currently written, the incremental mitigation rules do not cross-reference the off-set provision, and therefore the rules currently do not allow for the use of “off-set” as part of an incremental mitigation plan.

Recommendation: The rules should be modified so that the use of an offset as defined under the current rules should not be counted under the cap.

Recommendation: Recommend that the Mitigation Rules be modified so that offsets, as defined under the current rules, can be used in an incremental mitigation plan.

Water Quality

Issue Statement: Springs and ground water inflow to surface water have an impact on water quality, including temperature. However, the current mitigation program addresses only the water quantity impacts of proposed new ground water uses. In addition, there is no current process for tracking or addressing the potential cumulative impacts on water quality of the mitigation program in combination with other programs in the basin. The key issue is whether there may be a "tipping point" where reduced spring and ground water inflow resulting from all water programs will cumulatively have a negative impact on water quality in the future.

Recommendation: No recommendation was reached by the Group on water quality; however the group did agree that more work is needed to address water quality in the context of an integrated water management plan for the Deschutes Basin. The group also agreed to continue discussions about water quality and the need for an integrated water management plan.

Non-Irrigation Season Mitigation

Issue Statement: Under the Deschutes Mitigation Rules, mitigation is calculated on the basis of the annual volume of consumptive use, rather than on a cubic foot per second basis. While the annualized volumetric approach in the rules addresses the volume of consumptive use, the rules do not address the OWRD's estimate that ground water pumping impacts are uniformly distributed over all months of the year. Thus far, all mitigation water has been returned to the system during the irrigation season. While the additional flow to the system during the summer months is a positive effect, some have raised concerns about ground water pumping impacts on streamflow during the non-irrigation season.

Recommendation: While no consensus agreement could be reached, the group agreed that this issue should be addressed in a broader planning process. The group agreed to continue a dialogue about this issue beyond the forum convened for this report.

7(j) Conditioned Permits

Issue Statement: The term “7(j)” refers to a condition required by statute to be included in certain water right permits and certificates in the Deschutes Basin that were issued during the time period after Senate Bill 1033 was enacted in 1995 (amending the Scenic Waterway Act), but before the initial ground water study results were available in 1998. In the absence of technical information to determine whether a proposed use would "measurably reduce" scenic waterway flows, the statute allowed a new ground water permit to be issued with the condition that provided the ground water use could be regulated in the future if analysis of data available after permit issuance discloses the use will measurably reduce the protected scenic waterway flows. Studies completed in 2001 show a connection between ground water and surface water and, as a result, all new ground water right permits are now required to mitigate for the impacts of their use under the rules. The issue is whether the 7(j) condition has been triggered and, if so, how it should be implemented.

Recommendation: No consensus could be reached on this issue.