



Connecting Central Oregon's Water, Land & Environment

SETTLEMENT AGREEMENT IN OREGON SPOTTED FROG LAWSUIT SUBMITTED FOR COURT APPROVAL

Introduction

On October 28, 2016, five central Oregon irrigation districts (Arnold, Central Oregon, Lone Pine, North Unit, and Tumalo), the United States Bureau of Reclamation, and two environmental groups submitted to Judge Ann Aiken a settlement agreement intended to resolve two lawsuits related to the Oregon spotted frog. The settlement agreement will go into effect only if it is approved by Judge Aiken.

The settlement agreement is good news for central Oregon irrigation districts and their members who rely on stored water from Crane Prairie, Wickiup, and Crescent Lake reservoirs. The settlement will significantly reduce the uncertainty faced by water users last winter and spring and allow farmers to better prepare for the 2017 irrigation season. The settlement also represents a science-based effort to improve Oregon spotted frog habitat in the Deschutes Basin and avoid adverse impacts to other species. The settlement demonstrates that collaborative solutions can be achieved when all parties come to the table—an approach that has worked repeatedly in central Oregon.

General Background

The settlement agreement relates to lawsuits filed by the Center for Biological Diversity (CBD) and WaterWatch of Oregon (WaterWatch) in the United States District Court for the District of Oregon. CBD filed a lawsuit against Reclamation in December 2015, and WaterWatch filed a lawsuit against Reclamation and Central Oregon, North Unit, and Tumalo irrigation districts in January 2016. The court consolidated the two lawsuits into a single case.

CBD and WaterWatch alleged that Reclamation violated the Endangered Species Act (ESA) by failing to consult with the U.S. Fish and Wildlife Service (FWS) regarding the potential effects of Crane Prairie and Wickiup reservoir operations on the Oregon spotted frog after FWS listed the species as threatened in August 2014. CBD also alleged that Reclamation violated the ESA by operating Crane Prairie and Wickiup reservoirs in a way that harms the Oregon spotted frog. WaterWatch made a similar allegation against Reclamation and also alleged that Central Oregon, North Unit, and Tumalo irrigation districts violated the ESA by operating Crane Prairie, Wickiup, and Crescent Lake reservoirs in a way that causes harm to the Oregon spotted frog.

Arnold and Lone Pine irrigation districts intervened in the cases to protect their rights to store water in Crane Prairie Reservoir and to use that water for irrigation. The Confederated Tribes of the Warm Springs Reservation of Oregon and the State of Oregon requested to participate in the

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DBBC Member Districts

*Arnold Irrigation District • Central Oregon Irrigation District • Lone Pine Irrigation District • North Unit Irrigation District
Ochoco Irrigation District • Swalley Irrigation District • Three Sisters Irrigation District • Tumalo Irrigation District
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cases as *amicus curiae* (i.e., someone who is not a party to the case but offers information related to the case). The court granted both requests.

Earlier this year, Judge Aiken denied a request by CBD and WaterWatch to order immediate changes to the operation of Crane Prairie, Wickiup, and Crescent Lake reservoirs. Those changes would have resulted in abrupt and severe restrictions on reservoir operations and disrupted water supplies to thousands of families throughout the Deschutes Basin. Judge Aiken also ordered the parties to participate in settlement discussions. Those discussions, which began on June 1, 2016, ultimately resulted in the settlement agreement submitted to Judge Aiken.

Summary of Settlement Agreement

Obligations of Irrigation Districts

In September 2015 and February 2016, the irrigation districts voluntarily implemented changes to the operations of Crane Prairie, Wickiup, and Crescent Lake reservoirs to improve habitat for the Oregon spotted frog. Under the settlement agreement, the irrigation districts would continue to implement those operational changes through July 31, 2017, with some modifications. In addition to the previously implemented changes, the irrigation districts would ensure a minimum winter instream flow in the Upper Deschutes River of 100 cubic feet per second (cfs)—a significant increase over the 20.8 cfs that would otherwise be required.

The operational changes established under the settlement agreement are summarized below:

- *Crescent Lake Reservoir.*
 - *Minimum Non-Winter Flow.* A minimum instream flow of 30 cfs will be provided from March 15 through November 30 in Crescent Creek immediately downstream of Crescent Lake Dam.
 - *Minimum Winter Flow.* A minimum instream flow of 20 cfs will be provided from December 1 through March 14 in Crescent Creek immediately downstream of Crescent Lake Dam, except that if the flow in the Little Deschutes River is less than 110 cfs by November 30, the transition from 30 cfs to 20 cfs will be delayed until flows of 110 cfs in the Little Deschutes River are sustained for at least one week.
 - *Maximum Changes in Flow.* The maximum rate of increase in flow immediately downstream of Crescent Lake Dam will be 30 cfs (plus or minus 2 cfs) per day, and the maximum rate of decrease in flow will be 20 cfs (plus or minus 2 cfs) per two-day period.
 - *Ramp-Down.* Ramp down of releases at Crescent Lake Dam at the end of the irrigation season will begin no earlier than September 1 and end no later than October 31.
- *Crane Prairie Reservoir.* The reservoir will be operated to provide for stable surface water elevation during Oregon spotted frog breeding and rearing (subject to operational and monitoring limits), as described below:

- *Storage Target.* The reservoir will be operated during the storage season to reach a volume of at least 40,000 AF but no more than 50,000 AF by March 15, provided inflow is sufficient. Storage volume will never exceed 50,000 AF unless necessary to store flood water.
- *Surface Elevation Changes.* Surface elevation will not increase more than 2 feet after March 15 unless necessary to store flood water. Surface elevation will not decrease between March 16 and July 15, unless coordinated with FWS based on monitoring and adaptive management. After July 15, surface elevation will not decrease more than 0.1 foot per day, unless Wickiup Reservoir cannot meet irrigation demand.
- *Minimum Reservoir Volume.* Reservoir volume will not drop below 35,000 AF at any point during the year unless inflow to the reservoir is less than the combined total of natural evaporation and seepage loss, and then will drop only to the extent dictated by those natural conditions. The reservoir may be lowered below 35,000 AF under other circumstances specified in the settlement agreement.
- *Use of Stored Water.* Up to 15,000 AF of stored water will be available for irrigation use.
- *Wickiup Reservoir.*
 - *Minimum Winter Flow.* A minimum instream flow of 100 cfs will be provided from September 16 to March 30 on the mainstem Deschutes River immediately downstream of Wickiup Dam.
 - *Minimum Spring Flow.* A minimum instream flow of 600 cfs will be provided March 31 through September 15 on the mainstem Deschutes River immediately downstream of Wickiup Dam.
 - *Spring Ramp-Up.* Flows below Wickiup Reservoir will be increased as needed to reach 600 cfs immediately downstream of Wickiup Dam by March 31, 2017, provided the depth of water immediately downstream of the dam increases no more than 0.1 foot in any 4-hour period and no more than 0.5 foot in any 24-hour period.
 - *Fall Ramp-Down.* Releases of water from Wickiup Reservoir will be ramped down at the end of the irrigation season to the 100 cfs minimum instream flow over a period of no less than 7 days.

Obligations of Reclamation

Under the settlement agreement, Reclamation would commit to using its best efforts to fulfill its obligations under the ESA related to the Oregon spotted frog by July 2017. The irrigation districts anticipate that this will result in the issuance of a biological opinion and an Incidental Take Statement (ITS) by FWS that would provide the irrigation districts with certain liability protection under the ESA. The parties have requested that the ITS expire on July 31, 2019.

Obligations of CBD and WaterWatch

Under the settlement agreement, in exchange for the commitments by the irrigation districts and Reclamation, CBD and WaterWatch's lawsuits would be dismissed. And so long as the settlement agreement remains in effect, the groups would agree not to pursue the ESA claims raised in their lawsuits. CBD and WaterWatch would retain the right to challenge the biological opinion and ITS. CBD and WaterWatch also reserve the right to seek their attorneys' fees from Reclamation, but agree not to seek attorneys' fees from the irrigation districts.

Next Steps

The settlement agreement is a step in the right direction, but the DBBC recognizes that it does not permanently resolve potential concerns related to the reservoirs' effects on the Oregon spotted frog or provide long-term liability protection to irrigation districts. The benefits of the settlement agreement to the irrigation districts end on July 31, 2017.

By the time the settlement agreement expires, the irrigation districts' goal is to be covered by an ITS issued by FWS. Further modifications to reservoir operations and/or other conservation measures to benefit the Oregon spotted frog may be required to benefit from the liability protection of the ITS. The irrigation districts plan to work closely with Reclamation to ensure that any proposed changes to reservoir operations and/or conservation measures are reasonable and based on sound science.

The irrigation districts anticipate the ITS will expire on July 31, 2019. At that time, the irrigation districts' goal is to have long-term liability protection under the multi-species habitat conservation plan (HCP) that is currently being developed by the DBBC and the City of Prineville. The conservation measures that will likely be required under the HCP will require significant investments by the irrigation districts and public and private partners in conservation projects, such as canal lining and piping.