



Oregon

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MEMORANDUM

TO: Water Resources Commission

FROM: Phillip C. Ward, Director

SUBJECT: Agenda Item I, November 17, 2006
Water Resources Commission Meeting

Request for Adoption of Amendments to the Mid Coast Basin Rules, OAR Chapter 690, Division 518

I. Issue Statement

The Commission is asked to adopt rules establishing reservations for multipurpose storage for future economic development in three waterways of the Mid Coast Basin (OAR Chapter 690, Division 518). The final proposed rules are located in Attachment 1.

II. Background

Reservations of water for multipurpose storage for future economic development are allowed by ORS 537.356. Any local government, local watershed council, or state agency or individual cooperating jointly with those entities may request that the Commission reserve unappropriated water for multipurpose storage for future economic development. In addition to the statutory requirements, reservation requests are processed as basin program amendments through the rulemaking process.

On September 20, 2005, the Department received a request by Lincoln City for reservations on two waterways tributary to Devils Lake adjacent to Lincoln City and a tributary of the Salmon River north of Lincoln City. The reservation request is provided in Attachment 2 and a map of the area is provided in Attachment 3. The Department has determined that quantities of unappropriated water are available for the reservations, provided that Lincoln City withdraws its six pending water right applications on Side Creek, Rock Creek, and Treat River upon approval of the reservations.

Lincoln City's reservation request results from a "Supplemental Settlement Agreement" (SSA) resolving a number of water right protests. Lincoln City agreed in the SSA to withdraw six pending protested applications, if the three proposed reservations are approved as requested. These applications are within the same area as the reservation requests, for storage and secondary diversion of stored water. This will terminate contested case hearings on those six applications.

On September 29, 2005 the Department sent notice to affected local governments as required for reservations of water by ORS 537.356. No comments from local governments were given at that time. The Commission authorized initiation of the rulemaking process on May 5, 2006.

III. Public Interest Review

Under ORS 537.358, in adopting a rule under ORS 537.356 to reserve unappropriated water for multipurpose storage for future economic development, the Commission must include a public interest review that takes into consideration the public interest factors described under ORS 537.170.

The public interest standards under ORS 537.170(8) are:

- (a) Conserving the highest use of the water for all purposes, including irrigation, domestic use, municipal water supply, power development, public recreation, protection of commercial and game fishing and wildlife, fire protection, mining, industrial purposes, navigation, scenic attraction or any other beneficial use to which the water may be applied for which it may have a special value to the public.
- (b) The maximum economic development of the waters involved.
- (c) The control of the waters of this state for all beneficial purposes, including drainage, sanitation and flood control.
- (d) The amount of waters available for appropriation for beneficial use.
- (e) The prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved.
- (f) All vested and inchoate rights to the waters of this state or to the use of the waters of this state, and the means necessary to protect such rights.
- (g) The state water resources policy formulated under ORS 536.295 to 536.350 and 537.505 to 537.534.

The Department finds that the reservation request by the City of Lincoln City is consistent with the public interest:

- (a) Since the reservations would reserve water for such a broad purpose (multipurpose storage for future economic development), establishment of the reservations would be consistent with conserving the highest use of the water for all purposes. The proposed reservations provide the flexibility to address a wide variety of important water uses in the future.
- (b) The reservations are for multipurpose storage for future economic development, and are therefore consistent with the maximum economic development of the waters involved.
- (c) The reservations are consistent with the control of the waters of Oregon for all beneficial purposes, including drainage, sanitation and flood control. The reservation of water has no negative impact on such considerations.
- (d) The Department has determined that water is available for the reservations based on the Department's water availability model, provided that Lincoln City withdraws its six pending protested water right applications upon approval of the reservations as requested by Lincoln City.

- (e) The proposed reservations are consistent with the prevention of wasteful, uneconomic, impracticable or unreasonable use of the waters involved, since reservations merely reserve certain amounts of unappropriated water for future economic development. The proposed reservations do not result in approval of any water right application, and any future water right application would be subject to the applicable public interest review.
- (f) The proposed reservations would establish certain amounts of unappropriated water for future economic development with a certain priority date. Any water rights that are senior to the priority date of the reservation will be entitled to protection as senior appropriators. Any water rights that are junior to the priority date of the reservation will be subject to regulation in favor of any water right permits or certificates that appropriate reserved water. Any future water right application for the use of reserved water will be processed under the applicable water rights application process, which includes provisions for the prevention of injury to all vested and inchoate rights, and any permit issued would be conditioned as necessary to protect such rights.
- (g) The reservation is consistent with state water resources policy formulated under ORS 536.295 to 536.350 and 537.505 to 537.534. ORS 536.310, (3) and (4) address several policy issues including preservation of adequate and safe water supplies and protection of such water supplies for human consumption, while conserving maximum supplies for other beneficial uses. The statute states that multiple purpose impoundment structures are to be preferred over single-purpose structures. The proposed reservations would reserve certain amounts of unappropriated water for future economic development, which is consistent with all of the aforementioned state water resource policies.

IV. Rulemaking Process

The Department developed a hearing draft of the rules that proposed reservations on two waterways tributary to Devils Lake adjacent to Lincoln City and a tributary of the Salmon River north of Lincoln City. Notice of the public rulemaking was published in the *Oregon Bulletin*, and a hearing draft of the proposed rules was made available July 1, 2006. Under ORS 536.300 basin program amendments require public notice in addition to regular rulemaking notice requirements. The statute requires publication in a local newspaper once per week for four consecutive weeks. The Department published two series of newspaper notices. During the first publication notice, the Lincoln City News Guard (a weekly) failed to publish notice in one of the required weeks. The rulemaking was re-noticed in the July 1, 2006 Secretary of State's bulletin and also for the required time in the News Guard in a second series of notices. For basin program amendments, a public hearing must also be held by a Commissioner within the affected basin. The hearing for these rules in was held in Lincoln City on October 4, 2006. Commissioner Rasmussen was the hearings officer. The hearing was attended by four parties consisting of a member of the watershed council, a representative for Miami Corporation, a staff person for the City of Lincoln City, and the attorney for the City of Lincoln City. No comments were given at the hearing. The deadline for submitting written comments to the Department was October 18, 2006.

Three written comments were received and are provided in Attachment 4. WaterWatch of Oregon and the Confederated Tribes of the Siletz commented in support of the proposed rules, and Miami Corporation commented in opposition to the proposed rules.

V. Rule Highlights

The final proposed rules would reserve waters of the following streams for multipurpose storage for future economic development as allowed under ORS 537.356 with a priority date of May 5, 2006:

- 374 acre-feet of unappropriated water in Rock Creek, tributary to Devil's Lake;
- 1,250 acre-feet of unappropriated water from Treat River, tributary to Salmon River;
and
- 1,350 acre-feet of unappropriated water from an unnamed stream (locally referred to as "Side Creek"), tributary to Devil's Lake, for future application exclusively by the City of Lincoln City.

VI. Issues Identified in Written Comments

1. *Comment* - WaterWatch of Oregon expressed support for the proposed rules.

2. *Comment* - The Confederated Tribes of the Siletz expressed support for the rules.

3. *Comment - Miami Corporation's Interests*

In their comments, Miami Corporation asserts that impoundments, if allowed in the Treat River drainage, will take land away from timber production and are not appropriate or safe.

Response- The reservation does not establish a water right, take any lands, or change regulations for environmental protection or public health and safety. Approval of a reservation does not mean that any subsequent water right applications will be received or approved. Review of water right applications must be based on the applicable public interest review standards at the time of the water right application. The proposed reservations (which are not water right applications) do not exempt any future water right applicant from dam safety, or any other applicable standards.

Comment - Treat River Contested Case

Miami Corporation asserts that the Treat River contested case will be adversely influenced by the adoption of the basin program amendment for the reservations. Much of the content of this comment deals with the history and background of the Treat River contested case and legislation concerning the establishment of the Office of Administrative Hearings (OAH). There are also portions that deal with the question of whether the Treat River contested case has been assigned to the OAH.

Response - The Treat River contested case is a separate matter from the reservation request. The Treat River contested case is not before the Commission at this time. The establishment of the reservations is an action that the Commission holds through statutory authority. Since the City of Lincoln City is the applicant for the Treat River, Rock Creek, and Side Creek water right applications, Lincoln City has the ability to withdraw those applications at any time. Lincoln City has agreed to withdraw six pending protested water right applications if the three proposed reservations are approved as requested. This will result in termination of the contested cases for those six water right applications.

Comment - the Reservation Request

Miami Corporation asserts that the City of Lincoln City's reservation request did not contain the required information for the Commission to make a determination on the potential impact on public interest and private property owners.

Response - The establishment of the reservation has several public interest factors that are outlined above. The Department considers that the reservation request is consistent with the public interest. Water is available in the amounts specified in the reservation request, provided that Lincoln City withdraws their pending water right applications on Rock Creek, Side Creek, and Treat River. The public interest review for the proposed reservations is limited to the proposed reservations, and does not include any other subject matter, such as future water right applications. The reservations, if approved, do not result in approval of any water right application. Any future water right application would be reviewed under the full range of applicable public interest review standards.

Comment - the Settlement Agreement

Miami Corporation asserts that the Department agreed in the Supplemental Settlement Agreement to recommend that the Commission initiate and approve the reservations as requested by Lincoln City. Miami Corporation also asserts that the Department has "tied its hands" as to the rulemaking process and has restricted its ability to consider all public comments. Miami Corporation asserts that they were not invited to be parties to the Settlement Agreement. Miami Corporation asserts that the City of Lincoln City may not unilaterally withdraw the applications connected to the Treat River contested case.

Response - In a rulemaking authorized by the Commission, the Department carries out the formal rulemaking process. The Department provides a final recommendation to the Commission based on consideration of statutory and rule requirements and any comments received. The City of Lincoln City is the applicant for water right applications on Treat River, Rock Creek, and Side Creek, and they may withdraw those water right applications at any time. If the basin program amendment for the reservations is adopted as requested, Lincoln City has agreed to withdraw their six pending protested water right applications on Treat River, Rock Creek, and Side Creek.

The Settlement Agreement resolved a series of disputes about specific water right matters. Miami Corporation did not request standing to be a party or file any protests related to those water right applications. The Miami Corporation failed to take steps to become a party to the water right Settlement Agreement.

Comment - Commission authority and Policies

Miami Corporation asserts that granting the reservation request exceeds the Commission's authority, is not in the public interest, and is inconsistent with the Commission's policies.

Response - The Department reviewed a variety of authorities and materials, including, but not limited to, the reservation request, water availability information, ORS 537.356 and 537.358, OAR 690 Divisions 400 and 410, and all comments received. The Department determined that the reservation request is in the public interest and is consistent with the Commission's authorities and policies.

Comment – Commission Policies

Miami Corporation states that it is the Commission's policy "that the state will reserve unappropriated water for future economic development for 'high priority' storage projects."

Response – The Commission's policies are worded to "encourage" "high priority storage projects." The reservation process does not specify that only "high priority" projects can be involved in a reservation.

Comment – House Bill 3038

Miami Corporation suggests that the reservation is inconsistent with the policies of House Bill 3038 (Chapter 410, 2005 Oregon Laws) with respect to municipal water right permit extensions.

Response --The proposed reservations do not establish or approve any water right application, so there is no direct connection to any permit extension.

Comment – the Treat River Reservation

The record does not support the need or purpose for the Treat River reservation.

Response –Both Lincoln City's request and Miami Corporation's comments on page 8, "The City is understandably concerned about securing an adequate water supply to meet projected growth in and around the City," recognize the City's need for expanded water supply.

Comment – Feasibility Analysis

Miami Corporation asserts that a feasibility analysis for a storage project is required before the reservation request is submitted.

Response - The reservation process does not establish, evaluate, or prejudge any future water right application.

Comment – Whether the Record Informs the Commission of Legal Issues

Miami Corporation asserts that the record does not inform the Commission of legal issues

Response - The legal issues identified are related to the Treat River contested case, specific regulatory approvals, and public interest issues. The Treat River water right application contested case is a separate matter and not before the Commission at this time.

Comment – Whether the Record is Silent Regarding Support and Other Cultural Issues

Miami Corporation asserts that the record is silent regarding support and other cultural issues.

Response –In addition to the two letters of support from the Confederated Tribes of the Siletz and WaterWatch, the other parties that participated in the Settlement Agreement have pledged to submit no comments other than to support the proposed reservation. Miami Corporation did not list any cultural issues in this comment.

Comment - Miami Corporation Attachments A through L.

Response – These materials are part of the record and provided in Attachment 4.

VII. Summary

The final proposed rules in Attachment 1 amend the Mid Coast Basin Program (OAR Chapter 690, Division 518) to allow the three reservations requested by the City of Lincoln City. Based on the required public interest review and consideration of public comments received, the Department recommends approval of the reservations as requested by the City of Lincoln City.

VIII. Alternatives

The Commission may consider the following alternative actions:

1. Adopt the final proposed rules in Attachment 1
2. Adopt modified final proposed rules.
3. Not adopt the proposed rules and request that the Department further evaluate the issues.

IX. Recommendation

The Director recommends that the Commission adopt the final proposed rules in Attachment 1.

Attachments:

1. Final Proposed Rules, OAR Chapter 690, Division 518 – Mid Coast Basin Program
2. Lincoln City's Reservation Request
3. Geographic Reference Map
4. Written Comments on July 1, 2006 Hearing Draft

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