



April 30, 2009

Bill Fujii
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271

Re: Comments, Home Creek Reservation for Future Economic Development Rulemaking, OAR
Chapter 690, Div. 512

Dear Mr. Fujii,

Thank you for this opportunity to comment on the draft rules for the Home Creek Reservation for Future Economic Development. As you are aware, in 2005, WaterWatch, Oregon Natural Desert Association (ONDA), Oregon Trout, WRD, ODFW, BLM, OPRD, Roaring Springs Ranch and Harney County Court entered into a settlement agreement to resolve a number of water right issues in the Home Creek and Threemile Creek subbasins in southeastern Oregon. As part of the settlement agreement, all parties agreed to support or not oppose the establishment of a reservation for future economic development, under a number of stipulated provisions. See Final Draft Settlement Agreement and Attachments A & B In the Matter of Instream Water Right Applications IS 84562 (Home Creek) and IS 84563 (Threemile Creek), pp 5-6. On October 6, 2008 Harney County requested a reservation of 4,550 acre feet of unappropriated water on Home Creek in the Malheur Lakes Basin for multipurpose storage for future economic development. On February 25, 2009 the WRC authorized the WRD to initiate formal rulemaking to authorize the reservation request in administrative rule. It is those draft rules that WaterWatch and ONDA are commenting on today.

As a general matter, WaterWatch and ONDA do not oppose a reservation of water for future economic development in the Home Creek Basin as long as the terms of the settlement are adhered to, as long as the benefit granted by this reservation to projects applying for water under the reservation is limited to that as provided by statute, and as long as the existing permitting statutes and rules are adhered to in the processing of storage project applications under the reservation. Moreover, if in fact the full 4,550 acre feet as requested is reserved under the reservation, is it very important to us that the record clearly reflect that the method used for determining the amount of unappropriated water available for the reservation in the Home Creek reservation was arrived at through settlement negotiations relative to water rights issues in the Home Creek Subbasin specifically and in no way sets a precedent for how "unappropriated waters available for reservations" will be determined in future rulemakings for reservations for economic development.

That said, while we do not oppose a reservation for future economic development for the Home Creek Subbasin, for the reasons outlined below, the draft rules as written do not accurately reflect the settlement agreement, nor do they adhere to the governing reservation statutes, thus WaterWatch and ONDA cannot support the draft rules as written. We offer the following comments on the proposed rule

provisions, including suggestions on bringing the proposed language more in line with governing statutes and settlement agreement provisions.

1. Water Availability: WaterWatch and ONDA are especially concerned with the proposed rules findings/declarations as to “water availability” for future storage permits that move forward under any Home Creek reservation. In a nutshell, the draft rules go beyond the statutory authority for reservations for future economic development by proposing that in approving the Home Creek reservation for “unappropriated waters” that this somehow meets the “water availability” requirements of the permitting statutes for the projects applying for water under the reservation. Specifically, rather than simply reserve the proposed amount with a specific priority date attached, as allowed by statute, the rules not only declare that 4500 AF is “available for appropriation” in later permitting processes (OAR 690-512-0100(5)), but also, by rule, deviates from the WRD’s current methodology for determining water availability by providing, in rule, an alternative method for calculating water availability for projects applying under the reservation that relies on the reserved amount as the baseline for appropriation. See (OAR 690-512-0110(3)).

Not only are these draft rule provisions contrary to statute, but these provisions directly undermine a key provision of the settlement agreement that explicitly preserves WaterWatch and ONDA’s¹ right to raise water availability concerns in the later permitting process. Highlighted below are the relevant sections of the governing statute and the settlement agreement, as well a brief explanation of the distinction between the state’s policy on water allocation and the WRD’s 2005 memo regarding unappropriated water in the Home Creek Basin that was used to determine “unappropriated water” for the purposes of the reservation.

A: The Reservation for Future Economic Development statutory directives: The statute governing reservations for future economic development allow any local government, local watershed council or state agency or any other individual cooperating jointly with a local government, local watershed council or state agency to request the Water Resources Department to reserve unappropriated water for multipurpose storage for future economic development. ORS 537.356(1).

By statute, the sole benefit granted to a multi-purpose storage application that is submitted under the established reservation for future economic development is a priority date that matches that of the reservation, regardless of when the application might actually be submitted. ORS 537.356(3). The statute provides no other assurances or guarantees. Specifically, it does not state that if a reservation is approved, then by virtue of the fact that a reservation exists that water is then somehow guaranteed to be available for any and all storage project applications that are submitted under the reservation in the future.

To the contrary, the reservation statutes explicitly provide that “[a] person requesting use of the reserved water for new storage shall submit a water right application and comply with the procedure set for the in ORS 537.140 to 537.252, except that the priority date for a storage right approved for use of reserved water shall be the date of the reservation.” ORS 537.358(2). In a nutshell, the only exception to the permitting statutes is related to the priority date. There are no other exceptions. Thus, the water

¹ Note: for the purposes of the Settlement Agreement, “WaterWatch” included WaterWatch of Oregon, ONDA and Oregon Trout.

availability determination required under statute, and associated rules, still applies to all storage applications submitted under the reservation.

Allocating “unappropriated” water for a reservation under the reservations statutes is very different than making a finding that “water is available” for a specific application under the permitting statutes (see C. below). To propose in a rule reserving water under the reservation statutes that the “water availability” requirements of the permitting statutes are deemed met, exceeds statutory authority allowed by the reservation statutes.

B. The Settlement Agreement: In the 2005 settlement agreement, OWRD, OPRD, ODFW, BLM, Roaring Springs Ranch and Harney County Court agreed for the purposes of the settlement to use the OWRD’s “precipitation over drainage basin areas” methodology and stipulated that based on that methodology, 4550 AF of water is available for a reservation pursuant to ORS 537.356.² See Settlement Agreement, C(4)(a). In other words, these parties stipulated that they would support a reservation request up to the amount of 4550 AF.

In the settlement agreement, WaterWatch expressly did not stipulate that 4550 AF of water is available for future storage in the Home Creek Basin. WaterWatch explicitly reserved the right to challenge water availability relating to any application for storage (except small ponds). The other parties signed the settlement agreement that included WaterWatch’s explicit right to raise water availability concerns with regards to future applications for storage under the reservation. In reserving this right, we acknowledged that the proposed reservation would make a finding to water availability with regards to the reservation amount. However, as is made clear by our stipulation reserving our right to raise water availability in permitting processes, did not agree that that any finding made with regards to the reservation would carry over to individual storage applications. The language as proposed eliminates the ability of WaterWatch and ONDA to challenge water availability determinations in any future permitting proceeding, which is directly contrary to the provisions of the settlement agreement.

C. The distinction between water available for appropriation under the permitting statutes vs. unappropriated water allowed to be “reserved” under the reservation statutes. The permitting statutes are very clear. In evaluating a water right, water must be available. ORS 537.153(2), ORS 537.170(8)(d). Under the state’s rules on water allocation, the state is guided by the principle that waters of the state shall be protected from overappropriation. Specifically, surface waters can not be allocated during the months or half months when the allocations will not contribute to overallocation. OAR 690-410-070(2)(a). Over appropriation means a condition of water allocation in which the quantity of surface water available during a specified period is not sufficient to meet the expected demands from all water rights at least 80 percent of the time during that period OAR 690-400-0010(11)(A)(a). The water allocation policy does allow for an exception to the 80% exceedence level for storage, but only if a number of public interest hurdles are met and the storage season avoids periods of the year when flows are low and seldom exceed the needs of water rights and when additional flows might are needed to support public uses. OAR 690-410-070(2)(c). The Department’s practical application of this rule provision is to restrict new storage projects to 50% exceedence levels. This practice has been in place since 1992.

²The statute referred to allows the reservation of all “unappropriated” waters. As noted in section C, this differs from a finding of “water is available” for appropriation.

With regards to the 4,550 AF proposed to be reserved under the Home Creek reservation, in discussions related to the settlement agreement, the WRD stressed the fact that reservation statutes allow a reservation to reserve all unappropriated water. See Memo from Tom Paul, WRD to Phil Ward, 6/6/2005. The WRD applied a basin yield analysis to determine that 4500 AF of water was unappropriated. As explained in the WRD memo, this analysis shows the overall water that might emerge from average precipitation and resulting runoff. This is not water that could be counted on being there 50% of the time from year to year. And, importantly, this basin yield analysis does not factor into its determination any of the policy and/or statutory directives that bind and/or guide the WRD in approving storage permits (i.e. Div. 410, Div. 400, the Climate Change policies recently adopted by the WRC, etc).

D. The Proposed Home Creek Reservation and Water Availability: The draft rules not only reserve all unappropriated water for the Home Creek Reservation as allowed by statute, they also, by rule, state the 4550 AF of water under the reservation is also deemed “available” for purposes of the permitting statutes for any individual storage project that applies under the Reservation. Specifically, section OAR 690-512-0100(5) states:

For purposes of review of applications to store reserved water under OAR Chapter 690, Division 310, and subject to the provision of section (7), the reserved quantities of water listed under in OAR 690-512-0110 are available for appropriation (emphasis added).

Then, in OAR 690-512-0110(1) the rules propose:

Four thousand five hundred fifty (4,550) acre-feet of unappropriated water of Home Creek and tributaries are reserved for storage in multipurpose reservoirs to be constructed in the future (emphasis added).

And finally, OAR 690-512-0110(3) overrides the current water availability calculations/determinations done by the WRD when issuing new storage permits by stating:

Water availability for applications shall be calculated based on the percentage of the drainage area above the point of appropriation not to exceed the amount proportional to the total and any quantity previously issued permits subtracted from the remaining reserved water if these applications are above the proposed point of diversion.

Read together these three provisions clearly go beyond the reservation statutory authority. By stipulating in reservation rules that 4500 af of water that is reserved under the reservation statutes is “available” for appropriation by future storage projects under the permitting statutes/rules, the WRD is not adhering to the reservations statutes specific directive that storage projects be subject to the permitting statutes, except for the single exception of “priority date”. Making a positive determination that “water is available” for any and all applications that apply for water under the reservation is a very different thing than reserving “unappropriated” water for future economic development. The former is not contemplated nor allowed in the reservation statutes.

It is also important to keep in mind that these provisions regarding “water availability” are inconsistent with the terms of the settlement agreement signed by all parties. This settlement agreement

resolved a number of issues with regards to the instream and the storage applications on Home Creek. Key to WaterWatch and ONDA's agreement to the reservation portion of the settlement was the clear understanding that "water availability" with regards to future projects under the reservation would not be definitively determined by the adoption of a reservation. This proposed rule language trumps any possibility of raising water availability concerns in the permitting process, and thus is inconsistent with the settlement agreement as signed by WRD and others. It essentially renders our stipulation with regards to water availability, as agreed to by all parties including WRD, meaningless.

As outlined below, we think the draft rules need reworking in many areas. With regards to this issue in particular, we ask the Commission to delete all the proposed rule provisions cited above, and substitute the language with provisions similar to that that was recently adopted in the Mid-Coast Reservation for future economic development, namely:

4,550 acre-feet of unappropriated water in Home Creek is reserved for multipurpose storage for future economic development as allowed under ORS 537.356 with a priority date of February 25, 2009.

This language is both consistent with the governing statutes and the settlement agreement.

2. The Request for 4,550 Acre Feet under the Home Creek Reservation: Harney County has applied for a reservation for 4,550 acre feet. According to the WRD June 2005 memo, this amount represents the total sum of unappropriated water in the basin, as based upon a "basin yield" analysis of the Home Creek watershed. Basin yield analyses do not meet the guidelines for "water availability" under the state's Division 400 and 410 rules.

WaterWatch and ONDA will not oppose a reservation for this full amount, only if the proposed rule language that attempts to administratively find that this amount is deemed "available" for future permitting decisions on storage applications that come forward under the reservations is deleted. If the WRD and WRC retain the "water availability" language we oppose the reservation the amount of 4,550 and ask the WRC to instead adopt a reservation in the amount of 1,660 AF, which is the amount available under the WRD's water availability model for storage. See WRD's water availability for Home Creek, attached.

As an additional point, it is important to note that the basin yield analysis arose out of settlement negotiations. If the WRC moves forward with a reservation for the full amount we ask that the record clearly state that this was calculated for the purposes of settlement and that the use of a basin yield determination will not set precedent for any future reservation requests. Though WaterWatch and ONDA did specifically not stipulate that there was 4,550 AF of unappropriated water for the reservation, those who did were very clear that this stipulation was "for the purposes of the agreement" only. See Settlement Agreement 4(a) at pg. 5. The clearest course of declaring this would be to insert rule language in this regard.

3. Rule Construction of the Proposed Rules: The proposed rules have two sections- one titled "Reservations" (OAR 690-512-0100) and the other titled "Malheur Lake Basin Reservations" (OAR 690-510-0110). This framework sets forth, in rule, a number of policy declarations about reservations that are unconnected to Home Creek. This is of concern to WaterWatch and ONDA because, as

constructed, this language could be carried over to other reservations both inside and outside of the Malheur Lake Basin. As outlined below in our comments on specific sections, we think some of these policy declarations are inconsistent with governing statutes. Moreover, the way the rule construction is drafted, it sets forth a framework for all reservations in the basin, not just Home Creek.

The rule construction as proposed is much broader than the purpose of the Home Creek Reservation request, as outlined in the Staff Report to the WRC dated 2/25/09 (attached). Given that this rulemaking was spurred by the application of one request for a reservation for future economic benefit in the Home Creek subbasin, we think the more efficient route is to simplify the rules and focus them in specifically on the Home Creek request. We suggest that the rule be redrafted so that there is one section that is titled "Home Creek Reservation for Future Economic Development". Within that section, the rule provisions should be kept as simple as possible, and should adhere to the statutory directives and the pertinent settlement agreements. Any additional language and/or policy development should be deleted. We do not think it appropriate to use the Home Creek Reservation request as a forum to develop general "reservation" policy.

4. Specific Comments to the Proposed Rules Sections: While we think the rules should be reworked, we are providing the following comments on the specific language provided in order to better inform the WRD and WRC of our concerns.

OAR 690-512-0100 Reservations: Please see comments under Section 3 above regarding rule construction and the proposed stand alone section of "Reservations" versus a consolidation and simplification of rule elements under a "Home Creek Reservation for Future Economic Development".

OAR 690-512-0100 (1): This section states that "Reservations of water for economic development are established pursuant to ORS 537.249 and 537.356 to ensure sufficient surface water will be available in the future to meet expected needs" (emphasis added). To the contrary, a reservation does not "ensure sufficient surface water will be available" to any one entity but rather grants a priority to multipurpose storage projects that apply under the reservation to any available water, by virtue of assigning a priority date of the reservation. This sentence should be struck as it declares policy intent via rule that is not present in the statute. In its place should simply be the recitation of the statute, namely:

Reservations for future economic development reserve unappropriated water for multipurpose storage for future economic development.

OAR 690-512-0100(3): This section states that reservations "allocate surface water for storage in multipurpose reservoirs." To the contrary, reservations "reserve" unappropriated waters to a certain amount for multipurpose storage for future economic development. Once a reservation is established, then an applicant can apply for a multipurpose storage permit under the reservation. Only after the storage application is processed under the full permitting statutes and rules and receives a favorable final order and permit, is the water actually "allocated". This section should be struck.

OAR 690-512-0100(5): We have two issues with this section. First, this section states that the quantity of water under 690-512-0110, is available for appropriation. As noted in our introductory comments above, the only statutory preference a reservation for future economic grants to applications under the reservation is a "priority date" for unallocated waters up to the reserved amount. The statute in no way

allows an exemption to the water availability determination required under the permitting statutes and associated rules.

Second, while likely unintentional, this section seems to imply that the review of applications under reservations is limited to OAR Chapter 690, Division 310, and the provisions provided in this rule. Any application for a multipurpose storage right under a reservation is still subject to all statutory and rule requirements that apply to regular applications, including the Division 33 rules, the Division 410 policies, the permitting statutes, etcetera.

This section should be struck.

OAR 690-512-0100(6): While we appreciate this section's inclusion and agree that this analysis is required by the permitting rules, this section does not assuage our concerns with regards to other proposed rule language with regards to "water availability".

OAR 690-512-0100(7): This section appears to be an attempt to put into rule the relevant sections of the settlement agreement that pertain to this reservation. We agree that the settlement provisions need to be included in the reservation rule. That said, we think the language as drafted does not achieve this with clarity. For instance, introductory language of this section limits review to Division 310 review rather than the "requirements of ORS chapter 537 and applicable rules" and the proposed rules seem to direct, via rule, that the WRD definitively find (a)-(c), rather than saying that OWRD will only issue an order an application to store water if they find (a)-(c). It also appears to mix what the parties to the settlement thought needed to be found before an order could be issued approving a storage project, and the conditions that needed to be put on any permit. We would suggest that this section be reworked to include the following language:

(7) In addition to the requirements of ORS chapter 537 and applicable rules, OWRD will only issue an order approving an application for a permit to store water in the Home Creek basin reserved under any reservation if it first finds:

- (a) The proposed reservoir and any water rights secondary with the storage right are consistent with the purpose and intent of the reservation following consultation with Harney County Court;
- (b) The proposed reservoir and any water rights secondary to the storage right will protect instream values, including but not limited to instream flows and water quality based upon a written assessment of these values developed in consultation with ODFW and DEQ; and
- (c) Whether minimum bypass flows are required.

(8) In addition to the requirements of ORS chapter 537 and applicable rules, any final order approving an application for a permit to store water under the Home Creek Reservation shall contain the findings required in (7)(a)-(c) above (make sure numbers match in final rules), and will also contain conditions that:

- (a) Set the appropriate storage season,
- (b) Ensure no injury to senior water rights, including instream water rights,

- (c) Protect instream values, and
- (d) Set minimum bypass flows if identified under (7)(c) above.

(9) In addition to the requirements of ORS chapter 537 and applicable rules, OWRD will only issue an order approving a water right secondary to a storage project under the Home Creek Reservation if it first finds:

- (a) The proposed water right secondary to the storage right is consistent with the purpose and intent of the reservation following consultation with Harney County Court;
- (b) The proposed water right secondary to the storage right will protect instream values, including but not limited to instream flows and water quality based upon a written assessment of these values developed in consultation with ODFW and DEQ.

OAR 690-512-0100(8): As noted, we think the rules should be consolidated into one section to address the Home Creek Reservation only. If this is done, this subsection should be melded with the language in OAR 690-512-0110(2) to read: Permits for multipurpose storage approved under the Home Creek Reservation shall receive the priority date of the Reservation, February 25, 2009.

OAR 690-512-0100(9): As noted above, we think the rules should be consolidated into one section to address the Home Creek Reservation Request only. Subsection (9) sets forth details with regards to progress reports that are specific to Home Creek. While we appreciate this language, because this is not found under a “Home Creek Reservation” title but rather the general “Reservations” section preceding the “Malheur Lake Reservations” section, which then contains a “Home Creek Reservation” subsection, it seems a bit misplaced here. Shortening/consolidating the rules into one section will help clear up any confusion.

OAR 690-512-0110 Malheur Lake Reservations: As noted above, we suggest that it would be simpler and clearer to adopt a “Home Creek Reservation” so that there are not unintentional consequences with any future reservations, nor any rule provisions made that should be specific to Home Creek but as currently “titled” would apply to any Malheur Lake Basin Reservation.

OAR 690-512-0110(1): As noted above, we propose that the WRC adopt a reservation statement similar to that adopted in the recent Mid-Coast Reservation, namely:

4,500 acre-feet of unappropriated water in Home Creek is reserved for multipurpose storage for future economic development as allowed under ORS 537.356 with a priority date of February 25, 2009.

OAR 690-512-0110(2): Because of the rule construction, this would imply that any reservation under the Malheur Lake Basin (not just the Home Creek Reservation) would have a priority date of February 25, 2009. Adoption of the sentence proposed above would alleviate this confusion.

OAR 690-512-0110(3): As noted in Section 1 of our comments, the current draft rule language with regards to “water availability” exceeds the statutory authority of the reservation statutes. It also is directly contrary to the provisions set forth in the settlement agreement concerning WaterWatch’s ability to raise water availability issues with regards to specific applications, irregardless of the amount of “unappropriated water” reserved under a Home Creek Reservation. Please refer to section 1 for our

arguments on this matter. For the rules to be consistent with statutory directives and settlement agreement provisions, this section must be struck.

Conclusion: As noted, while WaterWatch and ONDA do not oppose a reservation request for the Home Creek Subbasin, we do oppose the rules as drafted. As drafted they exceed their statutory authority and are inconsistent with specific stipulations afforded WaterWatch/ONDA in the settlement agreement.

We suggest that the rule be reworked so that there is one section that is titled "Home Creek Reservation for Future Economic Development". Within that section, the rule provisions should be kept as simple as possible, and should adhere to the statutory directives and the pertinent settlement agreements. Any additional language, provisions in conflict with governing statutes, and/or policy development should be deleted. Specific suggestions on these points were noted above.

Thank you for the opportunity to comment. If you would like to discuss our comments, please feel free to contact us at any time.

Sincerely,



Kimberly Priestley
WaterWatch



Brent Fenty, Executive Director
Oregon Natural Desert Association

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

In the Matter of Water Right Applications)
IS 84562 and IS 84563 in the Name of the)
Oregon Parks and Recreation)
Department)
Applicant)

SETTLEMENT AGREEMENT

Roaring Springs Ranch, Inc.)
Protestant)

Harney County Court)
Protestant)

WaterWatch of Oregon)
Protestant)

Oregon Department of Fish & Wildlife)
Intervenor)

United States Department of Interior)
Bureau of Land Management)
Intervenor)

The Oregon Water Resources Department ("OWRD"), the Oregon Parks and Recreation Department ("OPRD"), Roaring Springs Ranch, Inc., Harney County Court, WaterWatch of Oregon, Oregon Natural Desert Association and Oregon Trout ("WaterWatch"), the Oregon Department of Fish and Wildlife ("ODFW") and United States Department of Interior, Bureau of Land Management ("BLM"), collectively referred to as the "Parties" to this Agreement, enter into this Settlement Agreement ("Agreement") and hereby stipulate and agree as follows.

A. Background of This Agreement

1. Application IS 84562 (Home Creek)

- (a) On October 17, 2000, OPRD submitted an application to the OWRD for an instream water right certificate on Home Creek, for recreation and scenic attraction (Application IS 84562). On June 25, 2002, the OWRD issued a Proposed Final Order ("PFO") proposing to approve the application for the proposed use in the following amounts in cubic foot per second ("cfs"):

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
3.49	7.0	17.0	35.6	53.0	31.0	8.0	3.58	3.03	3.15	2.83	2.91

- (b) On August 9, 2002, the OWRD received timely filed protests to the PFO from Roaring Springs Ranch, Harney County Court and WaterWatch. OWRD also received requests for standing from ODFW and BLM. The matter was referred to the Office of Administrative Hearings and ODFW and BLM were granted party status.

2. Application IS 84563 (Threemile Creek)

- (a) On October 17, 2000, OPRD submitted an application to the OWRD for an instream water right certificate on Threemile Creek, for recreation and scenic attraction (Application IS 84563). On June 25, 2002, the OWRD issued a Proposed Final Order ("PFO") proposing to approve the application for the proposed use in the following amounts in cfs:

JAN	FEB	MAR	APR	MAY	JUN	JUL	AUG	SEP	OCT	NOV	DEC
4.85	5.66	7.89	11.5	11.4	6.89	4.74	4.0	4.0	4.0	4.0	4.62

- (b) On August 9, 2002, the OWRD received timely filed protests to the PFO from Roaring Springs Ranch, Harney County Court and WaterWatch. OWRD also received requests for standing from ODFW and BLM. The matter was referred to the Office of Administrative Hearings and ODFW and BLM were granted party status.

3. Agreement to settle

- (a) On the basis of numerous settlement discussions, the parties agree that the protests against applications IS 84562 and IS 84563 may be resolved on the following terms.

B. Modification of the process when agencies file for instream water rights

1. OPRD and ODFW will enter into a Memorandum of Agreement ("MOA") with OWRD wherein the three state agencies agree that any future application for an instream water right will include written documentation of how the agency applying for an instream water right has complied with the requirements contained in its own administrative rules for instream water rights, including application of the required methods to determine the requested flows.
2. OWRD will propose the written documentation requirement of the MOA as a rule within 180 days of signing this settlement agreement. Any final rule adopted by Oregon Water Resources Commission will replace the MOA.
3. The parties clarify that any rulemaking described in paragraph B(1) and (2) above will not add any additional substantive requirements to the rules governing OPRD's or ODFW's instream application process, but that the intent is to assure that OWRD receive documentation of the methodology by which quantification of requested flows is calculated or achieved.

C. Terms of the Agreement for Application IS 84562 (Home Creek)

1. Amendment of reach on Home Creek subject to an instream water right

- (a) OPRD will draft a letter to OWRD amending its application IS 84562 such that the reach for the instream water right is described as follows:

HOME CREEK FROM UPPER BOUNDARY OF THE STEENS WILDERNESS AREA (SE 1/4 NW 1/4, SECTION 17, T35S, R32½E, W.M.); TO THE LOWER BOUNDARY OF THE STEENS WILDERNESS AREA (SE 1/4 NE 1/4, SECTION 10, T35S, R32E, W.M.)

2. Potential future small storage ponds on private lands on ephemeral streams in the Home Creek basin

- (a) For private lands, the parties agree that future small storage ponds may be developed on ephemeral streams in the Home Creek basin for the purposes of maintaining or improving riparian areas on Home Creek, protecting instream flows in Home Creek, or providing water for livestock or fire suppression. While wildlife may incidentally use such small storage ponds, wildlife is not a purpose for which the ponds may be developed.
- (b) OPRD agrees to subordinate a water right issued pursuant to application IS 84562, for purposes of water regulation, to junior priority date water rights for small storage ponds as may be authorized by OWRD pursuant to ORS 537.140 to ORS 537.211 or ORS 537.409 to store water on private lands for the purposes identified in paragraph C(2)(a) above, up to a cumulative total of four-hundred acre feet (400 AF) of water as follows:
- (i) Such small storage ponds will be constructed only on ephemeral streams in the Home Creek Basin;
- (ii) No such small storage pond may exceed fifteen acre feet (15AF).
- (c) The parties clarify that the ponds identified in paragraph C(2)(a) and (b) above are to be filled by natural run off or flow. The ponds may be filled only once per storage season unless otherwise provided in a water right permit. If a water right permit authorizes pond maintenance or more than one fill per storage season, the total amount of water authorized for the initial fill, plus subsequent pond maintenance or refill, shall be specified in the water right, and the total allocation to such water right shall be subtracted from the 400 AF limit described in paragraph C(2)(b) above.

- (d) The parties clarify that the ponds identified in paragraph C(2)(a) and (b) may be constructed either off channel or in channel on ephemeral streams in the Home Creek basin. The parties intend that, to the extent possible, the ponds authorized under this provision will be constructed in natural draws or on ephemeral streams, in order to avoid the need for mechanical diversion or by-pass flow structures or devices.
- (e) Any final order and certificate issuing from application IS 84562 will contain the following Specific Condition:
 - (i) For purposes of water regulation, this water right does not have priority over junior priority date water rights as may be subsequently authorized by OWRD pursuant to ORS 537.140 to ORS 537.211 or ORS 537.409 to store water on private lands for livestock or fire suppression use but each not to exceed 15 AF in size, up to a cumulative limit of 400 AF of water. Such ponds may be constructed either in channel or off channel only on ephemeral streams in the Home Creek basin, and are to be filled by natural runoff or flow. While wildlife may incidentally use such small storage ponds, wildlife is not a purpose for which the ponds may be developed.
- (f) The parties agree that the condition specified in paragraph C(2)(e)(i) above shall replace the existing proposed condition in the PFO and draft certificate regarding livestock use for application IS 84562.
- (g) The parties reserve the right to challenge any application for small storage ponds referred to in this section or OWRD action relating to such small storage ponds for failure to be consistent with the terms of this agreement or any applicable law or regulation.

3. Cap on human consumption on private land

- (a) OPRD agrees to subordinate a water right issued pursuant to application IS 84562 for purposes of water regulation to junior priority date water rights for human consumption as may be subsequently authorized by OWRD on private land not to exceed a cumulative total of up to 0.05 cubic foot per second (0.05 cfs).
- (b) The parties clarify that water rights for human consumption are limited to 0.005 cfs per household on private land.
- (c) Any final order and certificate issuing from application IS 84562 shall contain the following Specific Condition:
 - (i) For purposes of water regulation, this water right does not have priority over junior priority date water rights as may be subsequently authorized by OWRD on private land for human consumption not to exceed a cumulative total of 0.05 cfs and not to exceed 0.005 cfs per household.

- (d) The parties agree that the conditions specified in paragraph C(3)(c)(i) above shall replace the existing proposed condition in the PFO and draft certificate regarding use of water for human consumption for application IS 84562.

4. Large storage facility

- (a) OWRD, OPRD, ODFW, BLM, Roaring Springs Ranch and Harney County Court agree for the purposes of this Agreement to use the OWRD's "precipitation over drainage basin area" methodology described in its Memorandum to Phil Ward from Tom Paul, dated June 6, 2005, incorporated by reference herein (and attached hereto as Attachment A), and stipulate that based on that methodology, four-thousand-five-hundred-fifty acre feet (4550 AF) of water is available for a reservation pursuant to ORS 537.356 (reservation of water for multipurpose storage uses) in the Home Creek basin area as the Home Creek basin is defined by OWRD.
- (b) WaterWatch expressly does not stipulate that 4550 AF of water is available for future storage in the Home Creek basin area. WaterWatch reserves the right to challenge water availability relating to any application for water storage, with the exception of potential future small storage referred to in paragraph C(2)(a) – (f) above. In reserving this right to challenge water availability, WaterWatch acknowledges that the proposed reservation will include a specific finding relating to water availability.
- (c) Harney County Court may file a request for reservation of water for multipurpose storage on Home Creek.
- (d) In addition to the requirements of ORS chapter 537 and applicable rules, OWRD will only issue an order approving an application for a permit to store water in the Home Creek basin reserved under any reservation if it first finds:
 - (i) The proposed reservoir and any water rights secondary to the storage right are consistent with the purpose and intent of the reservation following consultation with Harney County Court;
 - (ii) The proposed reservoir and any water rights secondary to the storage right will protect instream values, including but not limited to instream flows and water quality based upon a written assessment of these values developed in consultation with ODFW and DEQ; and,
 - (iii) Whether minimum bypass flows are required.
- (e) Any final order approving an application for a permit to store water as described paragraph C(4)(d) above shall contain the findings required in paragraph C(4)(d) and also contain conditions setting an appropriate storage season and conditions

necessary to ensure no injury to senior water rights (including IS 84562) and to protect instream values.

(f) Effective date of reservation rules:

- (i) Any reservation of water requested by Harney County Court shall be effective for twenty (20) years from the date of the final rule granting the reservation, unless the effective date has been extended by further rulemaking of the Water Resources Commission.
- (ii) The expiration of the Home Creek basin reservation rule shall not affect pending applications that have been received and deemed complete and not defective by the OWRD pursuant to ORS 537.150(2), prior to the expiration date of the rules.

(g) Progress Reports

- (i) If the OWRD has not received applications for multipurpose reservoir permits for the full quantity of reserved water in the Home Creek basin within five years of the final rule granting the reservation, the OWRD will provide the parties with a progress report on the development of the reservations. The OWRD will continue to provide progress reports at five-year intervals while the reservation is in effect unless OWRD receives applications for multipurpose reservoir permits for the full quantity of reserved water.
- (h) Roaring Springs Ranch agrees to withdraw its existing applications R 84576 and S 84577 within fifteen (15) days of the effective date of a reservation consistent with the terms of this Agreement, but preserves its right to seek the water (4550 AF of storage for supplemental irrigation of 5700.2 acres) described in R 84576 and S 84577 under the reservation. Roaring Springs Ranch further agrees to put its application on hold pending the outcome of the reservation. If the proposed reservation is not approved by the Water Resources Commission and established by rule, Roaring Springs Ranch shall not be required to withdraw its pending applications R 84576 and S 84577, and OWRD, OPRD, ODFW, BLM, Roaring Springs Ranch and Harney County Court agree that for purposes of this Agreement, the OWRD's determination of water availability shall be in accordance with the June 6, 2005 memorandum from Tom Paul to Phil Ward referenced above in paragraph C(4)(a). WaterWatch does not agree that the June 6, 2005, memorandum referenced in paragraph C(4)(a) is the appropriate water availability analysis and reserves the right to challenge water availability in any further proceedings regarding applications R 84576 and S 84577 to address this issue if the proposed reservation is not approved.
- (i) The parties agree to not object to or to support the establishment of a reservation with the conditions identified in paragraph C(4)(d) – (h).

D. Terms of Agreement Application IS 84563 (Threemile Creek)

1. Potential future small storage ponds on private lands on ephemeral streams in the Threemile Creek basin

- (a) For private lands, the parties agree that future small storage ponds may be developed on ephemeral streams in the Threemile Creek basin for the purposes of maintaining or improving riparian areas on Threemile Creek, protecting instream flows in Threemile Creek, and providing water for livestock and fire suppression. While wildlife may incidentally use such small storage ponds, wildlife is not a purpose for which the ponds may be developed.
- (b) OPRD agrees to subordinate a water right issued pursuant to application IS 84563, for purposes of water regulation, to junior priority date water rights for small storage ponds as may be authorized by OWRD pursuant to ORS 537.140 to ORS 537.211 or ORS 537.409 to store water on private lands for the purposes identified in paragraph D(1)(a) above up to a cumulative limit of ninety-two acre feet (92 AF) of water as follows:
 - (i) Such small storage ponds will be constructed only on ephemeral streams in the Threemile Creek basin;
 - (ii) No such small storage pond may exceed fifteen acre feet (15AF).
- (c) The parties clarify that the ponds identified in paragraphs D(1)(a) and (b) above are to be filled by natural run off or flow. The ponds may be filled only once per storage season unless otherwise provided in a water right permit. If a water right permit authorizes pond maintenance or more than one fill per storage season, the total amount of water authorized for the initial fill, plus subsequent pond maintenance or refill, shall be specified in the water right, and the total allocation to such water right shall be subtracted from the 92 AF limit described in paragraph D(1)(b) above.
- (d) The parties clarify that the ponds identified in paragraph D(1)(a) – (c) may be constructed either in channel or off channel on ephemeral streams in the Threemile Creek basin.
- (e) Any final order and certificate issuing from application IS 84563 will contain the following Specific Condition:
 - (i) For purposes of water regulation, this water right does not have priority over junior priority date water rights as may be subsequently authorized by OWRD pursuant to ORS 537.140 to ORS 537.211 or ORS 537.409 to store water on private lands for livestock and fire suppression use, but each not to exceed 15 AF in size, up to a cumulative limit of 92 AF of

water. Such ponds must be constructed either in channel or off channel only on ephemeral streams in the Threemile Creek basin, and are to be filled by natural runoff or flow. While wildlife may incidentally use such small storage ponds, wildlife is not a purpose for which the ponds may be developed.

- (f) The parties agree that the conditions specified in paragraph D(1)(e)(i) above shall replace the existing proposed condition in the PFO and draft certificate regarding livestock use for application IS 84563.
- (g) The parties reserve the right to challenge any application for small storage ponds referred to in this section or OWRD action relating to such small storage ponds for failure to be consistent with the terms of this agreement or any applicable law or regulation.

2. Cap on human consumption on private land

- (a) OPRD agrees to subordinate a water right issued pursuant to application IS 84563 for purposes of water regulation to junior priority date water rights for human consumption as may subsequently be authorized by OWRD not to exceed a cumulative total of up to 0.05 cubic foot per second (.05 cfs).
- (b) The parties clarify that water rights for human consumption are limited to 0.005 cfs per household on private land.
- (c) Any final order and certificate issuing from application IS 84563 will contain the following Specific Condition:
 - (i) For purposes of water regulation, this water right does not have priority over junior priority date water rights as may be subsequently authorized by OWRD on private land for human consumption not to exceed a cumulative total of 0.05 cfs and not to exceed 0.005 cfs per household.
- (d) The parties agree that the conditions specified in paragraph D(2)(c)(i) above shall replace the existing proposed condition in the PFO and draft certificate regarding use of water for human consumption for application IS 84563.

E. General Provisions

- 1. In signing this Agreement, the parties preserve any rights authorized by law not expressly waived by this Agreement.
- 2. The Parties agree that the terms and conditions of this Agreement shall be incorporated into the Final Orders issued by OWRD in connection with IS 84562 and IS 84563, as shown in the attached Draft Final Orders and Draft Certificates (herein attached as Attachment B)

3. Upon issuance by OWRD of Final Orders and Certificates for IS 84562 and IS 84563 that conform to the attached Draft Final Orders and Draft Certificates, the Parties agree that all issues raised in protests filed to applications IS 84562 and IS 84563 are resolved. In addition, the parties expressly waive any right to file exceptions or to seek judicial review of such Final Orders or Certificates referred to in paragraph E(2) above.
4. This Agreement is binding upon and inures to the benefit of the parties and their respective heirs, executors, administrators, trustors, trustees, beneficiaries, predecessors, successors, affiliated and related entities, officers, directors, principals, agents, employees, assigns, representatives, and all persons, firms, associations and corporations connected with them.
5. Each party to this Agreement represents, warrants, and agrees that the person who executed this Agreement on its behalf has the full right and authority to enter into this Agreement on behalf of that party and bind that party to the terms of the Agreement.
6. The terms, provisions, conditions, and covenants of this Agreement are not severable. If any term, provision, condition or covenant of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the parties agree to reconvene to renegotiate the terms of this Agreement.
7. This Agreement may be executed in several counterparts and all documents so executed will constitute one Agreement, binding on the parties, notwithstanding that the parties did not sign the same original or the same counterparts. Delivery of an executed signature page to this Agreement by facsimile transmission is effective as delivery of an original signed counterpart of this Agreement.
8. The parties agree that this Agreement has been reached through good faith negotiations for the purpose of resolving legal disputes. The parties agree that no offers or compromises made in the course of negotiations shall be construed as admissions against interest and shall not be construed as establishing either legal or policy precedence for any future actions.
9. The parties agree to each bear their own costs and attorney fees.
10. This Agreement is effective as of the date of the last signature hereto.

/// /// ///

STATE OF OREGON
WATER RESOURCES DEPARTMENT
INTEROFFICE MEMO

June 6, 2005

TO: Phil Ward
FROM: Tom Paul
SUBJECT: Home Creek Reservation Request and Available Water

We have been involved in settlement discussions regarding an instream water right and a new storage application in the Home Creek basin. One possibility for settlement is a reservation for future storage. ORS 537.356 allows the Commission to reserve *unappropriated* water for multipurpose storage for future economic development. The Department may process reservation requests for up to the amount of unappropriated water. When processing reservation requests, the Department begins the assessment by looking at the 50 % exceedance flow information generated by the water availability model. This information is usually a conservative estimate of the amount of basin yield that may be available for storage. Use of the water availability model at 50% exceedance for evaluating water reservation requests is not required by rule or statute. Other hydrologic evaluations are often employed to estimate available unappropriated water that may be available for storage.

In the determination of median flow estimates, a base period is chosen and all the average daily flows for a specific date are arranged from high to low. The middle value, or median, is selected as the 50% exceedance flow. Half of the flow values are above the median, and half are below, so it is statistically valid to consider the median flow value as being present or exceeded 50% of the time. An average flow value for the same data set would be the sum of all the values divided by the total number of data used. The average value thereby relates directly to volume or basin yield.

Stream flow can be highly variable, especially east of the Cascades in an area such as Home Creek. When determining water availability for a direct flow appropriation the water availability model is used to determine when and how much live flow is available. The appropriate statistic in this case is an exceedance stream flow because it is a flow rate that exists 50% or 80% of the time. This statistic tells us how often to expect a given rate of stream flow. This same information is normally not an accurate estimate of basin yield, information that would be used to evaluate an application for storage (or reservation for storage). More accurate results would normally be derived using average flow, or estimating average runoff from average precipitation.

In the case of Home Creek, the reservation request is for 4,500 acre feet of water. Using the water availability model and the 50% exceedance flows results in an estimate of 70 acre-feet of water available for storage. It is important to understand that this estimate is based on median flow, a statistic best used in relation to live flow, not basin yield or

volume. Median flow is the flow that is expected 50% of the time, while average flow relates to volume, or basin yield, and is a more appropriate method for estimating available water for storage.

The department has additional hydrologic data which also can be used to determine the basin yield and the amount of unappropriated water. Staff compared the 50% exceedance flow generated from the water availability model to the volume generated by using average precipitation data. These two different methods produce different results. The 50% exceedance approach results in 70 acre feet of available water, while the average precipitation and resulting runoff method results in potential storage of over 16,000 acre-feet.

The following table calculates unappropriated water using average monthly precipitation and runoff information from National Resource Conservation Service (NRCS).

Home Creek at the mouth # 84562

Ac-ft/in runoff per sq mi	SCS runoff (in)	% runoff	Area (sq-mi)
53.3	14	44.20%	36.66

MONTH	Precipitation inches/month	Equivalent acre/foot per month	Runoff acre/foot per month	Flow @ 50% exceedance in CFS	Instream water right in CFS	Existing water rights in CFS	Equivalent existing water rights in AF	Instream water right equivalent acre foot per month	Potential Runoff Subject to Storage
January	3.67	7171.10	3167.05	3.49	3.49			214.59	2952.46
February	3.71	7249.26	3201.57	7.05	7.00			388.76	2812.81
March	4.51	8812.44	3891.93	17.40	17.00			1045.29	2846.64
April	2.64	5158.50	2278.20	35.60	35.60	71.25	4240.00	2118.35	0
May	2.55	4982.64	2200.54	53.20	53.00	71.25	4380.00	3258.84	0
June	1.77	3458.54	1527.43	31.10	31.00	71.25	4240.00	1844.63	0
July	0.61	1191.93	526.40	8.39	8.00	71.25	4380.00	491.90	0
August	0.93	1817.20	802.55	3.58	3.58	71.25	4380.00	220.13	0
September	1.29	2520.63	1113.21	3.03	3.03	71.25	4240.00	180.30	0
October	2.07	4044.73	1786.32	3.15	3.15			193.69	1592.63
November	4.18	8167.63	3607.15	2.83	2.83			168.40	3438.75
December	3.71	7366.50	3253.34	2.91	2.91			178.93	3074.41
TOTALS	31.64	61941.1	27355.69	171.73	170.59		25860.00	10303.81	16717.70

 -- Irrigation Season (No Water Available)

The table shows that based on average precipitation water in excess of existing water rights, including the instream water right, is available October through March. This will vary year to year based on precipitation occurrences and other hydrologic factors. Based on the average precipitation data there appears to be unappropriated water in the Home Creek basin for the Department to accept and process a reservation request for 4,500 acre feet of water.

Water Availability Analysis Detailed Reports

HOME CR > CATLOW VALLEY - AT HWY XING
MALHEUR LAKE BASIN

Water Availability as of 4/9/2009

Watershed ID #: 84562

Exceedance Level: 50%

Date: 4/9/2009

Time: 3:27 PM

Water Availability Calculation	Consumptive Uses and Storages	Instream Flow Requirements	Reservations
Water Rights		Watershed Characteristics	

Water Availability Calculation

Monthly Streamflows in Cubic Feet per Second
Storage at 50% Exceedance in Acre-Feet

Month	Natural Stream Flow	Consumptive Uses and Storages	Expected Stream Flow	Reserved Stream Flow	Instream Flow Requirement	Net Water Available
JAN	6.34	0.00	6.34	0.00	3.49	2.85
FEB	11.00	0.00	11.00	0.00	7.00	4.00
MAR	26.30	0.00	26.30	0.00	17.00	9.30
APR	44.50	0.00	44.50	0.00	35.60	8.90
MAY	36.60	0.00	36.60	0.00	53.00	-16.40
JUN	16.30	0.00	16.30	0.00	31.00	-14.70
JUL	5.35	0.00	5.35	0.00	8.00	-2.65
AUG	2.98	0.00	2.98	0.00	3.58	-0.60
SEP	3.25	0.00	3.25	0.00	3.03	0.22
OCT	2.90	0.00	2.90	0.00	3.15	-0.25
NOV	3.15	0.00	3.15	0.00	2.83	0.32
DEC	4.90	0.00	4.90	0.00	2.91	1.99
STO	9,860.00	0.00	9,860.00	0.00	10,300.00	1,660.00

Download Data ([Text - Formatted](#), [Text - Tab Delimited](#), [Excel](#))

(2) An in-stream water right is not subject to cancellation under ORS 537.260 or 537.410 to 537.450 but an in-stream water right may be canceled under ORS 540.610 to 540.650. [1987 c.859 §10]

537.352 Precedence of uses. Notwithstanding any provision of ORS 537.332 to 537.343 and 537.350, the right to the use of the waters of this state for a project for multipurpose storage or municipal uses or by a municipal applicant, as defined in ORS 537.282, for a hydroelectric project, shall take precedence over an in-stream water right when the Water Resources Department conducts a review of the proposed project in accordance with ORS 537.170. The precedence given under this section shall not apply if the in-stream water right was established pursuant to ORS 537.346 or 537.348. [1987 c.859 §11; 1995 c.416 §42]

537.354 In-stream water right subject to emergency water shortage provisions. An in-stream water right established under the provisions of ORS 537.332 to 537.360 shall be subject to the provisions of ORS 536.700 to 536.780. [1987 c.859 §12]

537.356 Request for reservation of unappropriated water for future economic development; priority date of reservation. (1) Any local government, local watershed council or state agency or any other individual cooperating jointly with a local government, local watershed council or state agency may request the Water Resources Commission to reserve unappropriated water for multipurpose storage for future economic development.

(2) A request under subsection (1) of this section shall be in writing on a form provided by the Water Resources Department. Before deciding whether to approve the request and initiate a rulemaking process, the commission shall request comments from any local government or watershed council within the geographic area or basin affected by the request. The comment period shall be closed not later than 120 days after the request is submitted.

(3) The priority date for any reservation established under this section shall be the date on which the commission takes action to initiate the rulemaking process. [1987 c.859 §13; 1997 c.445 §1]

537.358 Rules for reservation for future economic development; application for use of reserved water. (1) In adopting a rule under ORS 537.356 to reserve unappropriated water for multipurpose storage for future economic development, the Water Resources Commission shall include a public interest review that takes into consideration the factors described under ORS 537.170.

(2) A person requesting use of the reserved water for new storage shall submit a water right application and comply with the procedure set forth in ORS 537.140 to 537.252, except that the priority date for a storage right approved for use of reserved water shall be the date of the reservation. The commission by rule may describe a process for ensuring that the proposed use is consistent with the requirements of the rule establishing the reservation. [1987 c.859 §14; 1997 c.445 §2]

537.360 Relationship between application for in-stream water right and application for certain hydroelectric permits. If an application is pending under this chapter for a water right permit to use water for hydroelectric purposes or under ORS 543.010 to 543.610 for a hydroelectric permit or license at the time the Water Resources Commission receives an application for an in-stream water right under ORS 537.336 for the same stream or reach of the stream, the commission shall not take any action on the application for an in-stream water right until the commission issues a final order approving or denying the pending hydroelectric application. [1987 c.859 §15]

MISCELLANEOUS

537.385 Extension of irrigation season; rules; limitations. (1) Notwithstanding any condition or limitation of a water right permit issued under ORS 537.211 or 537.625 or a water right certificate issued under ORS 537.250, 537.630 or 539.140, upon receipt of a request by the State Department of Agriculture, the Water Resources Commission may, by rule, extend the irrigation season of a subbasin beyond the period established by adjudication, by rule or by condition imposed on a permit or certificate, if the commission finds:

(a) Water is available during the period of the extended irrigation season;

(b) Water use during the extended season would not impair in-stream flows that are necessary to protect aquatic resources; and

(c) Water diversion and use during the period of the extended season would not impair the achievement or maintenance of water quality standards as established for the water source by the Department of Environmental Quality.

(2) If the source of water identified in the request is stored water and water is available from the storage source during the period of the extended irrigation season, the commission may extend the irrigation season as requested without making the findings required by subsection (1) of this section.



Oregon

Theodore R. Kulongoski, Governor

Water Resources Department

North Mall Office Building
725 Summer Street NE, Suite A
Salem, OR 97301-1271
503-986-0900
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MEMORANDUM

TO: Water Resources Commission

FROM: Phillip C. Ward, Director

SUBJECT: Water Resources Commission Meeting
Agenda Item F, February 25, 2009

Reservation Request - Chapter 690, Division 512

I. Issue Statement

On October 6, 2008, the Oregon Water Resources Department (OWRD) received a request from Harney County for a reservation of 4,550 acre feet of unappropriated water for multipurpose storage for future economic development on Home Creek, tributary to the Catlow Valley in the Malheur Lakes Basin. The Commission is asked to authorize the Department to initiate a formal rulemaking process to modify the Malheur Lakes Basin Program (OAR Chapter 690, Division 512) pursuant to ORS 537.356 in response to the reservation.

II. Background

Reservation requests are processed as amendments to basin program rules through the rulemaking process. 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 any other individual cooperating jointly with a local government, local watershed council, or state agency may request the Commission to reserve unappropriated water for multipurpose storage for future economic development.

Reservations affect several things:

Priority Date - Establish a priority date for reservation water. The priority date for a reservation is the date the Commission takes action to initiate the rulemaking process under ORS 537.356(3).

Type of Use - Establish a limited classification of use for water under the reservation. Water right applications to appropriate reserved water may only request to use such water for multi-purpose storage for future economic development as allowed under ORS 537.356(1).

Water Availability - Reservations are reflected in the Department's water availability model.

A reservation is not the same thing as a water right application or permit. For example, approval of a reservation does not mean that any water right application will be approved, or that a reservoir may be constructed. Rather, a reservation merely sets aside water for a certain use, with a specific priority date. If a water user wishes to appropriate reserved water, they must submit a water right application to the Department. The Department would then review that water right application based on the applicable public interest review standards.

The Department received a reservation request from Harney County on October 6, 2008 (Attachment 1). The area involved in the reservation request is depicted in Attachment 2. Harney County's reservation request stems from a "Settlement Agreement" resolving a number of water right protests concerning instream water right applications and storage and use of stored water. The instream water right applications (IS 84562 & IS 84563) were on Home Creek and Three Mile Creek. The applications for storage and use of stored water (R 84576 and S 84577) are on Home Creek. The parties included in the Settlement Agreement are the Department, Oregon Department of Fish and Wildlife (ODFW), Oregon Parks and Recreation Department (OPRD), US Bureau of Land Management, Harney County, WaterWatch of Oregon, and Roaring Springs Ranch. The Settlement Agreement is included in the reservation request as an attachment.

The Settlement Agreement included several items. OPRD agreed to certain conditions related to the instream water rights and to adjust procedures in their instream water right application process. Harney County agreed to submit a reservation request for multi-purpose storage. The Department agreed to recommend that the Commission initiate the reservation process when requested by Harney County. Roaring Springs Ranch agreed to withdraw pending applications for storage and secondary diversion of stored water on Home Creek if the proposed reservation is approved as requested. This will effectively terminate any pending contested case hearings on those applications, and thereby resolve a number of additional protests.

III. Discussion

In the Settlement Agreement, the Department identified quantities of unappropriated water that are available for the reservations through a model from the Natural Resources and Conservation Service.

On October 16, 2008, the Department issued a public notice to local governments and watershed councils within the geographic area or basin affected by the request (Attachment 3). This public notice is required under ORS 537.356(2) of the reservation process. The public comment period closed on February 17, 2009. The Director's report for the November 2008 Commission meeting contained an item on Harney County's Reservation Request and the notice to affected local governments and watershed councils. If comments are received after the mailing of the staff report, they will be presented at the Commission meeting.

The authority to approve the reservation request lies with the Commission. As party to the agreement, the Department agreed to recommend that the Commission initiate a rulemaking as requested by Harney County. In undertaking that obligation, the Department has made specific commitments regarding the rulemaking process, or restricted its ability to consider all public comments.

The Department now fulfills its obligation under the Settlement Agreement by recommending that the Commission initiate the reservations as requested by Harney County. If a formal rulemaking is authorized by the Commission, the Department will carry out the regular rulemaking process to modify the Malheur Lakes Basin Program (OAR Chapter 690, Division 512). This process will fully consider all comments, and provide a final recommendation to the Commission based on consideration of all available information.

If the Commission authorizes initiation of a rulemaking process, a number of actions will be undertaken, including:

- Notice in the Secretary of State's monthly bulletin
- Newspaper notice in Harney County once per week for four consecutive weeks
- Notice to Legislators
- Notice to parties on the Department's rulemaking list
- Notice to local governments, known interested parties, settlement and commenting parties
- Hearing draft of rules posted on the Department's web page
- A public hearing in the basin with a Commissioner serving as the hearing officer.

IV. Alternatives

The Commission may consider the following alternatives:

1. Authorize initiation of a formal rulemaking process to modify the Malheur Lakes Basin Program (OAR Chapter 690, Division 512) as requested by Harney County.
2. Not authorize initiation of a formal rulemaking process to modify the Malheur Lakes Basin Program (OAR Chapter 690, Division 512) as requested by Harney County.
3. Defer action and direct staff to report back with additional information.

IV. Summary

The question before the Commission is currently limited to whether to authorize initiation of a formal rulemaking process concerning the reservation requested by Harney County. If a rulemaking is authorized by the Commission, The Department will carry out the regular rulemaking process for basin program amendments, continue to consider all comments, and provide a final recommendation to the Commission based on consideration of all available information.

The Director recommends Alternative 1, that the Commission authorize initiation of a formal rulemaking process to modify the Malheur Lakes Basin Program (OAR Chapter 690, Division 512) as requested by Harney County.