



# Oregon

John A. Kitzhaber, MD, Governor

## Water Resources Department

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### MEMORANDUM

**TO:** Water Resources Commission

**FROM:** Phillip C. Ward, Director

**SUBJECT:** Agenda Item H, February 18, 2011  
Water Resources Commission Meeting

#### **Request for an Exception to the Willamette Basin Program by the Opal Creek Ancient Forest Center under ORS 536.295**

#### **I. Issue Statement**

Under ORS 536.295 the Water Resources Commission may, under certain circumstances, allow the Department to consider an application to appropriate water for a use not classified as an allowable use by the applicable basin program. The Opal Creek Ancient Forest Center (“Center”) has requested an exception to the Willamette Basin Program. According to the request, the Center’s hydroelectric use “is largely non-consumptive in nature and not likely to be regulated for other water rights” as provided in ORS 536.295(1)(c). In addition, the applicant maintains that the use of the water will provide a public benefit as provided in ORS 536.295(1)(f) .

This report summarizes the information provided by the Center and evaluates the request against statutory criteria and rules of the Commission. The question before the Commission is whether to allow the Department to consider an application even though the use is not classified under the Willamette Basin Program. If the exception is granted, the application will be reviewed in the same manner as any other hydroelectric water right application.

#### **II. Background**

Basin programs are administrative rules adopted by the Commission that prescribe future allowable uses of water. The act of specifying the allowable future beneficial uses is called “classification” and is authorized under ORS 536.340. Classifying beneficial uses in a basin program involves analysis of basin-specific data and substantial public involvement. However, under ORS 536.295 the Commission may allow the Department to consider an application for a use not “classified” in a basin program if the use meets one or more of the criteria under subsection (1) of ORS 536.295 (Attachment 1). The Commission also must evaluate whether the proposed use is consistent with the general policies of the applicable basin program.

Commission approval of a request for an exception to a basin program does not guarantee that a water right will be issued, or if issued how it may be conditioned. The Commission is not making a public interest determination on the application. If the Commission approves the basin program exception, the Department will complete the application review process where issues such as the acceptability of the project considering the basin plan, scenic waterway flow requirements, potential conflict with existing water rights, and the resource standards in OAR 690-051-0160 through 690-051-0270 are considered. Public notice and comment opportunities will be provided in the same manner as any other hydroelectric water right application. If the Commission does not grant the request, the application will continue to be processed but will likely be denied due to the fact that the proposed use is not a classified use in the basin program.

### **III. Discussion**

#### **A. *Project Description***

OWRD staff met with owners of the Opal Creek Ancient Forest Center in May of 2008 and informed them that it would be necessary to apply for a water right for their existing hydroelectric project and suggested they request an exception to the basin program. In November 2010, the Center submitted a letter requesting the basin exception (Attachment 2). The 18 kilowatt hydroelectric project is the primary source of electricity for the buildings at the Center.

Water is diverted from Flume Creek and transported to the powerhouse via PVC pipe. After passing through the powerhouse all of the water is returned to the river immediately above the confluence of Opal and Battle Ax Creeks. Water is out of the stream for a half-mile. Together these creeks form the headwaters of the Little North Santiam River, tributary to the North Santiam River. (Township 8 South, Range 5 East W.M., Section 33).

A map showing the location of the facility is provided as Attachment 3.

#### **B. *Exception Request***

Generally, The Willamette Basin Program classifies the allowed uses of water and describes when those uses are allowed during the calendar year.

Oregon Administrative Rule (OAR) 690-502-0110(1)(a) states:

“The Little North Santiam River from the confluence of Battle Ax Creek and Opal Creek downstream to the Willamette National Forest boundary near Elkhorn at river mile 17 is a designated state scenic waterway. The Little North Santiam River and tributaries above the Willamette National Forest boundary are classified only for domestic, commercial use

for customarily domestic purposes not to exceed 0.01 cfs, livestock and public instream uses;”

The Center asks that an exception be approved so that it could apply for hydroelectric use on a year-round basis.

ORS 536.295 provides that the Commission may allow the Department to consider an application to appropriate water for a use not classified in the applicable basin program if the use is consistent with any one of seven statutory criteria. In their request, the Center asserts that their use “is largely non-consumptive in nature and not likely to be regulated for other water rights” [ORS 536.295(1)(c)] and “will provide a public benefit such as riparian or watershed improvement” [ORS 536.295(1)(f)].

*Department Analysis:* The Department believes that the proposed use is largely non-consumptive in nature and not likely to be regulated for other water rights since all flows are returned to the river. Water is returned above the confluence of Opal and Battle Ax Creeks and the scenic waterway of the Little North Santiam River. There are no other water rights on the river in this area. If a hydroelectric right is issued, it would likely be conditioned such that the diverted water is returned to the creek at a point described in the right to ensure that the non-consumptive nature of the use is maintained.

The Center claims that its hydropower project provides a public benefit in that “the hydropower electricity that this water provides is used to educate hundreds of Oregon school students annually who learn about the importance of riparian areas and watershed health.” The Department does not have the information or expertise to analyze this request against ORS 536.296(f), that the use “will provide a public benefit such as riparian or watershed improvement.” As such, and because the initial reason is sufficient to grant the exception, staff requests that the Commission limit its consideration of this point.

### **C. General Policies of the Willamette Basin Program**

ORS 536.295(4) requires the Commission to evaluate whether the proposed use is consistent with the general policies of the Willamette Basin Program, provided in Attachment 4. A comparison of the surface water allocation policy with information submitted by the Center demonstrates that the proposed use is consistent with the policies of the basin program:

- The point of diversion is not within an instream water right reach or minimum perennial streamflow.
- Instream water rights below the project will not be affected by this diversion since water is returned to the river.
- The source of water has no history of regulation.

- Hydroelectric time-limited water rights are subordinated to all other uses, so opportunities are preserved for future economic development.
- This use will not contribute to over-appropriation of water because the water is returned to the river for downstream uses.

*Department Analysis:* The Department believes that the proposed use is consistent with the general policies of the Willamette Basin Program.

#### **IV. Conclusion**

To approve a basin program exception request under ORS 536.295, the Commission must find that the request meets statutory criteria and the proposed use is consistent with the general policies of the applicable basin program. The Center has demonstrated that approval of this request will allow for consideration of a proposed use that is largely non-consumptive in nature and not likely to be regulated for other water rights and is consistent with the general policies of the Willamette Basin Program.

#### **V. Alternatives**

The Commission may consider the following actions:

1. Approve the request for a basin plan exception.
2. Deny the request for a basin program exception.
3. Take no action and direct staff to continue to work with the Center.

#### **VI. Recommendation**

The Director recommends Alternative 1, that the Commission approves the request by the applicant for an exception to the Willamette Basin Program as the use is largely non-consumptive in nature.

Attachments:

1. ORS 536.295
2. Ancient Forest Center's Exception Request
3. Location map
4. Willamette Basin Program General Policies for Surface Water Allocation

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## Attachment 1

**ORS 536.295 Conditions for consideration of application for use not classified in basin program; rules.** (1) Notwithstanding any provision of ORS 536.300 to 536.340, the Water Resources Commission may allow the Water Resources Department to consider an application to appropriate water for a use not classified in the applicable basin program is the use:

- a) Will be of short duration during each year;
- b) Will be for a continuous period of no longer than five years;
- c) Is largely nonconsumptive in nature and not likely to be regulated for other water rights;
- d) Is necessary to ensure public health, welfare and safety;
- e) Is necessary to avoid extreme hardship;
- f) Will provide a public benefit such as riparian or watershed improvement; or
- g) Is of an unusual nature not to recur in the basin, and unlikely to have been within the uses considered by the commission in classifying the uses presently allowed in the applicable basin program including but not limited to:
  - A. Exploratory thermal drilling;
  - B. Heat exchange;
  - C. Maintaining water levels in a sewage lagoon; or
  - D. Facilitating the watering of livestock away from a river or stream.

**690-502-0020**

**Policies**

Water Resources Commission and Department activities which affect the waters of the Willamette River Basin shall be compatible with the policies established in this rule. Surface water allocation, groundwater management, municipal; and domestic water systems, reservoir coordination, conservation and land use coordination are important issues in the Willamette Basin. The Commission's policies on surface water allocations issues are as follows:

- (1) Surface water allocation:
  - (a) Protect undeveloped streams with instream values for public instream uses;
  - (b) Seek a balance in the future appropriation of water between instream and total out-of-stream uses on those streams already significantly developed for out-of-stream purposes;
  - (c) Preserve opportunities for future economic development by reserving water for future use;
  - (d) Minimize the likelihood of over-appropriation due to new uses;
  - (e) Manage stored waters which have been released for instream purposes to meet flow needs reflected in established instream water rights;
  - (f) Allow irrigation use for the longest period possible between March 1 and October 31 provided sufficient water is available.