



# 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 J, September 30, 2011  
Water Resources Commission Meeting

#### **Request for an Exception to the Rogue Basin Program by Mr. Barry Shuart 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. Mr. Barry Shuart (Mr. Shuart) has requested an exception to the Rogue Basin Program. According to his request, his hydroelectric use would be “largely non-consumptive in nature and not likely to be regulated for other water rights” as provided in ORS 536.295(1)(c).

This report summarizes the information provided by Mr. Shuart 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 Rogue Basin Program. If the exception is granted, the application will be reviewed in the same manner as any other hydroelectric water right application. A listing of the review criteria for a hydroelectric application has been included as attachment 1.

#### **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 2). 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. In allowing a basin program exception, the Commission allows the Department to 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. 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***

Oregon Water Resources Department (OWRD) staff was contacted by Mr. Shuart this past April. He explained then, to OWRD staff, that he previously had operated a minor hydroelectric project on his property (HE 366) from 1982 to 2002 and was interested in restarting it. OWRD staff explained to him that the Rogue Basin Program had been adopted since his previous time-limited water right (HE 366) was issued and that use of water for hydroelectric use was no longer a classified use. OWRD Staff further explained that this being the case, he would need to seek an exception to the basin program from the OWRD Commission. In July 2011, Mr. Shuart submitted a letter requesting the basin exception (Attachment 3).

Approximately 1.3 cubic feet per second (i.e. 585 gallon per minute) of water would be diverted from Button Creek and transported to the powerhouse via PVC pipe. After passing through the powerhouse all of the water is transported to a small reservoir where it is released to return to Button Creek. The approximate distance between the point of diversion and where the water returns to Button Creek is 3,400 feet.

There are no water rights above the point where water returns to Button Creek other than those held by Mr. Shuart. Most likely due to the steep terrain in this area of Button Creek, ODFW has previously informed WRD that they have no fish concerns. Before Button Creek enters Elk Creek there is a natural 30 foot water fall that eliminates any concerns regarding anadromous fish.

A map showing the location of the facility is provided as Attachment 4.

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

Generally, The Rogue Basin Program classifies the allowed uses of water and when throughout the calendar year those uses are allowed.

Oregon Administrative Rule (OAR) 690-515-0000(1)(a)(B) states,

“The waters of Indian Creek, Evergreen Creek, Reese Creek, Trail Creek and Elk Creek and tributaries are classified only for domestic, livestock and instream use for recreation, fish life and wildlife except for the use of stored water.”

As Button Creek is a tributary of Elk Creek, Mr. Shuart requests that an exception be approved so that he may apply for hydroelectric use.

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 his request, Mr. Shuart asserts that his proposed use “is largely non-consumptive in nature and not likely to be regulated for other water rights” [ORS 536.295(1)(c)].

*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 Button Creek. 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 insure that the non-consumptive nature of the use is maintained. The Commission has previously approved Basin Plan Exceptions for hydroelectric use, when the water is returned to the stream.

#### **IV. Policies**

To approve a basin program exception request under ORS 536.295 subsection (1), the Commission shall evaluate whether the proposed use is consistent with the general policies of the applicable basin program. Unlike many of the other basin programs, the Rogue Basin Program does not specifically list any policies. Generally, the program limits the uses from streams that have a history of priority date based regulation.

*Department Analysis:* Since the use is non-consumptive, and will not negatively impact other water rights, it seems reasonable to conclude that this use is consistent with the general policies of the Rogue Basin Program.

#### **V. Conclusion**

Mr. Shuart 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 Rogue Basin Program.

#### **VI. 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.

## **VII. Recommendation**

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

### Attachments:

1. Standards for Evaluation for Minor Hydroelectric Projects
2. ORS 536.295
3. Mr. Stuart's Exception Request
4. Location map

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