



Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department

North Mall Office Building
725 Summer Street NE, Suite A
Salem, OR 97301-1266
503-986-0900
FAX 503-986-0904

MEMORANDUM

TO: Water Resources Commission

FROM: Phillip C. Ward, Director

SUBJECT: Agenda Item A, May 9, 2013
Water Resources Commission Meeting

Request for an Exception to the Willamette Basin Program by Gary Yeakle Pursuant to 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. Gary Yeakle has requested an exception to the Willamette Basin Program. His request is provided as Attachment 1. According to Mr. Yeakle's request, the 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).

This report summarizes the information provided by Mr. Yeakle 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 minor 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 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 and evaluate 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

Mr. Yeakle has filed an application (HE 600) for a new minor hydroelectric water right in Lane County. The application is for 300 gallons per minute (0.67 cubic feet per second) of water from Hucka Creek tributary to Fall Creek in the Willamette basin. The project is in the immediate vicinity of the Fall Creek Reservoir owned and operated by the U.S. Army Corps of Engineers. The proposed project will use about 80 feet of head to develop 6 theoretical horsepower for electricity production.

The proposed point of diversion for this project is within the NE ¼ NW ¼ of Section 33, Township 18 South, Range 1 East, W.M. The powerhouse would be located in tax lot 105. The project is on privately owned land.

Two maps (Site Map and Overview Map) showing the location of the facility are provided as Attachment 3.

B. Exception Request

Generally, the Willamette Basin Program classifies the allowed uses of water and when through-out the calendar year those uses are allowed. Hydroelectric use on Fall Creek is *not* classified. The portion of the Basin Plan pertaining to the Middle Fork Willamette River Subbasin (OAR 690-502-0060) is provided as Attachment 4.

Mr. Yeakle asks that an exception be approved so that he 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 his request, Mr. Yeakle asserts that the use “is largely non-consumptive in nature and not likely to be regulated for other water rights” [ORS 536.295(1)(c)]. This is one of the seven criteria.

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 creek. Water is returned above the confluence of Hucka Creek and Fall Creek Reservoir. There are no other water rights on the creek 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. In addition, Mr. Yeakle suggests that an exception be granted because the use would provide a public benefit because a "private residence off grid makes more energy available for grid consumers." Since, however, the public benefit is negligible and he has a stronger reason for an exception by way of the use being non-consumptive, staff are not making a recommendation on whether this use provides a public benefit.

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 5. A comparison of the surface water allocation policy with information submitted by Mr. Yeakle 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 creek above a major reservoir.
- 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 creek 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. Mr. Yeakle 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 Mr. Yeakle.

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. Mr. Yeakle's Exception Request
2. Conditions for Consideration of Application for Use Not Classified in Basin Program - ORS 536.295
3. Location maps (Site Map and Overview Map)
4. Middle Fork Willamette River Subbasin Program - OAR 690-502-0060
5. Willamette Basin Program General Policies for Surface Water Allocation

Dwight French
(503) 986-0819

RECEIVED BY OWRD

February 7, 2013

FEB 08 2013

Mr. Dwight French
Oregon Water Resources Department
727 Summer St. N.E. Suite A
Salem, Or. 97301-1271

SALEM, OR

RE: Request for an Exception to the Willamette Basin Program pursuant to
ORS 536.295

Dear Mr. French,

I am seeking an exception to the Willamette Basin Program for a small hydroelectric project on property that I own above Fall Creek Reservoir in Lane County. OAR 690-502-0060 (1)(c)(A) does not classify hydroelectric use as an allowed use for the Fall Creek tributary to the Middle Fork of the Willamette River. However, pursuant to ORS 536.295 (1)(c), I am seeking an exception to the basin program based on the fact that the use is a non-consumptive hydropower use and all waters will be returned to the creek and enter the reservoir. I am seeking to operate a Minor Hydroelectric Project (less than 100 theoretical horsepower), as the primary source of electricity at our intended place of residence.

I am in the process of constructing a place of residence at 42165 Big Fall Creek Road, Fall Creek. Due to our somewhat remote location, the distance to an electric utility would be quite expensive and it is not practical for me to generate all of our electricity needs from photovoltaic sources. The intended source of hydroelectric power would come from a small creek (Hucka Creek), which flows along the edge of our property, and into Fall Creek Reservoir.

As you know, the Oregon Water Resources Commission may allow the Water Resources Department to consider an application for appropriate water for a use not classified in the applicable basin program if that use is largely non-

consumptive in nature and not likely to be regulated for other water rights, pursuant to ORS 536.295 (1)(c). My proposed use meets that criterion because the hydroelectric project will be entirely non-consumptive in use and no other water rights would be impacted by my proposed use as next discussed. The surface water for the hydropower use will be captured at the northern most point of our property, and transported to a powerhouse via a PVC pipe. All parts of the system are located on our property. After passing through the powerhouse, all of the water will be returned to Hucka Creek. There are no water rights between our point of diversion and the return point, so our hydropower use would not need to be regulated for other water rights.

ORS 536.295 (1)(f) also allows consideration of an exception if the use will provide a public benefit. A private residence operated off grid makes more energy available for grid consumers. This would be a public benefit, and may satisfy this criterion for an exception.

Therefore, I request the Oregon Water Resources Commission approve an exception to OAR 690-502-0060 (1)(c)(A) that would allow us to apply to WRD to use water for hydropower purposes on a year-round basis.

Thank you for your consideration. If you have any questions, Please contact me.

Sincerely,



Gary Yeakle

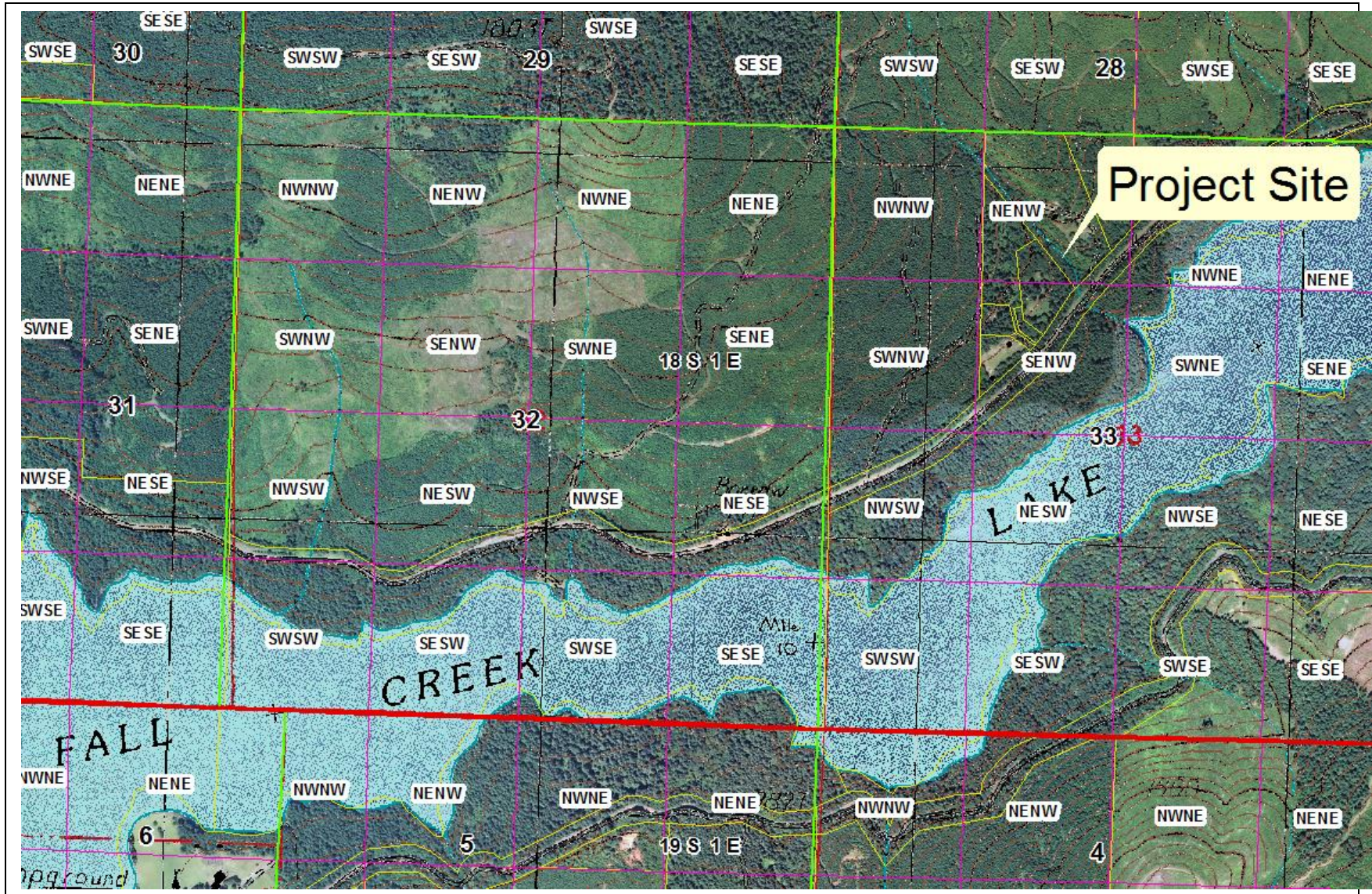
yeakleseclipse@yahoo.com

Cell (408) 887-6030

Attachment 2

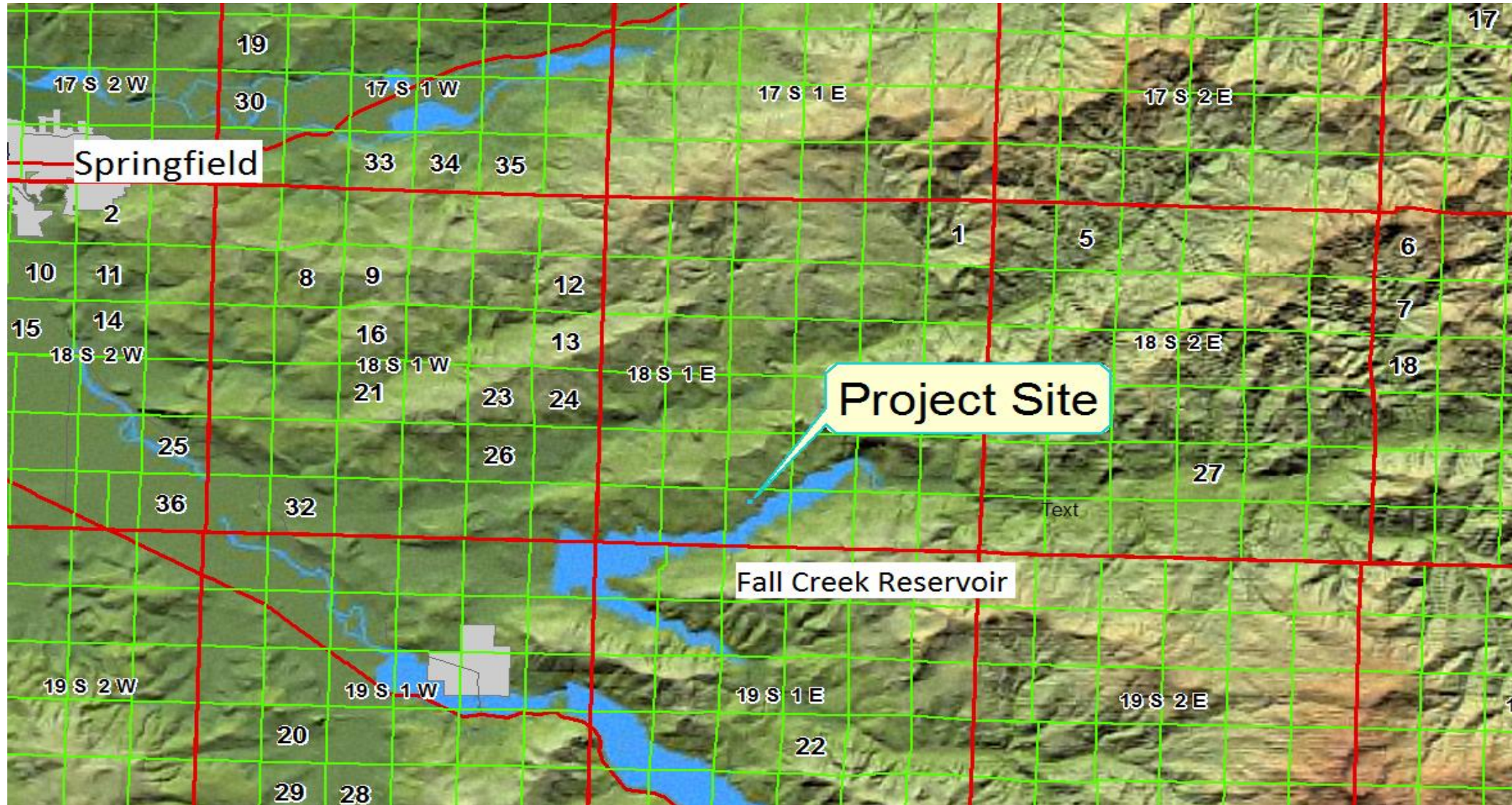
ORS 536.295 Conditions for consideration of application for use not classified in basin program; rules. (1) Notwithstanding any provision of ORS 536.300 to 536.340, the Water Resources Commission may allow the Water Resources Department to consider an application to appropriate water for a use not classified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



Attachment 3- Site Map

HE 600 – Yeakle Project



Attachment 3 – Overview Map

HE – 600 Yeakle Project

OAR 690-502-0060

Middle Fork Willamette River Subbasin

The Middle Fork Willamette River Subbasin includes the Middle Fork Willamette River and tributaries upstream from its confluence with the Coast Fork Willamette River south of Springfield:

(1) Surface water classification:

(a) The North Fork of the Middle Fork Willamette River, from a point one mile upstream from the railroad bridge near Westfir to its headwaters, and Waldo Lake, are designated state scenic waterways. These waters and tributaries are classified only for domestic, commercial use for customarily domestic purposes not to exceed 0.01 cfs, livestock and public instream uses;

(b) Except as otherwise specified in subsection (c) of this section, the Middle Fork of the Willamette River and tributaries below Dexter Dam are classified for domestic, livestock, municipal, irrigation, industrial, agricultural, commercial, power, mining, fish life, wildlife, recreation, pollution abatement, wetland enhancement and public instream uses from September 1 through January 31, and only for domestic, commercial use for customarily domestic purposes not to exceed 0.01 cfs, livestock and public instream uses from February 1 through August 31;

(c) The following streams and tributaries are classified for domestic commercial use for customarily domestic purposes not to exceed 0.01 cfs, livestock and public instream uses only:

(A) Fall Creek tributary to the Middle Fork of the Willamette River;

(B) Lost Creek tributary to the Middle Fork of the Willamette River.

(d) The Middle Fork of the Willamette River and tributaries above Dexter dam are classified year-round for domestic, commercial use for customarily domestic purposes not to exceed 0.01 cfs, livestock and public instream uses only;

(e) The waters of the natural lakes of the Middle Fork Willamette River subbasin above 3,000 feet elevation are classified only for domestic, excluding irrigation of lawn and noncommercial garden, commercial use for customarily domestic purposes not to exceed 0.01 cfs, livestock and public instream uses. Storage shall not be allowed on these lakes.

(2) For the purpose of maintaining a minimum perennial streamflow sufficient to support aquatic life and to minimize pollution and of attaining the highest and best use of waters released from storage, no appropriations of water except for domestic or livestock uses or waters to be legally stored or legally released from storage shall be made or granted by any state agency or public corporation of the state for the following waters and as shown in **Table 1**:

(a) The Middle Fork Willamette or its tributaries above the Willamette Middle Fork -- North Fork of the Willamette Middle Fork confluence for natural flows of the Willamette Middle Fork below 285 cubic feet per second, plus waters released from storage of up to 690 cubic feet per second measured at a point between said confluence and 1.0 miles above said confluence;

(b) Fall Creek or its tributaries above the Fall Creek -- Willamette Middle Fork confluence for natural flows of Fall Creek below 40 cubic feet per second, plus waters released from storage of

up to 470 cubic feet per second measured at a point between said confluence and 1.0 miles above said confluence;

(c) The Willamette Middle Fork or its tributaries above the Willamette Middle Fork -- Willamette Coast Fork confluence for natural flows of the Willamette Middle Fork below 640 cubic feet per second, plus waters released from storage of up to 1,475 cubic feet per second measured at a point between said confluence and 1.0 miles above said confluence.

[ED. NOTE: Table 1 referenced in this rule is not printed in the OAR Compilation. Copies may be obtained from the agency.]

Stat. Auth.: ORS 536.220, [ORS 536.300](#), [ORS 536.310](#), [ORS 536.340](#), [ORS 536.410](#), ORS 537.170, [ORS 537.356](#) & [ORS 537.358](#)

690-502-0020

Policies -- Willamette Basin Program

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.