



MEMORANDUM

TO: Water Resources Commission
FROM: Thomas M. Byler, Director
SUBJECT: Agenda Item G, November 19, 2015
Water Resources Commission Meeting

Petition for Withdrawal of the Smith River

I. Introduction

The Oregon Water Resources Department received a petition dated August 31, 2015, for withdrawal from appropriations – pursuant to ORS 536.410 – the watershed of the Smith River in Southern Oregon, including its tributaries and groundwater. The petition requests withdrawal for all uses including exempt uses, except for the establishment of instream water rights. A copy of the petition was delivered to the Commission at the September Commission meeting.

II. Background

ORS 536.410 authorizes the Commission to issue an “order” withdrawing unappropriated waters from further appropriation. Prior to issuing the order, the Commission must hold a public hearing and determine that a withdrawal order is necessary to ensure compliance with the state water resources policy, or that it is in the public interest to conserve water resources for the maximum beneficial use and control. By definition in ORS 536.007(10), the “state water resources policy” means the policies provided in ORS 536.295-536.350 and ORS 537.505-537.534.

An order of withdrawal shall specify the waters withdrawn, the uses for which the waters are withdrawn, the reasons for the withdrawal, and the duration of the withdrawal. A withdrawal order could result in a withdrawal of both the surface and groundwater resources for all uses except instream. According to this section of the statute, while the order of withdrawal is in effect, no applications for a permit or a hydroelectric license may be received by the Department. In addition, the Commission could revoke or modify the order at any time.

III. Discussion

ORS 536.007(5) specifies that the word “order” as it is used in ORS 536.410 has the meaning “given in ORS 183.310.” As a result, the withdrawal statute, ORS 536.410, is problematic to implement because it relies on an order of the Commission to execute the withdrawal, as opposed to a rule.

A rule is any “agency directive, standard or statement of general applicability that implements, interprets or prescribes law or policy.” ORS 183.310 (9). Rules apply to all persons and to the agency. In contrast, an order means “any agency action expressed orally or in writing directed to a named person or named persons, other than employees, officers or members of an agency.” ORS 183.310 (6)(a). An order is only binding on the person(s) named in the order. It would be impossible to identify and name all persons who might in the future seek to appropriate the waters of the Smith River Basin.

As a result, acting under this statute poses a predicament for the agency. The plain language of the statute specifies that the withdrawal be done by order, while the definitions in ORS 183.310 suggests that effective implementation would necessarily be done by rule.

IV. Other Options to Accomplish Similar Goals

In addition to rulemaking, there are other options that would accomplish the petitioner’s objectives through mechanisms other than withdrawal order pursuant to ORS 536.410. There are advantages and disadvantages to each approach, and some may not fully accomplish the petitioners’ goals. These options include:

1. Pursue designation of the Smith River and the tributaries of concern as State Scenic Waterways.
2. Seek to have Oregon Department of Fish and Wildlife, Oregon Department of Environmental Quality, or the Oregon Parks and Recreation Department apply for instream water rights on the Smith River and its tributaries.
3. Pursue legislation to have the basin withdrawn legislatively. See, for example, Oregon Revised Statutes, Chapter 538.
4. The Water Resources Commission, on its own, or in response to a petition for rulemaking, may direct the agency to begin a basin program amendment to classify the waters in the area of interest for instream purposes. Classifying or reclassifying surface and groundwater uses for the highest and best use, results in restricting the types of use, and in some cases, the quantity of water that can allocated for a particular use.

V. Conclusion

The Commission is not required to act on the petition. In considering any decision before the Commission, it is prudent to evaluate whether the proposed action is the most appropriate and effective means to achieve the desired purpose.

Because issuing a withdrawal order as provided in ORS 536.410 is legally problematic, the Department recommends that no action be taken on the petition at this time. If the Commission has an interest in limiting water uses within the Smith River watershed, the Department recommends that this be done through a basin program amendment to classify waters in the area. This option may not accomplish all of the goals of the petitioners; therefore, the Department recommends further evaluation before undergoing the process to amend the basin program.

VI. Alternatives

The Commission may consider the following alternatives:

1. Take no action on the petition and direct the Department to evaluate other options and report back to the Commission.
2. Take no action on the petition and direct the Department to provide further information on the merits of the petition in order for the Commission to consider pursuing withdrawal under ORS 536.410.
3. Deny the petition and direct the Department to take no further action.

VII. Recommendation

The Director recommends Alternative 1.

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