



**MEMORANDUM**

TO: Water Resources Commission

FROM: Thomas M. Byler, Director

SUBJECT: Agenda Item C, November 19, 2015  
Water Resources Commission Meeting

**Status of Reservations and Adoption of Temporary Rules**

**I. Introduction:**

On September 15, 2015, the Department received applications from the Oregon Department of Agriculture to extend the South Fork Burnt River, North Fork Burnt River, and Burnt River Subbasin reservations. At the August 22, 2014, Commission meeting, staff presented information on the process for extending reservations of water for future economic development based on the Department's Division 79 rules. Since then, staff have determined that the rules are outdated; therefore, the Commission will be asked to adopt temporary rules that will establish the process for considering the applications received in September 2015 to extend the Burnt River Reservations.

**II. Background**

In 1987, the Legislature authorized the establishment of instream water rights, and the reservation of water for future economic development. A reservation sets aside unappropriated water for future economic development. 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 future water right application will be approved, or that a reservoir may be constructed. Water users wishing to appropriate reserved water 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.

*Process History*

The Commission established rules in 1988 (Division 77), which required reservations to undergo a contested case hearing to determine if the reservation met the public interest factors in ORS 537.170, followed by rulemaking of the Commission to amend the basin program.

In an attempt to streamline the process, the Commission revised the reservations rules in 1992 (renumbered to Division 79), which stated that reservations would be established through a

contested case hearing under ORS 537.170, followed by an order of the commission. These Division 79 rules also provided that reservations would expire after 20 years, unless extended by the Commission. Pursuant to the rules, the extensions would follow the same process as a new reservation, but would keep the priority date of the original reservation.

The 1991 South Fork Burnt River request was the first application for a reservation; however, a final decision was delayed after unsuccessful attempts were made to conduct the process established in the Division 79 rules. Legislation was proposed in 1995, codified in ORS 537.249 which gave applicants that submitted requests prior to July 5, 1995, the opportunity to choose to: (1) undertake a public interest review and hearing under ORS 537.170 followed by an Order of the Commission; (2) have the application processed as a permit; or (3) establish the reservation through rulemaking. The Legislature waived the requirement for a public interest review and contested case proceeding under ORS 537.170 for applications submitted prior to July 5, 1995 if they were adopted by rule.

After a workgroup was conducted to further study reservations, the Legislature in 1997 amended the reservations statutes (ORS 537.356 and 537.358), indicating that new reservations would be established by rule, but would be subject to the public interest factors in ORS 537.170. The Division 79 rules were last amended in 1993 and were never updated to reflect the new processes in statute. It appears that the decision to not update the rules, was based on the fact that applications could be proceed utilizing the Division 79 process if the applicant did not choose the other options provided by the 1995 legislation.

#### *Current Status*

Previous reservation requests by the Oregon Department of Agriculture (ODA), resulted in the adoption of reservations in five basin plans. The three Burnt River reservations are the first that are set to expire. On September 15, 2015, the Department received applications from the Department of Agriculture, seeking to extend the three Burnt River reservations, which will automatically sunset on March 8, 2016, unless extended in rule by the Commission. This is the first time the Commission has had to consider a request to extend a reservation.

The existing Division 79 rules direct the Department to review extensions pursuant to all of the requirements in rule for initial reservations; however, the existing rules are inconsistent with the changes made to statute, and it is unclear to what extent they were relied upon even when the reservations were first adopted. Therefore, the rules need to be updated in order to establish the process for the pending extension applications.

#### *Next Steps*

Permanent rulemaking processes involve several steps and typically require a minimum of 4-5 months to complete. To address the need to extend the Burnt River reservation, the Commission will need to consider three rulemaking actions. The first rulemaking is the temporary rulemaking that will amend the Division 79 rules to allow processing of the currently-pending

reservation extension requests. The second rulemaking (which may only occur after the temporary rulemaking to amend Division 79) will require an amendment to Division 509, the Powder Basin Program, in order to extend the Burnt River reservations. The third rulemaking will involve amending the Division 79 rules to address the inconsistencies with current statutes through a permanent rulemaking process.

If the Commission conducted an amendment of Division 79 only through permanent rules and then conducted a permanent rulemaking process to amend Division 509 (the Powder Basin Program) the two rulemaking processes would require 8-10 months and could only be completed well after the March 2016 expiration date for the current Burnt River reservation

As a result, the Commission will need to adopt temporary rules to address the pending requests to extend the Burnt River Reservations, while permanent rules are developed to establish the process for considering future extensions. A rules advisory committee has or will consult on all three rulemakings: the Division 79 temporary rules; the permanent Division 79 rules; and the Division 509 Powder Basin Program rules, which would be amended if the Burnt River reservations are extended. The goal is to have both permanent rulemakings before the Commission in February.

### **III. Discussion: Process and Public Comment on Temporary Rules**

In developing temporary rules, the Department is not required to consult with a rules advisory committee or to provide an opportunity for public comment. However, the Department believes that better policies are developed when the Department engages with stakeholders and the public on rulemaking activities. Therefore, the Department consulted with a rules advisory committee (RAC), in which members provided feedback on the rules, but the RAC was not asked to reach consensus. For the temporary rules, the final meeting of the RAC was on November 10, 2015. The Department then announced the opening of a public comment period at the end of the day on November 12, accepting comments through November 16.

Excerpts of the public comments and the Department's responses are provided in Attachment 1. Copies of the public comments are included in Attachment 2. Changes made to the rules after the public comment period are shown in Attachment 3.

Given that the Burnt River Reservations are set to expire in March 2016, there is a need to develop temporary rules to clarify the process for extending reservations. Based on a review of the Division 509 rules, the Division 79 rules, the history around reservations, and applicable statutes and rules, the Department has identified a process to consider extensions.

These proposed final temporary rules in Attachment 4 do the following:

1. Establishes procedures to consider the pending requests to extend the Burnt River Reservation. They do not establish procedures for other reservations. The Department will work with the RAC to discuss permanent rules that will apply to all extensions for future reservations.

2. Continues the practice of approving extensions on reservations for up to 20 years.
3. Retains the information requirements in the application to request an extension. (The applications have already been submitted to the Department.)
4. Clarifies that the extension will also be conducted via a basin program rulemaking. This is consistent with how the reservations were originally established.
5. Follows public comment and hearing procedures as required by the Administrative Procedures Act, the Department's Basin Program statutes, and the Department's model rulemaking rules.
6. Requires a public comment period and notification for land use coordination purposes.
7. Consistent with the process for conducting a basin program rulemaking, the Commission will consider information in the application, comments received, and information from the Department.
8. The Commission will extend the reservation unless it is no longer consistent with the state water resources policies in ORS 536.310, as well as the Department's rules. These reservations were determined to be consistent when originally established.

#### **IV. Conclusion**

After discovering the issues with the process, as outlined above, the Department has determined that a temporary rulemaking followed by two permanent rulemakings is the only way to proceed if it wants to assure that the Burnt River reservations do not expire before the Commission has an opportunity to consider the Department of Agriculture's extension request. The Department has consulted with stakeholders about the temporary rules through a rules advisory committee and has further provided an opportunity for public comment to the extent possible. The Department will begin work to develop permanent rules to amend Division 79, but in the meantime the above-outlined process is necessary to address the immediate needs to consider the extensions of the Burnt River Reservations.

#### **V. Alternatives**

The Commission may consider the following alternatives:

1. Adopt the proposed rules in Attachment 4.
2. Adopt the proposed rules as modified by the Commission.
3. Not adopt the rules and provide the Department with further direction.

#### **VI. Director's Recommendations**

The Department appreciates the efforts of stakeholders and the public to assist the Department in this matter under tight timelines. The Director recommends Alternative #1 to adopt the proposed temporary rules.

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Attachments:

Attachment 1 – Excerpts of Comments and Department Responses

Attachment 2 – Public Comments

Attachment 3 – Changes made to public comment draft of proposed rules

Attachment 4 – Proposed Final Rules

Racquel Rancier

503-986-0828

**Excerpts of Public Comments and Department Responses**  
**Division 79 Temporary Rules**  
**November 19, 2015**

The Department grouped public comments based on issue area themes. Issues are in bold italics. Commenters are identified with an underline before their comments. Italics are the Department's responses.

***Issue: Expressed support and need for extending Burnt River Reservations.***

See comment letters from Wes Morgan - Burnt River Irrigation District, Oregon Farm Bureau/Burnt River Irrigation District, League of Oregon Cities/Special Districts Association, Oregon Water Resources Congress, Pat and Anna Sullivan, Oregon Farm Bureau/Burnt River Irrigation District.

*Department's Response: These temporary rules establish the process for considering the pending applications to extend the Burnt River Reservations. The Commission will determine whether to extend the reservations at its February 2016 meeting.*

***Issues: Change "may" extend to "shall" extend.***

Waterwatch of Oregon – "May vs. Shall: We strongly support the use of the word 'may' in the proposed review, as suggested in the draft rule. We would oppose the use of the word 'shall'. The WRC should retain discretion on this matter... In the RAC meetings a number of agricultural and/or irrigation groups equated reservations to instream water rights as a reason to greatly narrow the process that applies to extensions of reservations. Reservations are not water rights, thus this comparison is misplaced. The Commission is not being asked to review storage rights that have already been granted. That would be a different matter altogether. If reservation extensions are to move forward, we believe the Commission should hold broad authority to review, condition and make a final decision on any extensions."

Oregon Water Resources Congress – "While we appreciate the effort in drafting the temporary rules under such a short timeframe, as drafted the rules do not completely reflect the importance of the program and would allow for an overly subjective approach to approving an extension of a reservation. A slight language change would better clarify that the Water Resources Commission (WRC) will rely on the presumption that there *shall* be an extension so long as the reservation remains consistent with the program and rules of the Commission. While the rules before the Commission are temporary and apply only to the Burnt River reservation, it would be beneficial to have clear language to use as the basis for the upcoming permanent rulemaking process for extending agricultural reservations...[see original letter with additional comments on this issue]... The inclusion of the word "shall" rather than the current proposed term "may," provides greater consistency with the original legislative intent that these reservations remain until such time they are needed for economic development, and also provides some certainty for a potential applicant to rely on possibility of the reservation of water as a component of a water project. As you are aware, the development of a water storage project takes years and if the reservation of water is nearing a point where it will be up for an

extension, infusing uncertainty that the Commission may not extend the reservation could derail a potentially beneficial project from being funded or moving to the next phase of feasibility.”

Baker County Farm Bureau – “Given that the reservations were intended to protect and make water available for future economic growth, we think that it is essential that the process for extending these reservations is streamlined, and focuses only on whether the reservation is still consistent with the reservation statutes and other existing law. If these conditions are met, extensions of the reservations should be mandatory.”

League of Oregon Cities/Special Districts Association – “It is our understanding that when the legislature created, and later amended, the reservation program, they did not include an expiration date for reservations made in accordance with the law. The expiration date as contained in rules should, in our opinion, serve as no more than a check in to ensure that the reservation remains consistent with applicable statutes and administrative rules....”

Oregon Farm Bureau/Burnt River Irrigation District – “To be consistent with the intent behind the water reservations, an extension of the water reservation should be mandatory if the conditions outlined by the department for extension are met. This is the only approach that would be consistent with the intent behind the creation of the water reservations. When the legislature created reservations of water for future economic development, they did not authorize any sunset of the reservations. *See* ORS 537.358; ORS 537.249. Instead, the sunset on the reservations was developed as part of the original Division 079 rulemaking and was implemented by the Oregon Water Resources Department when it adopted the reservations in the individual basin plans. Given that the water reservations were created as a corollary to instream water rights – which permanently protect water instream – we do not believe it was consistent with the legislation or the legislative intent for the department to sunset the reservations. Water reservations were intended to ensure that water was available for future economic growth when instream water rights were granted. Just as instream water rights are valid forever once granted, the water reservations were intended to make water available for future economic growth, whether it is 5 years or 50 years before there is an ability to develop the water storage to move the project forward. As such, we believe that extensions of the reservations must be mandatory as long as the reservations remain authorized by statute and consistent with existing law.”

*Department’s Response: The Department is reluctant to make statements of policy at this time, while discussions are underway with RAC members to determine the approach for extending reservations as part of the permanent rulemaking. However, the Department has modified “may” to “shall” in the final proposed draft rules.*

*Issues: Evaluation Criteria for Extensions.*

Baker County Farm Bureau – “Given that the reservations were intended to protect and make water available for future economic growth, we think that it is essential that the process for extending these reservations is streamlined, and focuses only on whether the reservation is still consistent with the reservation statutes and other existing law.”

Wes Morgan - Burnt River Irrigation District – “We encourage you to adopt rules that will protect the original spirit and intent of the reservations...”

League of Oregon Cities/Special Districts Association – “The expiration date as contained in rules should, in our opinion, serve as no more than a check in to ensure that the reservation remains consistent with applicable statutes and administrative rules... If the Commission believes that reservations should go through an additional application for extension process, it is imperative that the process be clear and objective. The process should not include a reevaluation of the original reservation request and should not include additional evaluation criteria. Such reviews, including a public interest review, would occur upon an application for a water right to store the reserved water and again once an application is filed to put the stored water to beneficial use.”

Oregon Farm Bureau/Burnt River Irrigation District – “The department proposes to condition extensions on the reservations on consistency with ORS 536.310 (state water resources program criteria) and the rules of the Commission. OFB believes that this approach conflates the original application with the extension request, and fails to capture the purpose of the water reservations as a corollary to instream water rights. In the staff reports that accompany the original grants of the reservations, staff evaluated the reservations for consistency with ORS 536.310. These reservations were then authorized for future economic development. As discussed above, the legislation authorizing the reservations does not provide for them to sunset; instead, they were to be set aside for future economic development. To be consistent with this intent, the Commission should not revisit determinations that were already made authorizing these reservations. Instead, the Commission's review should be limited to continued consistency with the reservation statutes and existing law. To capture the intent of the legislature in creating water reservations, we recommend the following changes to the proposed OAR 690-079-0160(7) language: In considering an application to extend a reservation, the Commission shall review information in the application, comments received, and the recommendations of the Department. The Department ~~may~~ **must** extend the reservation, unless the Commission determines the reservation is no longer consistent **with ORS 537.356 or existing law** ~~with ORS 536.310 or with the rules of the Commission.~~”

WaterWatch of Oregon – “Standards of Review: We support the inclusion of ORS 536.310 and rules of the Commission; however, we think the standards should be broadened to include the rule requirement and standards in place at the time of adoption, and at time of review (whether or not that review actually took place). It should be noted that the governing statute does not speak to extensions at all; allowing extensions is purely a carry-over from the OAR 690- 79-005 rules. Importantly, the Division 79 rules required the Commission to apply the rule requirements and standards applied at the time of the reservation. In other words, the WRC retained the power for a wholesale relook at



the reservation before making a decision on an extension. The Commission should retain that power here. Additionally, as noted earlier the Burnt River Reservations contained directives requiring periodic reporting and review of the reservation. According to the 1996 staff report upon which the Commission approved the Burnt River Reservation, the Commission was to conduct these periodic reviews to determine whether the reservation continued to be in the public interest. These required reviews never happened. Thus, at the very least, the public interest criteria that would have applied at the check points should apply to any extension.”

*Department’s Response: The Department is reluctant to make statements of policy at this time, while discussions are underway with RAC members to determine the approach for extending reservations as part of the permanent rulemaking. These reservations were established pursuant to ORS 537.249, not the current ORS 537.356, which was amended after these reservations were established. The Department agrees that no public interest review of the factors under ORS 537.170 is required. In reviewing the staff reports, the “public interest” considerations under which these reservations were approved were the standards in ORS 536.310. These are the same factors the Department is proposing be considered here. Furthermore, in amending a Basin Program, the Commission is required to consider the factors in ORS 536.310 and the Department’s applicable rules, which are existing law.*

***Issue: Burden of proof for standard of review.***

WaterWatch of Oregon – “Burden of Proof: As written, the burden is on commenters to prove to the WRC that a proposed reservation is inconsistent with ORS 536.310 or with rules of the Commission. We would suggest that instead the Commission be required to make an affirmative finding that the extension of the reservation is in fact consistent with ORS 536.310 and the rules of the commission (in addition to standards noted below).”

*Department Response: The Department or commenters can provide information that the reservation is inconsistent with ORS 536.310 or the rules of the Commission. In addition, the Commission may also make that determination. The Department does not recommend changes to the rules.*

***Issues: Applicability of Division 79 rules***

Oregon Farm Bureau/Burnt River Irrigation District – “The language proposed by the department suggests that Division 079 may otherwise be applicable for processing applications or requests for extension received under ORS 537.249. As discussed above, the rules were never amended to implement ORS 537.249. As such, Division 079 does not apply to applications or extension requests for water reservations made under ORS 537.249. The Commission should revise the rule to make it clear that, as currently drafted, Division 079 does not apply to applications or extension requests under ORS 537.249. We recommend the following change to address this issue: OAR 690-079-0010 (3) Except as provided in OAR 690-079- 0160, OAR 690-079-0010-0150 does not apply to requests for extensions of reservations received by the Department in September 2015, which were originally established pursuant to ORS 537.249.”

*Department's Response: The Division 79 rules would have applied to reservations established under 537.249 that chose to go through the contested case and order process, instead of a rulemaking. The Department has not had the opportunity to review all other pending reservation requests and extensions, but does not believe that any were established pursuant to the contested case and order process. The Department agrees that the Burnt River Reservations were not established under the contested case and order process as allowed under ORS 537.249. The rest of the Division 79 language is being left intact until the permanent rulemaking process. The Department has made further adjustments to section 10 of the rule to clarify that "This Division also establishes temporary procedures to consider applications to extend reservations as provided in OAR 690-079-0160."*

***Issues: Reports and check points were not met.***

WaterWatch of Oregon – "Application Requirements, Section (4): The application for an extension should require documentation as to whether the required checkpoints under the original reservations were met. The Department and Commission were very deliberate in their adoption of check in points for the Burnt River Reservation and included the following rationale in requiring these reports: - During a five year review of the reservation, the Commission shall assess whether progress is being made on the reservation and whether it is in the public interest to continue the reservation. - The reports will provide information on the continued need for the reservation, the quantities of water allocated to each type of use and a description of why the reservations continue to be in the public interest."

*Department Response: The Department does not interpret the rules to mean that all progress reports must have been completed in order to be eligible for an extension. These are separate matters. Furthermore, staffing resources for this program were cut and the Department does not believe that progress reports were ever provided for any of the reservations, except Home Creek in 2014. If completing all progress reports were a criterion for extension, all reservations, except for Home Creek would not be eligible for extension. The public interest considerations are provided in ORS 536.310.*

***Issues: Priority date of storage projects.***

WaterWatch of Oregon – "Priority date of storage projects under the reservation, Section (3): Section (3) states that 'an approved time extension shall retain the priority date of the original reservation.' This is not a process question, but rather a policy question. The statutes governing the Burnt River Reservation do not grant water rights under the reservation the priority date of the reservation. See ORS 537.249 as compared to ORS 537.358. This is something that was a discussion point at the time of the Burnt River Reservation, and, for transparency reasons, should be considered by the Commission in reviewing the Burnt River extension application where there is the opportunity for a full public review and comment. In discussions in the RAC, the rationale for including this was that it was intent of the Department and prior enumeration of extensions in OAR 690-079-0050 (which sets for the term of the reservations and extension). Our concern

with this rationale is that it appears the Department is relying on select provisions of the old rules that governed the term of the reservation and extension, but not others. For instance, OAR 690-079-0050 also sets forth the process for periodic review of the reservations at which time the Commission could ‘require the applicant to provide evidence that the purpose, intent and amount of the reservation still meet the public interest standards of OAR 690, Division 11.’ Moreover, that same section (OAR 690-079-005) also required the Commission to subject an extension to all rule requirements and standards governing review of initial reservations. Yet, despite that, largely because of adamant opposition by the user community, nowhere in the temporary rules are these important rule provisions carried over. This strikes us as inequitable.

*Department Response: These rules do not address the priority dates of the water rights, only the priority date of the reservation. Division 509 states that the storage water rights will receive the priority date of the reservation; therefore, this comment is more appropriate for that rulemaking. As far as the priority date of the reservation, ORS 537.249(3) states that “A reservation established under the provisions of this section shall have as a priority date the date established in rules of the commission in effect on July 5, 1995.” The existing Division 79 rules were the rules in effect at that time. Other parts of the Division 79 rules were not codified in this manner by the Legislature. In fact, the Legislature established procedures that were different than what was enumerated in the Division 79 rules. For example, OAR 690, Division 11, references a public interest review as provided in ORS 536.170, which was waived by the Legislature in ORS 537.249. Some of the procedures in Division 79 for establishing reservations were the reason the Legislature was prompted to provide a different pathway to move forward. The Department believes that it is applying similar criteria to the initial review of these reservations. Finally, there will be a public interest review under the current water right permitting process if an application is filed for these reservations. Therefore, a determination will be made about whether the appropriation of the water is in the public interest at a future time once a water right application is filed. Finally, the Department does not believe that changing the priority date of the reservation is consistent with the idea of an extension. The Department does not believe that it is appropriate to change this policy and is not recommending changes to the rules.*

***Issue: Department should be able to provide the Commission with information.***

WaterWatch of Oregon – “Items for Commission review: While WaterWatch supports the WRC review of the application, comments received and the recommendations of the Department, we do not believe that WRC review should be limited to this list. In other words, it should not be an exhaustive list. We would suggest adding the words “including but not limited to” so the WRD retains authority as to what information it might want to put in front of the Commission for consideration in the WRC’s decision making (i.e. past staff reports, the reservation itself, etc). As written, commenters could put this information in front of the Commission but the WRD would arguably be limited to a recommendation.”

*Department’s response: The Department agrees that it should be able to provide information in addition to a recommendation to the Commission. The rules have been modified to address this.*

***Issue: Conditions of Approval.***

WaterWatch of Oregon – “Conditions of approval: While implicit in the Commissions powers under the basin planning statutes, the rules governing the extension process should make clear that the Commission can add conditions to reservations to ensure the use is consistent with ORS 536.310 and other laws/rules of the Commission, among other factors.”

*Department’s response: The Department does not believe this is necessary and did not modify the proposed rules.*

***Issue: Technical Corrections***

WaterWatch of Oregon – “The Commission should be the decision maker, as written it reads that the Department may extend the reservation.”

Oregon Department of Fish and Wildlife – Oregon Department of Fish and Wildlife should be singular, not plural.

*Department Response: The Department appreciates these comments and has made the corrections.*



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**To:** Water Resources Commission and  
Rule Coordinator, Oregon Water Resources Department

**From:** Tracy Rutten, League of Oregon Cities;  
Mark Landauer, Special Districts Association of Oregon

**Date:** November 16, 2015

**Re:** **Public Comments on Draft Temporary Rules - ESTABLISHING PROCEDURES TO CONSIDER  
PENDING APPLICATIONS TO EXTEND BURNT RIVER RESERVATIONS - Amending OAR Division 079  
and Adding New Provisions**

The League of Oregon Cities and Special Districts Association of Oregon appreciate the opportunity to provide comments on the draft temporary rules released by the Oregon Water Resources Department on November 12, 2015. The League and SDAO share in support for the three extension requests filed in September of 2015 for the Burnt River as such reservations are an important tool to ensure future water supply to support economic development in Oregon.

We encourage the Water Resources Commission to consider the following change to the draft temporary rules to better reflect what we believe is critical policy to ensure that reservations remain a viable tool for future economic development:

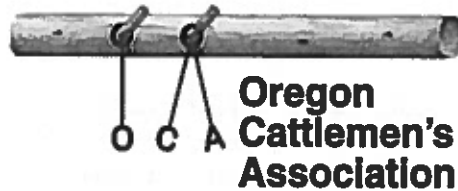
**OAR 690-079-0160 –**

In considering an application to extend a reservation, the Commission shall review information in the application, comments received, and the recommendations of the Department. The Department ~~may~~ **shall** extend the reservation, unless the Commission determines the reservation is no longer consistent with ORS 536.310 or with the rules of the Commission.

It is our understanding that when the legislature created, and later amended, the reservation program, they did not include an expiration date for reservations made in accordance with the law. The expiration date as contained in rules should, in our opinion, serve as no more than a check in to ensure that the reservation remains consistent with applicable statutes and administrative rules. If the reservation is found to be in accordance with applicable statutes and rules, we believe the extension shall be approved. Reservations are not a water right application but are simply a tool to ensure adequate water supplies for future economic development. Oregon is in critical need of significant investments and additional tools that will allow for the storage of critical water supplies for future use. If the Commission believes that reservations should go through an additional application for extension

process, it is imperative that the process be clear and objective. The process should not include a reevaluation of the original reservation request and should not include additional evaluation criteria. Such reviews, including a public interest review, would occur upon an application for a water right to store the reserved water and again once an application is filed to put the stored water to beneficial use.

We thank you for the opportunity to comment and appreciated your consideration.



November 16, 2015

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Re: Comments on Temporary Division 079 Rulemaking - November 19, 2015  
Commission Meeting

Chair Roberts, Director Byler, and Members of the Commission,

Thank you for the opportunity to comment on the proposed temporary changes to Division 079 designed to facilitate the extension of water reservations in the Burnt River Subbasin. This letter is submitted jointly on behalf of the Oregon Farm Bureau (OFB), the Oregon Cattlemen's Association (OCA), and the Burnt River Irrigation District (BRID) to express strong support the extensions of the water reservations statewide, and to urge the Water Resources Commission (Commission) to adopt our proposed changes to the temporary rules designed to ensure the extensions move forward in as streamlined a manner as possible.

By way of background, OFB is a voluntary, grassroots, nonprofit organization representing Oregon's farmers and ranchers in the public and policymaking arenas. As Oregon's largest general farm organization, its primary goal is to promote educational improvement, economic opportunity, and social advancement for its members and the farming, ranching, and natural resources industry as a whole. Today, OFB represents over 7,000 member families professionally engaged in the industry and has a total membership of over 60,000 Oregon families.

With more than 1700 members statewide, the OCA is the voice of the cattle industry in Oregon. Its mission is to advance the economic, political and social interest of the Oregon cattle industry.

The BRID delivers water to irrigators in the Burnt River area, and is directly affected by the reservations proposed for extension under the temporary rules. The Burnt River extensions were the first established in Oregon and BRID remains strongly committed to the need to reserve and protect water for future storage projects.

The availability of water for future economic needs, including agriculture, has long been at the forefront of our members' thoughts. With long-term projections of drought, the need to ensure a reliable water supply to help feed our growing nation and growing world has never been more critical. With a total value of over \$4.5 billion in annual farm gate sales, Oregon agriculture is

the state's second largest industry sector. Oregon agriculture is also among the nation's most diverse sectors, with over 220 different commercial commodities grown in the state. About 80% of Oregon's agricultural production leaves the state, and about 40% is exported internationally. Roughly 12% of all jobs in Oregon are directly or indirectly connected to farming and ranching. Agriculture represents a vital part of Oregon's economy, and it is critically important that we ensure long-term availability of water so Oregon's second largest industry sector can continue producing food and fiber.

### **Background on Water Reservations**

The temporary rulemaking is designed to provide the standards and procedures for processing the extension request for the Burnt River Subbasin water reservations, which expire in March 2016. The department is also working on a permanent rulemaking, which will govern the extensions set to expire in the next several years in five basins throughout eastern Oregon.

The water reservations in the five basins set aside water for future economic development. In 1987, the Oregon legislature authorized the Commission to reserve water for future economic development. The creation of water reservations was part of the same legislation allowing for the establishment of instream water rights. *See* ORS 537.356-537.358. The record is clear that the reservations of water for economic development were intended to be a corollary to instream water rights, and were designed to ensure that water was reserved for future growth when permanent instream water rights were created. The statute allows for any local government, local watershed council, or state agency to request that the Commission reserve unappropriated water for multipurpose storage for future economic development. In this case, all of the reservations were requested by the Oregon Department of Agriculture.

The initial procedures established by the legislature for setting aside reserved water did not prescribe the process for establishing a reservation, but directed the Water Resources Commission to adopt rules for implementing the program. The Division 079 rules were created for this purpose, establishing a process that required both a public interest review and a contested case hearing. However, in 1995, the legislature adopted legislation authorizing water reservations to be processed as a rulemaking instead of through a contested case hearing, and expressly providing that the public interest review would occur at the time individual applications were processed under the reservation as an alternative to the process in ORS 537.359. Even though all of the reservations at issue in the five basins were created using the authority of ORS 537.249, the department never updated its rules to reflect the policies found in ORS 537.249. As such, the Division 079 rules do not implement ORS 537.249. When it processed the initial round of reservations, the department did not have a formal rulemaking to guide their procedures for processing the applications. Instead, the department applied some sections of Division 079 to the applications, and developed their own recommendations about the criteria under which an application should be evaluated.



## Comments on Temporary Division 079 Rules for Extension

1. *The Commission Should Modify Section 7 of the Temporary Division 079 Rules to Match the Intent Behind the Reservations.*

In the temporary Division 079 rules, the department proposes the Commission use the following standard in determining whether to grant an extension:

In considering an application to extend a reservation, the Commission shall review information in the application, comments received, and the recommendations of the Department. The Department may extend the reservation, unless the Commission determines the reservation is no longer consistent with ORS 536.310 or with the rules of the Commission. See Proposed OAR 690-079-0160(7).

As members of the Rules Advisory Committee, we voiced concerns that the proposed wording now recommended by department staff is inconsistent with the intent behind the reservations in two respects: 1) the extension of reservations should proceed if the conditions outlined by the department are met; and 2) any conditions for reservation extensions should focus only on continued consistency with existing law, particularly the reservation statute.

### *A. Extension of Reservations Should be Mandatory if Conditions Are Met.*

To be consistent with the intent behind the water reservations, an extension of the water reservation should be mandatory if the conditions outlined by the department for extension are met. This is the only approach that would be consistent with the intent behind the creation of the water reservations. When the legislature created reservations of water for future economic development, they did not authorize any sunset of the reservations. See ORS 537.358; ORS 537.249. Instead, the sunset on the reservations was developed as part of the original Division 079 rulemaking and was implemented by the Oregon Water Resources Department when it adopted the reservations in the individual basin plans. Given that the water reservations were created as a corollary to instream water rights – which permanently protect water instream – we do not believe it was consistent with the legislation or the legislative intent for the department to sunset the reservations. Water reservations were intended to ensure that water was available for future economic growth when instream water rights were granted. Just as instream water rights are valid forever once granted, the water reservations were intended to make water available for future economic growth, whether it is 5 years or 50 years before there is an ability to develop the water storage to move the project forward. As such, we believe that extensions of the reservations must be mandatory as long as the reservations remain authorized by statute and consistent with existing law.

### *B. Conditions for the Reservations Should Focus Only on Continued Consistency with Existing Law, Particularly the Reservation Statute.*

The department proposes to condition extensions on the reservations on consistency with ORS 536.310 (state water resources program criteria) and the rules of the Commission. OFB believes

that this approach conflates the original application with the extension request, and fails to capture the purpose of the water reservations as a corollary to instream water rights. In the staff reports that accompany the original grants of the reservations, staff evaluated the reservations for consistency with ORS 536.310. These reservations were then authorized for future economic development. As discussed above, the legislation authorizing the reservations does not provide for them to sunset; instead, they were to be set aside for future economic development. To be consistent with this intent, the Commission should not revisit determinations that were already made authorizing these reservations. Instead, the Commission's review should be limited to continued consistency with the reservation statutes and existing law.

To capture the intent of the legislature in creating water reservations, we recommend the following changes to the proposed OAR 690-079-0160(7) language:

In considering an application to extend a reservation, the Commission shall review information in the application, comments received, and the recommendations of the Department. The Department ~~may~~ **must** extend the reservation, unless the Commission determines the reservation is no longer consistent with ORS 537.356 or existing law with ORS 536.310 or with the rules of the Commission.

We urge the Commission to ensure consistency with the reservation statute and adopt the suggested changes to OAR 690-079-0160(7).

*2. The Temporary Division 079 Rule Should be Modified to Be Consistent with ORS 537.249.*

We also encourage the Commission to ensure that it is clear regarding the interaction of the temporary rules with the broader Division 079 rules. By its plain language, Division 079 only applies to reservations created under ORS 537.356. As discussed above, Division 079 was never updated to include procedures for processing applications for reservations received under ORS 537.249. In the temporary Division 079 rules, the department proposes the following clarification in the purpose section to provide context for the changes to the Division 079 rules:

(3) Notwithstanding subsection 1 and 2 of this section, and except as provided in OAR 690-079-0160, OAR 690-079-0010-0150 do not apply to requests for extensions of reservations received by the Department in September 2015, which were originally established pursuant to ORS 537.249. See OAR 690-079-0010.

The language proposed by the department suggests that Division 079 may otherwise be applicable for processing applications or requests for extension received under ORS 537.249. As discussed above, the rules were never amended to implement ORS 537.249. As such, Division 079 does not apply to applications or extension requests for water reservations made under ORS 537.249. The Commission should revise the rule to make it clear that, as currently drafted, Division 079 does not apply to applications or extension requests under ORS 537.249. We recommend the following change to address this issue:

OAR 690-079-0010

(3) Except as provided in OAR 690-079- 0160, OAR 690-079-0010-0150 does not apply to requests for extensions of reservations received by the Department in September 2015, which were originally established pursuant to ORS 537.249.

Thank you again for the opportunity to comment on the proposed temporary Division 079 rules.

Sincerely,



Mary Anne Nash  
Public Policy Counsel  
Director of Regulatory Affairs  
Oregon Farm Bureau Federation  
maryanne@oregonfb.org  
(541) 740-4062



Martha Pagel  
Schwabe, Williamson & Wyatt  
Representing the Oregon Cattlemen's Association and Burnt River Irrigation District  
mpagel@schwabe.com  
(503) 540-4260

**SMITH Cindy S**

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**From:** Danette Faucera <danette.l.faucera@state.or.us>  
**Sent:** Monday, November 16, 2015 3:42 PM  
**To:** rule-coordinator  
**Subject:** ODFW comments for Amending OAR Division 079 and Adding New Provisions

The Oregon Department of Fish and Wildlife submits the following correction:

**690-079-0160 Extension of Reservation Requests Received in September 2015**

**(6) The Department shall provide notification, accept public comment, and hold hearings as provided in ORS 183.335, ORS 536.300(3), and OAR 690, Division 1. Notice shall also be provided to Oregon Department of Environmental Quality, Oregon Departments of Fish and Wildlife, Oregon Parks and Recreation Department, and Business Oregon. The public comment period shall be no less than 30 days.**

*Danette*

**Danette Faucera  
Water Policy Coordinator  
Oregon Department of Fish and Wildlife  
(503) 947-6092  
4034 Fairview Industrial Drive SE  
Salem, OR 97302**

**SMITH Cindy S**

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**From:** Lauren Smith <laurens@owrc.org>  
**Sent:** Monday, November 16, 2015 12:33 PM  
**To:** rule-coordinator  
**Cc:** 'April Snell'  
**Subject:** Division 079 OWRC Comments Nov 16 2015  
**Attachments:** Division 079 OWRC Comments Nov 16 2015.pdf

Good Afternoon:

Attached please find Oregon Water Resources Congress' comments on "Establishing Procedures to Consider Pending Applications to Extend Burnt River Reservations—Amending OAR Division 079 and Adding New Provisions." If you have any questions or concerns, please do not hesitate to contact me.

Thank you,

**Lauren Smith**  
***Policy Coordinator***  
***Oregon Water Resources Congress***  
795 Winter St. NE  
Salem, OR 97301  
Email: [laurens@owrc.org](mailto:laurens@owrc.org)  
Phone: (503) 363-0121  
Fax: (503) 371-4926  
[www.owrc.org](http://www.owrc.org)



## Oregon Water Resources Congress

795 Winter St. NE | Salem, OR 97301 | Phone: 503-363-0121 | Fax: 503-371-4926 | [www.owrc.org](http://www.owrc.org)

November 16, 2015

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

**Re: Establishing Procedures to Consider Pending Applications to Extend Burnt River Reservations—Amending OAR Division 079 and Adding New Provisions**

Dear Ms. Rancier:

The Oregon Water Resources Congress (OWRC) is submitting comments on the “Establishing Procedures to Consider Pending Applications to Extend Burnt River Reservations—Amending OAR Division 079 and Adding New Provisions,” released on November 12, 2015. OWRC is highly supportive of the agricultural reservation program and wants to ensure that the foresight of the Oregon Legislature in setting aside water for storage for future economic development is preserved. While we appreciate the effort in drafting the temporary rules under such a short timeframe, as drafted the rules do not completely reflect the importance of the program and would allow for an overly subjective approach to approving an extension of a reservation. A slight language change would better clarify that the Water Resources Commission (WRC) will rely on the presumption that there *shall* be an extension so long as the reservation remains consistent with the program and rules of the Commission. While the rules before the Commission are temporary and apply only to the Burnt River reservation, it would be beneficial to have clear language to use as the basis for the upcoming permanent rulemaking process for extending agricultural reservations.

OWRC is a nonprofit association representing irrigation districts, water control districts, improvement districts, drainage districts and other local government entities delivering agricultural water supplies. These water stewards operate complex water management systems, including water supply reservoirs, canals, pipelines, and hydropower production, and deliver water to roughly 1/3 of all irrigated land in Oregon. OWRC has been promoting the protection and use of water rights and the wise stewardship of water resources on behalf of agricultural water suppliers for over 100 years.

We suggest that the proposed rule language be modified slightly to clarify that the presumption is that the reservation of water continues to be consistent with the legislative intent under which it was created and remains an important piece of Oregon's water supply future. When the Legislature created the agricultural water reservation program, they did not place expiration dates on the reservations of the water; the expiration date, and now the extension provisions, are a creation of a complex and often outdated set of administrative rules. If the reservations must go through an application for extension process, that process should be clear and

*The mission of the Oregon Water Resources Congress is to promote the protection and use of water rights and the wise stewardship of water resources.*

objective. It should not be a venue to argue the validity of the original reservation or reevaluation of "public interest;" those pieces were hashed out during the legislative process. It is no accident that agricultural reservations were developed alongside the instream water right program and as such should be considered as an equally important component to a balanced water program in Oregon. Additionally, when someone does apply for a permit to utilize the reservation of water, at that time, the reserved water will undergo extensive water right permitting review and other requirements under Oregon law, including a public interest review.

Specifically, OWRC would prefer 690-079-0169(7) to read:

"In considering an application to extend a reservation, the Commission shall review information in the application, comments received, and the recommendations of the Department. The Department *shall* extend the reservation, unless the Commission determines the reservation is no longer consistent with ORS 536.310 or with the rules of the Commission."

The inclusion of the word "shall" rather than the current proposed term "may," provides greater consistency with the original legislative intent that these reservations remain until such time they are needed for economic development, and also provides some certainty for a potential applicant to rely on possibility of the reservation of water as a component of a water project. As you are aware, the development of a water storage project takes years and if the reservation of water is nearing a point where it will be up for an extension, infusing uncertainty that the Commission may not extend the reservation could derail a potentially beneficial project from being funded or moving to the next phase of feasibility.

Finally, we would like to point out that there is no harm in extending agricultural reservations. Today, all of the water reserved under this program is protected instream as it is not available for appropriation. Until such time that an innovative project comes to fruition, with adequate funding and ability to meet complex permitting requirements, this water will remain instream, benefitting the environment. As we look to the future and the water investment programs Oregon Water Resources Department now operates, these reservations could play a hugely important role in meeting Oregon's diverse water needs. Agricultural reservations present a unique opportunity that several communities could utilize as part of Place-based planning discussions, creating ideas that can be refined using feasibility funding, and then implemented using funds from the new SB 839 program. The challenge of meeting Oregon's current and future water needs necessitates a long-term strategy and the reservations of water set aside by the legislature 20 years ago will continue to be an important part of that strategy.

Thank you for the opportunity to comment on the draft rules for "Establishing Procedures to Consider Pending Applications to Extend Burnt River Reservations—Amending OAR Division 079 and Adding New Provisions." Adopting clear and objective rules for the extension of this and other reservations will preserve the legislative intent that the reservations remain in place, as well as the vast potential benefits the applications of the reserved of water have to Oregon's economy, environment and rural communities. Please do not hesitate to contact me if you have any questions about our comments or would like to discuss this issue further.

Sincerely,  
April Snell  
Executive Director



*Not Just  
Another  
Dam  
Project*

# Burnt River Irr. District

19498 Hwy 245  
Hereford, Or. 97837

Mail to: PO Box 825  
Baker City, Or 97814

541-446-3313 Office  
541-519-4665 Manager (Cell)  
208-949-7393 Secretary  
briver@ortelco.net  
morganwc@q.com

November 16, 2015

Rule Coordinator  
Oregon Water Resources Department  
725 Summer Street NE, Suite A  
Salem, Oregon 97301-1271  
rule-coordinator@wrdd.state.or.us

Re: Comments on Temporary Division 079 Rulemaking - November 19, 2015 Commission Meeting

**Chair Roberts, Director Byler, and Members of the Commission,**

Thank you for the opportunity to submit comments on the proposed temporary rule changes to Division 079 designed to facilitate the extension of water reservations in the Burnt River Subbasin.

The Burnt River Irrigation District Board of Directors and patrons had been very instrumental in the original process of establishing the rules, 20 years ago, for the Reservation of Water in Burnt River and the Powder River Basin. Over the last 20 years some things have changed, but the need for water and economic stability has undoubtedly increased due to many factors. These factors include varying climate conditions, drought, increased costs, loss of timber based jobs, and the increased demand for water just due to the increase in population. Thus, moving forward into the future makes the extension of these reservations as important, if not more important, than the previous 20 years.

We (Burnt River Irrigation District and Baker County) have made every effort to pursue exercising these Reservations by developing storage projects on both the North and South Forks of the Burnt River and other locations in the Powder Basin, unfortunately, financial and regulatory restrictions and constraints have made it difficult to move forward with development of these water reservations. The Irrigation District has gone as far as purchasing the land for the South Fork project, and has put forth considerable effort, time, and money towards the feasibility and development of a project. The irrigated lands on both the South and North Forks are severely short on receiving the full amount of righted water, and unable to adequately irrigate crop and pasture lands. This shortage severely restricts the landowner's ability to provide economic stability to themselves and the economic stability of Baker County.

The addition of a multipurpose storage project, and the water associated with, would not develop a lot of new water righted ground, but would provide the owners of existing righted ground the ability to increase the production of the existing crops of Alfalfa, wild meadow hay and pasture lands. The growing season in the Burnt River area is not conducive to growing crops of more value, but the need to extend the water delivery season to closer meet the needs of the existing crops and the growing season is of great economic value. Also the other benefits of more water would be to Fish, Wildlife, water quality, and overall riparian health.

Thank you for your understanding and considerations in this important matter. Also, we encourage you to adopt rules that will help protect the original spirit and intent of the reservations as these reservations are critical to the economic future of Baker County and the Burnt River Irrigation District.

Sincerely,  
Burnt River Irrigation District Board of Directors and Patrons

  
By Wesley Morgan (Manager)



November 16, 2015

Rule Coordinator  
Oregon Water Resources Department  
725 Summer Street NE, Suite A  
Salem, Oregon 97301-1271  
rule-coordinator@wrд.state.or.us

Baker County Farm Bureau - Comments on Temporary Division 079 Rulemaking

Chair Roberts, Director Byler, and Members of the Commission,

Thank you for the opportunity to submit comments on the temporary Division 79 rulemaking. The Baker County Farm Bureau is very supportive of the extensions of the reservations in the Burnt River Subbasin, and urges you to adopt rules that help facilitate these extensions. With increasing drought frequency in Oregon, it has never been more essential that we have a reliable water supply to meet our agricultural and municipal needs in the Powder River Basin.

It is my understanding that the temporary rulemaking will provide the standards under which the reservation extension requests are processed for the Burnt River Subbasin. As such, we feel it is important that the rules recognize that water reservations were intended to protect the water necessary for future economic growth, and serve as a counter balance to the instream water rights which are pending in this basin. Given that the reservations were intended to protect and make water available for future economic growth, we think that it is essential that the process for extending these reservations is streamlined, and focuses only on whether the reservation is still consistent with the reservation statutes and other existing law. If these conditions are met, extensions of the reservations should be mandatory.

We appreciate your work to ensure that these valuable reservations are protected and made available for future use. Our need for this water has never been greater, and the water is essential for the continued economic prosperity of our county.

Sincerely,

  
Logan Kerns  
Baker County Farm Bureau President



November 16, 2015

Racquel Rancier  
Water Resources Department  
72 Summer Street NE, Ste. A  
Salem, OR 97301-1271

Re: Comments, Draft Temporary Rules Governing Reservation Extensions, Division 079

Dear Raquel,

Thank you for the opportunity to comment on the Division 79 draft temporary rules. WaterWatch's comments will be brief given the short amount of time allowed for review/comment.

As a general matter, the Water Resources Department and Commission have known for quite some time that certain reservations were set to expire in the near future (i.e. this subject was an agenda item at the August 2014 Oregon Water Resources Commission meeting). Given this, we do not believe that temporary emergency rule with its truncated public notice/comment period is justified.

As to the specifics of the proposed rules, as we understand it, the Division 079 draft temporary rules are to govern the processing of the extension of the Burnt River Reservations, which are set to expire in March 2016. These rules are not meant to determine policy decisions with regard to that extension but rather to set forth a process for WRC consideration of the extension. Given that, our comments will be limited to process points.

(1) Priority date of storage projects under the reservation, Section (3): Section (3) states that "an approved time extension shall retain the priority date of the original reservation." This is not a process question, but rather a policy question. The statutes governing the Burnt River Reservation do not grant water rights under the reservation the priority date of the reservation. See ORS 537.249 as compared to ORS 537.358. This is something that was a discussion point at the time of the Burnt River Reservation, and, for transparency reasons, should be considered by the Commission in reviewing the Burnt River extension application where there is the opportunity for a full public review and comment.

In discussions in the RAC, the rationale for including this was that it was intent of the Department and prior enumeration of extensions in OAR 690-079-0050 (which sets for the term of the reservations and extension). Our concern with this rationale is that it appears the Department is relying on select provisions of the old rules that governed the term of the reservation and extension, but not others. For instance, OAR 690-079-0050 also sets forth the

process for periodic review of the reservations at which time the Commission could “require the applicant to provide evidence that the purpose, intent and amount of the reservation still meet the public interest standards of OAR 690, Division 11.” Moreover, that same section (OAR 690-079-005) also required the Commission to subject an extension to all rule requirements and standards governing review of initial reservations. Yet, despite that, largely because of adamant opposition by the user community, nowhere in the temporary rules are these important rule provisions carried over. This strikes us as inequitable.

(2) Application Requirements, Section (4): The application for an extension should require documentation as to whether the required checkpoints under the original reservations were met. The Department and Commission were very deliberate in their adoption of check in points for the Burnt River Reservation and included the following rationale in requiring these reports:

- During a five year review of the reservation, the Commission shall assess whether progress is being made on the reservation and whether it is in the public interest to continue the reservation.
- The reports will provide information on the continued need for the reservation, the quantities of water allocated to each type of use and a description of why the reservations continue to be in the public interest.

See Staff Report to the Commission, Addendum to Agenda Item D, March 8, 1996, page 3, under “Terms of Reservation and Periodic Review”. WaterWatch raised this in RAC.<sup>1</sup> The proposed draft rules ignore this point in its entirety (application requirements/standard of review).

(3) Standards of extension, Section (7):

- May vs. Shall: We strongly support the use of the word “may” in the proposed review, as suggested in the draft rule. We would oppose the use of the word “shall”. The WRC should retain discretion on this matter.
- Items for Commission review: While WaterWatch supports the WRC review of the application, comments received and the recommendations of the Department, we do not believe that WRC review should be limited to this list. In other words, it should not be an exhaustive list. We would suggest adding the words “including but not limited to” so the WRD retains authority as to what information it might want to put in front of the Commission for consideration in the WRC’s decision making (i.e. past staff reports, the reservation itself, etc). As written, commenters could put this information in front of the Commission but the WRD would arguably be limited to a recommendation.
- Burden of Proof: As written, the burden is on commenters to prove to the WRC that a proposed reservation is inconsistent with ORS 536.310 or with rules of the Commission. We would suggest that instead the Commission be required to make an affirmative

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<sup>1</sup> Note: WaterWatch was the only conservation group serving on the RAC.

finding that the extension of the reservation is in fact consistent with ORS 536.310 and the rules of the commission (in addition to standards noted below).

- Standards of Review: We support the inclusion of ORS 536.310 and rules of the Commission; however, we think the standards should be broadened to include the rule requirement and standards in place at the time of adoption, and at time of review (whether or not that review actually took place).

It should be noted that the governing statute does not speak to extensions at all; allowing extensions is purely a carry-over from the OAR 690- 79-005 rules. Importantly, the Division 79 rules required the Commission to apply the rule requirements and standards applied at the time of the reservation. In other words, the WRC retained the power for a wholesale relook at the reservation before making a decision on an extension. The Commission should retain that power here.

Additionally, as noted earlier the Burnt River Reservations contained directives requiring periodic reporting and review of the reservation. According to the 1996 staff report upon which the Commission approved the Burnt River Reservation, the Commission was to conduct these periodic reviews to determine whether the reservation continued to be in the public interest. These required reviews never happened. Thus, at the very least, the public interest criteria that would have applied at the check points should apply to any extension.

- Conditions of approval: While implicit in the Commissions powers under the basin planning statutes, the rules governing the extension process should make clear that the Commission can add conditions to reservations to ensure the use is consistent with ORS 536.310 and other laws/rules of the Commission, among other factors.
- Decision maker: The Commission should be the decision maker, as written it reads that the Department may extend the reservation.<sup>2</sup>

Conclusion: Again, it is important to note that this is a process rulemaking and we urge the Commission to focus on that aspect of the rules (especially given the very short time period for public comment).

On that note, we anticipate that the Commission will receive comments with regard to larger policy questions surrounding reservations. In the RAC meetings a number of agricultural and/or irrigation groups equated reservations to instream water rights as a reason to greatly narrow the process that applies to extensions of reservations. Reservations are not water rights, thus this comparison is misplaced.<sup>3</sup> The Commission is not being asked to review storage rights that have

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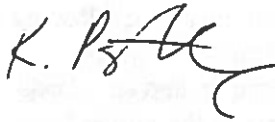
<sup>2</sup> This is likely just a typo as the rest of Section 7 references the Commission.

<sup>3</sup> It should also be noted that 15 instream water right applications in the Powder basin were protested by irrigation interests in the early/mid-1990s. These have still not been resolved, thus any assertion that instream flows for fish are currently protected by instream water rights is incorrect.

already been granted. That would be a different matter altogether. If reservation extensions are to move forward, we believe the Commission should hold broad authority to review, condition and make a final decision on any extensions.

Thank you for your consideration of our comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'K. Priestley', with a stylized flourish at the end.

Kimberley Priestley  
Senior Policy Analyst

## SMITH Cindy S

---

**From:** RANCIER Racquel R  
**Sent:** Tuesday, November 17, 2015 10:01 AM  
**To:** SMITH Cindy S  
**Subject:** Fwd: Burnt River reservations

Sent from my iPhone

Begin forwarded message:

**From:** ENRIGHT Diana M <[diana.m.enright@state.or.us](mailto:diana.m.enright@state.or.us)>  
**Date:** November 16, 2015 at 1:51:22 PM PST  
**To:** RANCIER Racquel R <[Racquel.R.RANCIER@state.or.us](mailto:Racquel.R.RANCIER@state.or.us)>  
**Subject:** FW: Burnt River reservations

Not sure if anyone else is forwarding comments to you...

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**From:** Pat & Anna Sullivan [<mailto:buckmup@ortelco.net>]  
**Sent:** Sunday, November 15, 2015 1:52 PM  
**To:** rule-coordinator  
**Subject:** Burnt River reservations

To the Commission:

Thank you for the opportunity to comment on these very important reservations that will provide multiple benefits to our community, the agriculture industry and water quality in our sub basin.

As a rancher and water user that already has my water supplied to me by Unity Reservoir the additional irrigation water that would be provided through new storage facilities probably wouldn't be as important to me as it would be to my neighbors and the lands that are not covered by Unity Reservoir. However the benefits of additional water to multiple other issues that our sub basin is faced with makes new storage facilities very important to me and my family.

New facilities would provide jobs to our community not only in the construction of the dams but also in the management of the systems along with the recreation opportunities that they will provide.

New facilities will supply more control and management of this sub basin water resource and will provide more water to the basins that Burnt River flows into along with a certain amount of flood control.

As a Burnt River agriculture water quality committee member the additional flows and control that will be provided through new storage facilities will have a direct and positive impact on our water quality and will enhance our ability to meet our goals.

Once again thank you for this opportunity to comment. In general I support any thing that preserves our water reservation in the Burnt River sub basin and if I can help in any way I would be happy to do so.

Pat Sullivan  
25501 Hwy 245; Hereford OR 97837  
541 446 3399

**DIVISION 079 TEMPORARY RULES**  
**DRAFT SHOWING CHANGES MADE TO PUBLIC COMMENT DRAFT OF RULES**

After reviewing the public comments, the Department made changes to the rules. These changes are highlighted for the Commission below in red. Strikethrough and red means language was removed after the public comment period. Bold and red means language was added after the public comment period. Bold and underlined in black print are changes that were originally proposed in the public comment draft and were not changed.

**690-079-0010**

**Purpose**

(1) This Division establishes the procedure for state agencies to request reservations of water for future economic development pursuant to ORS 537.356.

(2) These rules shall apply to all reservation requests received by the Department after June 30, 1989. Notwithstanding the provisions of OAR 690-079-0040 to 690-079-0150, any reservation for which a request is received by the Department prior to June 5, 1992, and which is approved under these rules, shall receive a priority date of June 5, 1992, provided information that conforms to the provision of OAR 690-079-0060 are received by the Department prior to January 1, 1995. For purposes of this rule, the request for a reservation of water in the Willamette Basin for municipal purposes and the request for a reservation of water in the Willamette Basin for agricultural purposes, both of which were referenced in the Commission's Willamette Basin Plan as adopted on January 31, 1992, shall be considered requests received by the Department prior to June 5, 1992.

**(3) ~~Notwithstanding subsection 1 and 2 of this section, and This Division also establishes temporary procedures to consider applications to extend reservations as provided in OAR 690-079-0160. Except as provided in OAR 690-079-0160, OAR 690-079-0010 — to 0150 do not apply to requests for extensions of reservations received by the Department in September 2015, which were originally established pursuant to ORS 537.249.~~**

**690-079-0160**

**Extension of Reservation Requests Received in September 2015**

(1) **This section was adopted by temporary rulemaking to establish a process to consider pending applications submitted in September 2015 to extend reservations established under ORS 537.249 that are set to expire in March 2016.**

(2) **Notwithstanding OAR 690-079-0020 to 690-079-0150, and except as specifically stated in this section, applications to extend reservations established in OAR Chapter 690, Division 509 that were received by the Department in September 2015, shall be processed according to the provisions in this section.**

- (3) Prior to termination of the approved term of reservation, the applicant may apply for a time extension of up to 20 years from the expiration date established in rule. An approved time extension shall retain the priority date of the original reservation.
- (4) An application for an extension shall contain the information required in OAR 690-079-0060.
- (5) If the applicant for an extension of a reservation made the election in ORS 537.249(2) to establish the reservation by rule, then an extension of a reservation must also occur by a rulemaking that amends the applicable basin program plan.
- (6) The Department shall provide notification, accept public comment, and hold hearings as provided in ORS 183.335, ORS 536.300(3), and OAR 690, Division 1. Notice shall also be provided to Oregon Department of Environmental Quality, Oregon Department of Fish and Wildlife, Oregon Parks and Recreation Department, and Business Oregon. The public comment period shall be no less than 30 days.
- (7) In considering an application to extend a reservation, the Commission shall review information in the application, comments received, and ~~recommendations of the Department~~ **information and recommendations provided by the Department**. ~~The Department Commission shall may~~ **extend the reservation, unless the Commission determines the reservation is no longer consistent with ORS 536.310 or with the rules of the Commission.**



**DIVISION 079 TEMPORARY RULES**  
**Proposed Final Rules for Commission Consideration**

**Bold and Underlined** = New Text

**690-079-0010**

**Purpose**

(1) This Division establishes the procedure for state agencies to request reservations of water for future economic development pursuant to ORS 537.356.

(2) These rules shall apply to all reservation requests received by the Department after June 30, 1989. Notwithstanding the provisions of OAR 690-079-0040 to 690-079-0150, any reservation for which a request is received by the Department prior to June 5, 1992, and which is approved under these rules, shall receive a priority date of June 5, 1992, provided information that conforms to the provision of OAR 690-079-0060 are received by the Department prior to January 1, 1995. For purposes of this rule, the request for a reservation of water in the Willamette Basin for municipal purposes and the request for a reservation of water in the Willamette Basin for agricultural purposes, both of which were referenced in the Commission's Willamette Basin Plan as adopted on January 31, 1992, shall be considered requests received by the Department prior to June 5, 1992.

**(3) This Division also establishes temporary procedures to consider applications to extend reservations as provided in OAR 690-079-0160. Except as provided in OAR 690-079-0160, OAR 690-079-0010 to 0150 do not apply to requests for extensions of reservations received by the Department in September 2015, which were originally established pursuant to ORS 537.249.**

**690-079-0160**

**Extension of Reservation Requests Received in September 2015**

- (1) This section was adopted by temporary rulemaking to establish a process to consider pending applications submitted in September 2015 to extend reservations established under ORS 537.249 that are set to expire in March 2016.**
- (2) Notwithstanding OAR 690-079-0020 to 690-079-0150, and except as specifically stated in this section, applications to extend reservations established in OAR Chapter 690, Division 509 that were received by the Department in September 2015, shall be processed according to the provisions in this section.**
- (3) Prior to termination of the approved term of reservation, the applicant may apply for a time extension of up to 20 years from the expiration date established in rule. An approved time extension shall retain the priority date of the original reservation.**

- (4) **An application for an extension shall contain the information required in OAR 690-079-0060.**
- (5) **If the applicant for an extension of a reservation made the election in ORS 537.249(2) to establish the reservation by rule, then an extension of a reservation must also occur by a rulemaking that amends the applicable basin program plan.**
- (6) **The Department shall provide notification, accept public comment, and hold hearings as provided in ORS 183.335, ORS 536.300(3), and OAR 690, Division 1. Notice shall also be provided to Oregon Department of Environmental Quality, Oregon Department of Fish and Wildlife, Oregon Parks and Recreation Department, and Business Oregon. The public comment period shall be no less than 30 days.**
- (7) **In considering an application to extend a reservation, the Commission shall review information in the application, comments received, and information and recommendations provided by the Department. The Commission shall extend the reservation, unless the Commission determines the reservation is no longer consistent with ORS 536.310 or with the rules of the Commission.**