



Oregon
Kate Brown, Governor

Water Resources Department
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MEMORANDUM

TO: Water Resources Commission

FROM: Thomas M. Byler, Director

SUBJECT: Agenda Item B, April 13, 2016
Water Resources Commission Meeting

**Consideration of Adoption of Oregon Administrative Rules 690, Division 79:
Procedures for Extending Reservations**

I. Introduction

Oregon Administrative Rules (OAR) 690, Division 79, outline procedures for considering extensions of reservations; however, these rules are out of date. At the November meeting, the Commission adopted temporary Division 79 rules in order to consider the requests to extend the Burnt River Reservations, while the Department worked on permanent Division 79 rules. At the February Commission meeting, staff provided an update on the permanent Division 79 rulemaking.

During this agenda item, the Commission will consider adoption of the permanent Division 79 rules that outline procedures to consider extensions of reservations of water for future economic development.

II. Background

A reservation of water for future economic development establishes a priority date and sets aside a quantity of water for storage to meet future needs. A water right permit must be subsequently obtained in order to use water under a reservation. As discussed in detail in the November 2015 staff report, the existing permanent Division 79 rules, which outline procedures to establish and extend reservations, have not been updated since 1992 and 1993, before the statutes governing reservations were amended in 1995 and 1997; therefore, they are inconsistent with subsequent statutory changes.

While the procedures for processing reservations are outlined in the Division 79 rules, the actual reservations of water reside in Basin Program Rules. Basin Programs with reservations that sunset include Grande Ronde, Hood River, Malheur, Malheur Lake, Owyhee, and Powder River. As outlined in Attachment 1, many of these reservations are scheduled to sunset within the next 12 months, without further action by the Commission. It is because of this timing need that the Commission is asked to consider updating the rules at the April 13 special meeting.

The rulemaking currently before the Commission proposes to amend the Division 79 rules through a permanent rulemaking process to establish the procedures for processing future requests for extensions. The Draft Proposed Rules are included in Attachment 2.

In developing these rules, the Department convened a Rules Advisory Committee. Representatives included: Oregon Farm Bureau, Burnt River Irrigation District, Oregon Department of Agriculture, WaterWatch of Oregon, Oregon Department of Fish and Wildlife, Oregon Water Resources Congress, Oregon Cattlemen's Association, League of Oregon Cities, Special Districts Association of Oregon, and Association of Oregon Counties. The Rules Advisory Committee provided input on the rules, but was not asked to achieve consensus.

At the February Commission meeting, the Commission adopted rules to extend the Burnt River Reservations in the Powder Basin Program, using procedures outlined in the temporary Division 79 rules. This was the first time the Commission had to consider extending a reservation. During that meeting, staff also provided a comparison of how the permanent Division 79 rules compared to the temporary Division 79 rules. An excerpt from that staff report is included in Attachment 3 for your convenience.

The public comment period was open between February 1 and March 4, 2016, and public hearings were held in Baker City and Salem. Attachment 4 includes written comments received and Attachment 5 includes a transcript of the public hearing in Salem. No comments were received at the Baker City hearing.

III. Discussion

Changes made to the public hearing draft: Public comments were reviewed to determine whether changes to the rules were needed. The Department's response to public comments are included in Attachment 6. No changes were made to the public hearing draft of the rules as a result of the public comments. As discussed above, this means that the temporary Division 79 rules are similar to the public hearing draft of the proposed Division 79 permanent rules.

After the public comment period closed, staff realized that section 60 of the Division 79 rules was titled "Information Requirements, and that the new section 170 of the public hearing draft was also titled "Information Requirements." As a result, the draft of the proposed final rules was modified. Section 170 is now titled "Information Requirements to Request Extension of Reservations in Rule."

Summary of Rules: The proposed changes to the Division 79 rules address procedures to consider extension of reservations that are established in rule and are set to sunset. Key features of the rules and changes include:

1. Removes of language that makes the provisions temporary and applicable only to the Burnt River Reservations.
2. Applies to all requests to extend reservations established in rule.

3. Allows for extensions up to 20 years, which enables the Commission to check-in on the reservations and ensure they are still consistent with policy, while also providing water developers with time to make progress as storage projects can take a long time to develop.
4. Reservations would maintain their original priority date when extended.
5. Establishes a new section that addresses information requirements that are specific to extensions. The changes to the information requirements were the result of recommendations from the Rules Advisory Committee and questions asked by the Commission about the Burnt River Reservations. These changes should provide for a more efficient process, while also ensuring that essential information is obtained.
6. Does not address other sections of the Division 79 rules that are also outdated. Future efforts will need to address the process for establishing new reservations, as well as determine if other existing provisions regarding extensions can be repealed. Upon advice from the Rules Advisory Committee and after considering time constraints, it was determined that these matters should not be addressed during this rulemaking.
7. The permanent rules allow the Commission to extend the reservation unless it determines that the reservations are no longer consistent with ORS 536.310 and rules of the Commission. The rules also specify that the Commission may modify or condition the reservations to ensure that they remain consistent with ORS 536.310 and the purposes of reserving water for future economic development. This is appropriate, as the Commission is prohibited from adopting rules that are inconsistent with ORS 536.310 (see ORS 536.320(3)) and is directed to consider ORS 536.310 in basin program rulemaking. In addition, it is appropriate to ensure that a reservation continues to meet the “purposes of reserving water for future economic development.”
8. The rules require a minimum 30-day public comment period, and require relevant state agencies to be notified.

IV. Conclusion

At the May meeting, staff will provide an overview of the status of reservations and describe efforts that are underway. In the meantime, these rules are necessary for the Department to consider requests to extend reservations of water that will sunset later this year and in the coming years.

V. Alternatives

The Commission may consider the following alternatives:

1. Adopt the proposed rules in Attachment 2.
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 Director recommends Alternative #1 to adopt the proposed rules.

Attachments:

Attachment 1 – Reservations Established in Rule with Sunset Dates

Attachment 2 – Proposed Division 79 Rules

Attachment 3 – Excerpt from February Staff Report Comparing Division 79 Draft Permanent Rules and Temporary Rules

Attachment 4 – Written Public Comments Received for Division 79 Rules

Attachment 5 – Summary of Oral Comments from Public Hearing

Attachment 6 – Department's Response to Public Comments Received

Racquel Rancier
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Reservations in Rule with Sunset Dates*

Hood Basin Program (OAR Division 504)**Expiration: October 17, 2016***Reservation**Quantity (acre-feet)*

West Fork Hood River Subbasin (690-504-0110)	9,000
East Fork Hood River Subbasin (690-504-0120)	50,000
Neal Creek Subbasin (690-504-0130)	5,000
Mosier Creek Subbasin (690-504-0140)	6,400
Eightmile Creek Subbasin (690-504-0150)	4,000
Fifteenmile Creek Subbasin (690-504-0160)	8,500

*Total**82,900 acre-feet***Powder Basin (OAR Division 509)****Expiration: March 8, 2036 (0110-0130)
May 26, 2020 (0140-0160)***Reservation**Quantity (acre-feet)*

South Fork Burnt River (690-509-0110)	17,800
North Fork Burnt River (690-509-0120)	6,500
Burnt River Subbasin (690-509-0130)	2,000
Pine Creek Subbasin (690-509-0140)	10,000
Eagle Creek Subbasin (690-509-0150)	4,300
Powder River Subbasin (690-509-0160)	33,890

*Total**74,490 acre-feet***Grande Ronde Basin (OAR Division 508)****Expiration: February 7, 2017***Reservation**Quantity (acre-feet)*

Upper Grande Ronde Subbasin (690-508-0110)	26,900
Middle Grande Ronde Subbasin (690-508-0120) (Catherine Creek and tributaries above Ames Creek)	9,000

*Total**35,900 acre-feet*

*This does not include reservations in rule that do not have sunset dates.

Malheur Basin (OAR Division 510)**Expiration: January 7, 2017***Reservations**Quantity (acre-feet)*

690-510-0110

1. Malheur River and tributaries, excluding the North
Fork and South Fork Malheur Rivers and tributaries

35,000

2. South Fork Malheur River and tributaries

13,200

*Total**48,200 acre-feet***Owyhee Basin (OAR Division 511)****Expiration: January 7, 2017***Reservations**Quantity (acre-feet)*

Owyhee River and tributaries (690-511-0110)

60,000

*Total**60,000 acre-feet***Malheur Lake (OAR Division 512)****Expiration: July 1, 2029***Reservation**Quantity (acre-feet)*

Home Creek and tributaries (690-512-0100)

4,550

*Total**4,550 acre-feet*

*This does not include reservations in rule that do not have sunset dates.

DIVISION 79
RESERVATIONS OF WATER FOR FUTURE
ECONOMIC DEVELOPMENT

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 **established in basin program rules** as provided in OAR 690-079-0160. ~~Except as provided in OAR 690-079-0160,~~ OAR 690-079-002~~10~~¹⁰ to 0150 do not apply to requests for extensions of reservations ~~received by the Department in September 2015,~~ which were originally established **in basin program rules** pursuant to ORS 537.249 **or ORS 537.356.**

KEY

Red Strikethrough = Deletions to existing rule

Bold and Underlined = Additions to existing rule

Highlighted in Yellow = Change from Public Hearing Draft

690-079-0160

Extension of Reservations ~~Requests Received in September 2015~~

- (1) This section ~~was adopted by temporary rulemaking to~~ establishes a process ~~to consider pending applications submitted in September 2015 to~~ **consider** extending reservations **established in basin program rules pursuant to ORS 537.249 or 537.356**~~established under ORS 537.249 that are set to expire in March 2016 that are set to expire unless extended in rule by the Water Resources Commission.~~
- (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,~~ **established in basin program rules** 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 690-079-01~~06~~**70**.
- ~~(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)~~ (5) 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)~~ (6) 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 may extend the reservation up to 20 years unless the Commission determines the reservation is no longer consistent with ORS 536.310 or with rules of the Commission. The Commission may modify the reservation or include conditions as necessary for the reservation to remain consistent with ORS 536.310 and the purpose of reserving water for future economic development.**

KEY

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690-079-0170 Information Requirements to Request Extension of Reservations in Rule

Requests to extend reservations of water for future economic development shall include the following information:

- (1) Requestor name and address;**
- (2) Description of the existing reservation and applicable rule reference;**
- (3) Discussion of the continued current and future need for the reservation;**
- (4) Description of actions taken to advance development of the reservation;**
- (5) Discussion of challenges to developing the reservation;**
- (6) Description of actions that will need to be undertaken in the future in order to develop the reservation;**
- (7) Information on how the proposal is compatible with overall basin program goals and policies;**
- (8) Identification of affected local governments**
- (9) Copies of letters notifying each local government of the intent to file an extension request that includes a description of the reservation and statement that an opportunity to provide comment will be provided at a future date;**
- (10) Description of expected economic benefits;**
- (11) Information on whether the reservation exists above or within a Scenic Waterway;**
- (12) Statement that explains how the reservation and proposed water use(s) will promote the beneficial use of the water without waste.**

KEY

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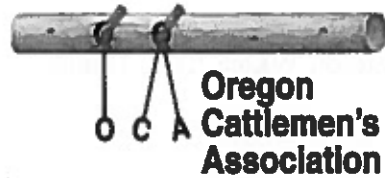
**Excerpt from February 25, 2016
Water Resources Commission Staff Report
Agenda Item B**

**III. Comparison Between Division 79 Temporary Rules and Draft Division 79
Permanent Rules**

During the November 2015 meeting, Commission members expressed an interest in ensuring that the Burnt River Reservations would be treated similarly to future extension requests. The temporary rules were used as the foundation for the Rules Advisory Committee to develop the permanent rules. As discussed below, the temporary Division 79 rules are similar to the public hearing draft of the proposed Division 79 permanent rules. The Commission will consider adoption of the permanent Division 79 rules in April, after the public comment period closes and staff have reviewed all comments to determine whether changes are needed.

A summary of similarities and differences between the rules include the following:

1. The permanent rules would apply to all requests for extensions, whereas the temporary rules apply only to the Burnt River Reservation requests.
2. Both rules allow for time extensions of up to 20 years, with the extended reservation retaining the priority date of the original reservation.
3. Both rules have the same notice, hearing, and public comment requirements, as well as the same information that the Commission can consider.
4. The permanent rules allow the Commission to extend the reservation unless it determines that the reservations are no longer consistent with ORS 536.310 and rules of the Commission. The rules also specify that the Commission may modify or condition the reservations to ensure that they remain consistent with ORS 536.310. While these provisions are not explicitly included in the temporary Division 79 rules, the provisions still apply to review of the Burnt River Reservations because the Commission is prohibited from adopting rules that are inconsistent with ORS 536.310 (see ORS 536.320(3)) and is directed to consider ORS 536.310 in basin program rulemaking.
5. The permanent rules also adjust information requirements for the application to extend the reservation, streamlining the extension process, and obtaining information that is useful to the Commission in decision-making. These changes are based on feedback the staff has received from the Commission, the Rules Advisory Committee, applicants, and staff members.



February 25, 2016

Diana Enright
Oregon Water Resources Department
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Re: Comments on Division 079 Rulemaking

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

Thank you for the opportunity to comment on the proposed changes to Division 079 designed to facilitate the extension of water reservations in five Oregon basins. This letter is submitted jointly on behalf of the Oregon Farm Bureau (OFB) and the Oregon Cattlemen's Association (OCA) 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 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 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

This rulemaking follows the temporary Division 079 rulemaking, and is designed to provide the standards and procedures for processing the extension requests for water reservations in five eastern Oregon subbasins, which expire in the next several years.

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 Division 079 Rules for Extension

In the 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 may extend the reservation up to 20 years unless the Commission determines the reservation is no longer consistent with ORS 536.610 or with rules of the Commission. The Commission may modify the reservation or include conditions as necessary for the reservation to remain consistent with ORS 536.310 and the purpose of reserving water for future economic development. *See* Proposed OAR 690-079-0160(6).

During the Rules Advisory Committee, OFB and OCA 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 be mandatory 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.

1. 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.

2. 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(6) language:

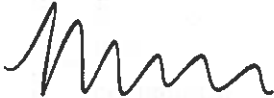
In considering an application to extend a reservation, the Commission must ~~may~~ extend the reservation up to 20 years unless the Commission determines the reservation is no longer

consistent with ORS 537.356 or existing law with ~~ORS 536.310~~ or with the rules of the Commission. The Commission may modify the reservation or include conditions as necessary for the reservation to remain consistent with ~~ORS 536.310~~ and the purpose of reserving water for future economic development.

We urge the Commission to ensure consistency with the reservation statute and adopt the suggested changes to OAR 690-079-0160(6).

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

Sincerely,



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March 4, 2016

Racquel Rancier
Water Resources Department
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Re: Comments, Draft Rules Governing Reservation Extensions, Division 079

Dear Raquel,

Thank you for the opportunity to comment on the Division 79 draft rules governing extensions of reservations for future economic development.

As stated in earlier comments regarding Reservation Extension temporary rules and/also the Burnt River Reservation extension rulemaking, as well as comments made in the RAC, we believe that if the state is going to extend reservations (not something found in statute) that the Commission should retain broad authority to take a wholesale review of the reservation. Much has changed in 20 years, and will change into the future, thus simply rubber stamping old reservations without evaluating new conditions such as changes in water availability due to climate change and/or newly listed species is, in our view, short sighted.

These rules fail to provide for this broad review and instead offer a very narrow lens to the Commission in their review of extension applications. In our view, this is due largely the effect of the make-up of the RAC.

With that said, we offer the following brief comments on the draft language as proposed.

OAR 690-079-0160(6)

- **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. This was discussed at length in the temporary rulemaking, with the WRC adopting rule language that says “may”.
- **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

- **Standards of Review:** We strongly support the inclusion of ORS 536.310 and rules of the Commission; however, we think the standards should be broadened to include the rule requirements and standards in place at the time of adoption.

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 governing extensions (found in OAR 690-79-005) required the Commission to apply the rule requirements and standards applied at the time of the reservation. In other words, absent these draft rules, 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.

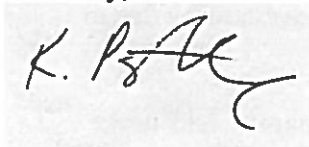
- **Conditions of approval:** We strongly support the recommended language makes clear that the Commission can add conditions to reservations to ensure the use is consistent with ORS 536.310 and other laws/rules of the Commission, among other factors.

690-079-0170 Information Requirements

Whether or not the applicant met existing rule requirements under the existing reservations (i.e. check points) should be a required piece of information in the application.

Thank you for your consideration of our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "K. Priestley", is written over a light gray rectangular background.

Kimberley Priestley
Senior Policy Analyst



*Not Just
Another
Dam
Project*

Burnt River Irr. District

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January 3, 2016

Rule Coordinator

Oregon Water Resources Department

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Salem, Oregon 97301-1271

rule-coordinator@wrdd.state.or.us

Re: Comments on Temporary Division 079 Rulemaking – February 25-26 Commission Meeting

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

Thank you for the opportunity to personally comment, in Baker City, on the proposed temporary rule changes to Division 079 designed to facilitate the extension of water reservations in the Burnt River Subbasin. Commissioner Corn, and Jason Spriet, Eastern Region Manager, facilitated the meeting which went very well.

The Burnt River Irrigation District Board of Directors and patrons have been very involved in the process of establishing the temporary rules. Lynn Shumway and I spent numerous hours on the phone participating in the Rules Advisory Committee, and I also attended the November Commission meeting. At the public testimony in Baker City we had overwhelming support from everyone in attendance. Not everyone felt comfortable testifying, but in visiting with those that didn't testify, they were all there to show their support.

I, and the patrons of the district, would like to reiterate that the Burnt River Irrigation District has 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 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.

Thank you again for the opportunity to voice my support, and for others to do the same. Your understanding and considerations in this matter is vital to the economy of the little town of Unity, patrons of the Burnt River Irrigation District, Baker County, and the state of Oregon. As we move forward into the future these reservations will no doubt become more and more important!

Sincerely,

Burnt River Irrigation District Board of Directors and Patrons

By Wesley Morgan (Manager)

**Oral Comments from Salem Rulemaking Hearing OAR 690, Division 79
Procedures to Extend Reservations of Water for Economic Development:**

April Snell: Chair Roberts, members of the Commission, for the record, April Snell, Executive Director of the Oregon Water Resources Congress, and I am here in support of the proposed Division 79 Rules, but also will make a few comments on the preceding discussion and some of the questions that came up around Division 509. I am a member of the RAC (Rules Advisory Committee) that has been working on this issue, and I think the continued confusion that members of the Commission have is indicative of the very complicated nature of this particular issue, where you have some various rules and some conflicting language and a lot of time that has elapsed since those were originally created. And so, it is quite understandable there are a lot of questions about this.

Burnt River Irrigation District is not of our members. Our interest is in ensuring that irrigated agriculture as a whole has an opportunity to utilize these Ag reservations as appropriate, and we are confident in what the group has come up with and what the staff recommendations are for those rules. And there will be more conversations to come as the other reservations that are set to expire come before this body and you make decisions. There are a few comments I would like to make in regards to some of the comments that were made previously, and I think some efforts on part of the group to obfuscate and otherwise further muddy the waters on an already complicated issue. The extension of an Ag reservation is not the same thing as a water permit, or any activity to actually put that water to use. It is simply putting that water aside for future use, and when Burnt River Irrigation District or any entity were to make use of that water, they would have to go through the standard water right process with all the appropriate standards, sideboards, and protection that every other water right entity has to go through. The notion that somehow the extension of this reservation would be detrimental is fairly unbased (sic). And it was mentioned in some of the written comments that you have that three are some in stream water rights that are being protested in this particular basin. Well, the effect of having an agricultural reservation, and your action of extending such reservation means that water is actually already in stream. Any available water is right there, because it is protected from being used by any other user currently in that particular basin. And that would apply to ones you are going to be looking in the future. So, for someone to say that somehow in stream is being negatively impacted, is completely unbased, and in fact this something that at the moment is benefitting the in stream environment. I won't speak for Burnt River because they are going to make comments on their own, but it's concerning to me that, well, just let me put it this way, 20 years ago, the world was a very different place. And the world that we are in today more complicated. And I think when these reservations were initially created alongside the in stream water rights, there was a notion that the State would be investing in water development and data management, and in stream and out of stream uses. And that investment did not happen. State agencies, including this Department and ODA had their budgets whacked for decades. It wasn't up until the last few years when Natural Resources Agencies, including ODA and Water Resources received additional funding. Funding for which in part allows them to have the staff to be able to look into these complicated issues that have otherwise been dormant over the past few years. And I know that there are many things that the Department has had to prioritize, and things that haven't got done, during those years where there wasn't the budget to support that. And so I would hope that there is some understanding of the fact that if an agency has not provided progress reports in the past, it's not because they don't have an interest in this, it is simply a factor of the resources. Additionally, a storage project is not an easy endeavor to do. It's not something, were I Warren Buffett, would I build a dam here in the Willamette Valley or on the east side? Maybe. But it would take longer than Warren Buffett probably has to live, and that is not a stretch at all. Some folks seem to think that storage projects just pop up overnight. That is a huge fallacy. The fact that there have not been storage projects from these various Ag reservations is a product of both funding, but

also the cultural and environmental and economic contest in which this State has evolved since the 80's and 90's when these statutes were passed. Now we're at this place where we need to be looking at what's best for the State as a whole and ensuring that there is water available for irrigated agriculture, for local communities, and for the benefit of the ecosystem that is done in tandem with local interests and ensuring that everybody's needs are met; not a single interest. And there are some groups who spend their whole entire life, simply sitting at the table to collect information and they use in a litigation, or they use to confuse the facts. And I encourage you to look closely at what your staff has provided you as far as the recommendations on these draft rules and that the extension of a reservation is simply putting aside, continuing to put that water aside, for future use. There simply, are no negative aspects, and any concerns there would be about how the water is going to be used would be utilized in the water permit process. And so, with that I will simply say, that this is a very complicated issue; it's one that has suffered from budget cuts and a time when we no longer have the people around that originally created these things, so we can't ask them what their intent was. But here we are today, and I think you guys have a good set of draft rules for you to consider. I'm sure you will get additional comments for this process, but it is something that is overly complicated on the face of it, but at the core of it, it's really simply ensuring that water is an option for someone to be able to put to use in the future. So with that, I will pause and see if there are any questions.

Commissioner Williams: I have a question. Just trying to visual where there is no storage being created. That's the goal. And so, your point was, if this water was reserved, its currently not being stored, just flowing through the river. So like in May, so long as that water runs, it is protected is what you are saying. So therefore, it basically enhances the in stream right in practice, not necessarily by law or intent, but by practice. Is that correct?

April Snell: I would agree with that, Commissioner Williams.

Chair Roberts: Thank you very much, April. Next person up, Mary Anne Nash, Farm Bureau.

Mary Anne Nash: Good morning, Chair Roberts and Commissioners. My name is Mary Anne Nash, here today on behalf of the Oregon Farm Bureau. I literally, just emailed in my comments, and I even think they are sitting in my outbox, and I am sorry I don't have written comments in front of you, but they are forth coming. But I will talk a little about what is in my comments and some of our framework for looking at water reservations, and this process going forward, because it is something you are going to continue hear about for the next several months. So we were a member of the RAC, and participated in the process from the beginning. Through that I have had extensive conversations with a lot of people who were around at the time that these reservations were developed and how I've come to think of them. As reservations were essentially the corollary and counterpart to in stream water rights, and so the thought was, if we are setting aside a lot of water in stream, we should also make sure that we have water for future economic development. I can definitely understand the desire and the concern around what has happened in the last 20 years, and what do we see looking ahead. I would urge you to focus on that next question, as April mentioned, there were a lot of factors that went into the fact that a lot of these reservations haven't gotten very far, not the least of which is cuts in agency budgets and considerable obstacles placed in the development of storage. The time that these reservations were created was around the time ESA lawsuits were ramping up and that ESA really became a litigation tool to stop this kind of development and really curtail water deliveries even from existing storage systems as we are seeing the attempt in Central Oregon right now. So there are considerable challenges to developing storage in Oregon right now. It's not an easy process and I think the development of these reservations will face a lot of challenges moving forward. When I talk to our members out in communities, they desperately see the need for this water and they really struggle with how they can engage to make it happen, particularly those who aren't members of Irrigation Districts and don't have a ready coalition. I view Place-Based

Planning as a really great opportunity for them to start engaging in these processes, and I've been pushing them to try and get involved in that process. But as we know, and that's just a pilot program this year, and hopefully we will see it expanded throughout the rest of the State, but there's no assurances of what is to come. When I step back and look at these reservations holistically, I would encourage you to view them as a corollary to in stream water rights, and not necessarily something that somebody has to come up in front of you and say, "I have this plan, and I have this idea in mind right now". But rather, "I'm in this area and I see future growth in this area, and we see agriculture expanding in this area, and we think we will need this water in the future, and we ask you to keep protecting it". As April mentioned, there is really no down side in continuing to set aside the water for future development, and it helps ensure we are balancing the in stream need with the out of stream needs in making sure we evaluating both long term looking forward.

I will get now into some specific comments on the Division 79 Rules. Throughout the RAC process, we advocated for, because these are extensions of rules and how we view in stream water rights, I still believe they shouldn't have ever had an expiration date. So if you are looking at water in stream, and looking at setting aside water for future needs, I can understand wanting a check-in, but it seems to me we should setting aside that water for future development whether its needed five years in the future or 25 years in the future. I continue to think it shouldn't have an expiration date, but should just be a reservation of water with maybe periodic check -ins.

One of the other comments we had, is looking at the conditions that the reservations are supposed to be evaluated against. I think it should just be the conditions of the reservations, and not necessarily of a full, fresh look at the basin plans, because again, these were already set aside for future needs. That evaluation already occurred, so this should be a quick check-in of, OK, is it still consistent with the purposes of the reservations, and consistent with our other existing laws. If so, then yes, we will grant this extension. Yes, we will continue to set aside this water.

So those were kind of our two comments; that the extension should be mandatory if conditions are met, and the analysis should only focus on continued consistency with existing law, and particularly with the reservation statute, and not necessarily a fresh look. With that, I will conclude and take any questions.

Chair Roberts: Thank you, Mary Anne. Next, Kimberley, WaterWatch.

Kimberley Priestley: For the record, my name is Kimberley Priestley, and I am here representing WaterWatch of Oregon. I don't have any prepared comments for today, but I just wanted to make a few clarifying points. First of all, I would agree with the Congress that if a reservation is in place, and the project has not been built, yes there is an indirect benefit to in stream values. However, the point I want to stress, is once a project is built, that project enjoys a priority date deeding back to the original reservation. In this case, I believe that is 1992. Essentially, you know, the harm comes, or potential harm, April is correct it comes through the regular permitting process, but the issue that we were trying to highlight in our comments is that it's the priority date of 1992 that sort of keeps this reservation alive, and will impact other uses, whether in stream or out of stream. I don't think that was necessarily highlighted today in any of the discussion. So I just wanted to point that out.

I also wanted, we heard from, we stated this in our comments, that I will just reiterate, that as to the notion that this is sort of a corollary for in stream water rights. The issue here and in other basins is that you don't necessarily have the in stream rights in place. So I think that argument makes sense if the in stream water rights were in place you have in stream water rights, you would have a reservation, but in the Burnt River, for instance in particular, and in other basins, the in stream water rights have been

protested so they've been stalled. So there isn't that corollary and that is the point we made in our written comments.

We will supply more detailed comments in the written comments, but I think some of the comments that were made, raised a couple of issues that I will just highlight. The Congress stated that 20 years ago, Oregon was a very different place, and we would agree with that, and one of the comments we will probably make in our written comments is that, the extension process is an opportunity for the Commission to look at changed circumstances, and this is something that was brought up in the RAC, but not agreed to; things such as, endangered species listings, changed water availability, things of that nature. It provides an opportunity for the Commission to look at sort of a broader scale at the decision they are making into the future.

As to the, there was some discussion toward a progress report with regards to Burnt River. We will, in our written comments, as we go forward, we will continue to push for that to be a condition that the Commission at least considers, because it's not. That is actually in the rules, so it is law, so people do have to comply with it. I think the disregard of that because of funding, for us anyway, it doesn't carry that much weight. Anyway, again, we will be providing written comments, but I just wanted to make a couple clarifying points. Thank you.

Chair Roberts: Thank you. OK. One more. As a reminder, after we finish comments pertinent to the hearing, then I will recess the hearing and we will just back to pick up comments related to Item A. Wes, are you up?

Wes Morgan: Chair Roberts, Commissioners, sorry about the confusion. I would like to comment on this, and I think that we have done in Burnt River; and this will lead to other questions, I'm sure. But the work that has been done in Burnt River, and I would like to thank you for your support on that. But going forward, I think these reservations very important and I would like to again stipulate and remind you that they are not a water right. If we want to bring up the in stream stuff, that is a water right. So there are two sides to that. These reservations are not a water right, so that makes some folks feel good, but on the other side, the in stream is a right, and doesn't make some people feel good. So I think we need to play on a level field there. As far as Burnt River stalling and protesting, yes we did protest. Stalling, no we've been pursuing these, have asked questions and have heard the same thing with the cuts and stuff, so it's something that we haven't pursued but we are more than willing to come and not throw the onus on ODA to report what is happening. We would be more than willing to sit beside and I do think that it was in the rules that it was a State Agency at the time, and I wish Lynn Shumway was here to give you the history on that. He was unable to make it. 20 years ago that were a lot of things that went on and ODA was the lead on that with Burnt River and a lot of work that they put in. I think with that, they are very important, and I don't think Burnt River Irrigation District would sit on a reservation where it is specific for economic development, and if someone came in with a good project for economic development that the Irrigation District would sit on it and say, "no, if it's not for irrigation water we aren't interested." Any project, if it's put in and comes to fruition, and we have a very specific project that comes to mind, but any project that's put in would require 25% of the water to be left in stream. That's the only way that there is going to be any in stream water for fish, so you know, let's get on the same side and form a partnership and quit playing this tug of war of trying to pull the rope each direction. Let's get a hold of the rope and pull it in the same direction. And see if we can get something done. Get all sides together, because we all have the same interests if we can push aside our personal ideas and, well I've got to win. Doesn't matter why, but that's my comments, and if you have questions I would, and I know you would, I would try to answer any of them.

Commissioner Corn: Would you comment a little further on, because you keep talking Burnt River Irrigation District, would you comment a little more on how the community is involved in this, more than just Burnt River Irrigation District?

Wes Morgan: Yes. Burnt River Irrigation District, I would say represents and vice versa, Baker County to a point. Burnt River took on the lead with this 20 years ago, and we continue, and I cannot take credit for that, before the last year or so, Burnt River has involved not only the patrons in the District, but the small communities of Unity, Hereford, and the Commissioners in Baker County, the whole county supports what we're doing, and that leads to the other eastern areas that have reservations have shown Burnt River tremendous support in what we are doing, so it's not just a focused Burnt River, it's not just for us; and I also have to throw in then, the fact we are interested in our partnerships that we have developed with OWEB, and ODFW, and the conversations and the work that has been done in Burnt River. You know, maybe we are selfish, but we like a little credit for that. We have enhanced riparian areas, we have enhanced habitat for fish and wildlife. We've done a lot of work with OWEB, and we've got a lot of people who are doing work on their own.

Department's Response to Public Comments Received

This document contains excerpts of select comments made and the Department's response. To view all comments received, please review the attachments with the full written and oral comments.

Commission Discretion to Extend Reservations – May vs. Shall (OAR 690-79-0160(6))

- **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. This was discussed at length in the temporary rulemaking, with the WRC adopting rule language that says ‘may’.”
- **Oregon Farm Bureau -**
 “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.”
- *Department Response: This matter was discussed at length in the RAC, but the RAC was unable to achieve consensus. During the temporary rulemaking, the Department proposed draft rules for public comment with “may”, and after review of comments, shifted to shall. The Commission changed it back to “may.” While reservations of water were established alongside the Instream Water Rights Act, the legislation does not specify that the Commission is precluded from exercising its discretion pursuant to its basin program planning authorities. Accordingly, the rules are subject to revision and may be modified by the Commission to assure that the uses of water be achieved for the maximum economic development for the state as a whole. The Department believes that it is important for the Commission to retain its discretion to extend, should conditions in the future warrant. As a result, the Department recommends no change to the proposed rules.*

Burden of Proof (OAR 690-79-0160(6))

- Waterwatch of Oregon
 “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.”
- *Department Response: The rules provide that the Commission may extend the reservations unless the Commission determines the reservation is no longer consistent with ORS 536.310 or with rules of the Commission. In evaluating requests to extend, the Department's recommendations to the Commission will consider information from staff, the Rules Advisory Committee, and the public. Furthermore, regardless of these rules, in conducting a basin program rulemaking, ORS 536.310 requires the Commission to take into consideration 536.220 and the declarations of policy in ORS 536.310. The Department does not recommend changes to the rules.*

Standards of Review and Conditioning

- Waterwatch of Oregon –
 “We strongly support the inclusion of ORS 536.310 and rules of the Commission; however, we think the standards should be broadened to include the rule requirements and standards in place at the time of adoption. 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 governing extensions (found in OAR 690-79-005) required the Commission to apply the rule requirements and standards applied at the time of the reservation. In other words, absent these draft rules, 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.”

 “We strongly support the recommended language makes 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.”
- Oregon Farm Bureau –
 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 Commissions 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(6) language:
 In considering an application to extend a reservation, the Commission **must** ~~may~~ extend the reservation ~~up to 20 years~~ 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~~. The Commission may modify the reservation or include conditions as necessary for the reservation to remain consistent with ~~ORS 536.310~~ and the purpose of reserving water for future economic development.

Department Response: According to the draft proposed rules, the Commission may modify the reservation or include conditions as necessary for the reservation to remain consistent with ORS 536.310 and the purpose of reserving water for future economic development. The Department proposes that reservations may be extended in 20 year blocks (meaning they are not necessarily in perpetuity), but also does not believe that they should be completely reevaluated as if they are a new reservation. Since the Commission is prohibited from adopting basin program rules that are inconsistent with ORS 536.310, the Department believes that consistency with ORS 536.310 is required to extend the reservations set to sunset. In conversations with the RAC, consistency with the purpose of reservations was desired, but it was decided not to point to the reservations statutes because ORS 537.356 was changed and most reservations were adopted pursuant to ORS 537.249. Instead, language relating to consistency with the "purpose of reserving water for future economic development" was added to the draft rules to address this issue.

Information Requirements

- Waterwatch of Oregon - Whether or not the applicant met existing rule requirements under the existing reservations (i.e. check points) should be a required piece of information in the application.
- *Department Response: The Department does not need to request this information from applicants. The Department should have this information on file if it is needed.*