

Status of Reservations of Water and Adoption of Temporary Rules



**WATER RESOURCES COMMISSION MEETING
11.19.2015**

**RACQUEL RANCIER, SENIOR POLICY
COORDINATOR**

History of Reservations



- **1987 legislation**
 - **Established authority for instream water rights and reservations for economic development**
- **1988 rules**
 - **Public interest review (537.170) contested case hearing**
 - **Established through amendment to basin program**

History of Reservations



- **1991 application filed for South Fork Burnt River**
- **July 1992 rules - Division 079**
 - **Public interest review (537.170) through contested case hearing**
 - **Established via order of the Commission**
- **November 1992 additional requests filed including additional Burnt River requests**

1995 Legislation – ORS 537.249



- **Reservations pending on July 5, 1995 options: contested case/order, permit, or rule**
- **If rule: no public interest review/contested case hearing under ORS 537.170**
- **ODA elected rule option for all pending reservations**
 - **Reservations established in Basin Programs**

History of Reservations



- **Division 079 rules not amended (1992/1993)**
- **1996 - Burnt River Reservations adopted into Division 509 basin rules**
 - **Reviewed for public interest under 536.220 and 536.310 NOT under 537.170.**

History of Reservations



690-509-0110

South Fork Burnt River Reservation

Seventeen thousand eight hundred (17,800) acre-feet of unappropriated water of the South Fork Burnt River and tributaries upstream of Unity reservoir are [is] reserved for storage by the Burnt River Irrigation District in multipurpose reservoirs to be constructed in the future. The priority date of the reservation is June 5, 1992. In accordance with ORS 537.249, a reservoir permit authorizing the storing of the water reserved under this rule shall be granted precedence over instream water rights in the Burnt River subbasin.

Stat. Auth.: ORS 537

Stats. Implemented: ORS 537.249 & ORS 537.356

Hist.: WRD 4-1996, f. & cert. ef. 3-15-96; WRD 3-2000, f. & cert. ef. 5-26-00

690-509-0120

North Fork Burnt River Reservation

Six thousand five hundred (6,500) acre-feet of unappropriated water of the North Fork Burnt River and tributaries upstream of Unity Reservoir are reserved for storage in multipurpose reservoirs to be constructed in the future. The priority date of the reservation is November 6, 1992.

Stat. Auth.: ORS 537

Stats. Implemented: ORS 537.249 & ORS 537.356

Hist.: WRD 4-1996, f. & cert. ef. 3-15-96; WRD 3-2000, f. & cert. ef. 5-26-00

690-509-0130

Burnt River Subbasin Reservation

Two thousand (2,000) acre-feet of unappropriated water are reserved for storage in reservoirs to be constructed on the Burnt River and tributaries. The priority date of the reservation is November 6, 1992.

Stat. Auth.: ORS 537

Stats. Implemented: ORS 537.249 & ORS 537.356

Hist.: WRD 4-1996, f. & cert. ef. 3-15-96; WRD 3-2000, f. & cert. ef. 5-26-00

History of Reservations



- **Workgroup report to the legislature**
- **1997 legislation amending ORS 536.356 and ORS 536.358**
 - **New reservations established by rule but consider the public interest factors in ORS 537.170**

History of Reservations



- **2014 Commission Meeting**
 - **Reported procedures for extensions per Division 79**
 - **Different procedures from how reservations were originally established**
- **2015 Discovery of Need to Update Rules**

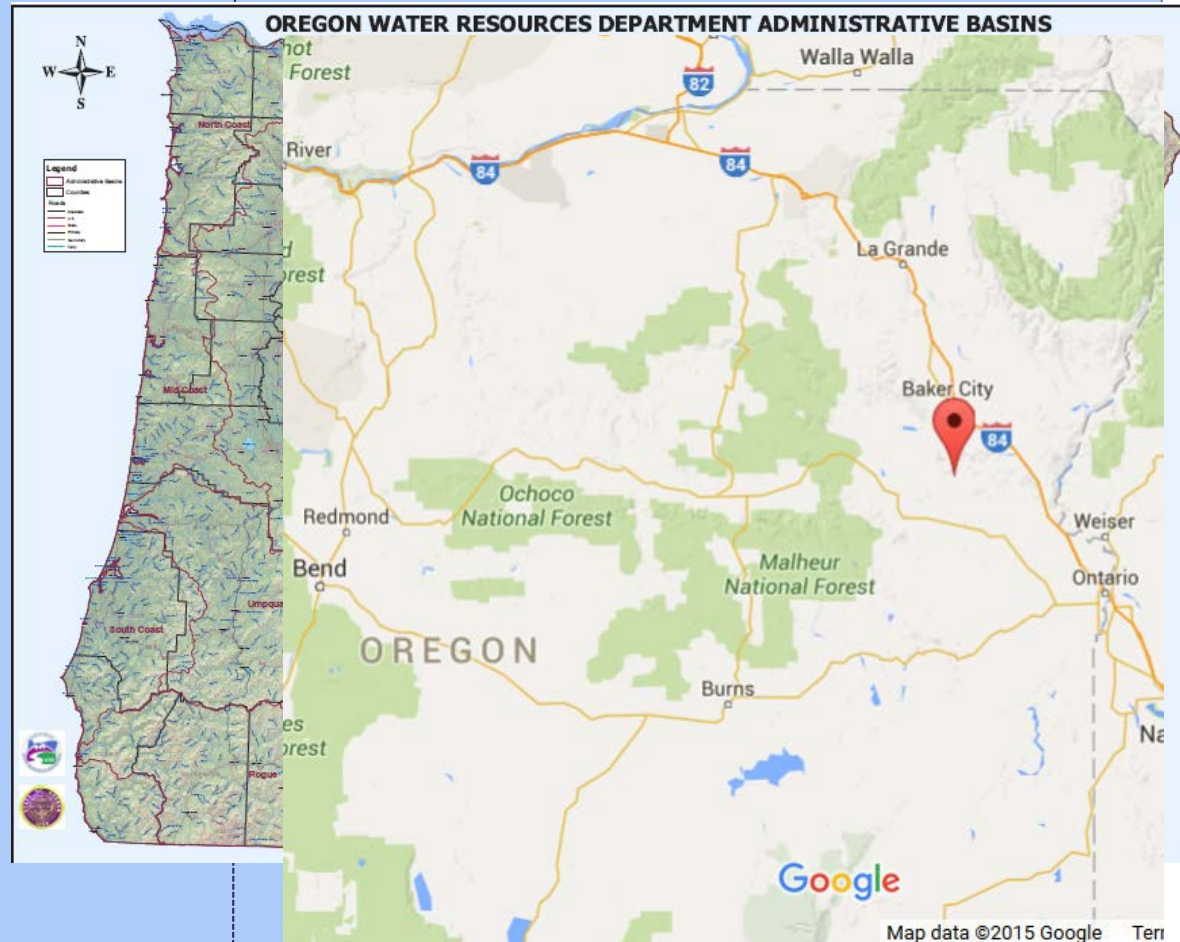
History and Resulting Issues



- **Issue: Public interest review and contested case under ORS 537.170**
 - Challenges resulted in reservations going through different process
 - Division 79 never amended to address different procedures
 - ✦ Still states procedures for contested case hearing and order of the Commission.
- **Burnt River Reservations**
 - Reviewed under ORS 536.310
 - Basin Program Amendment to Division 509

History and Resulting Issues

- **Burnt River Reservations**
 - **Expire March 6, 2016**
 - **Applications filed Sept. 15, 2016**
- **Process for extensions??**



Next Steps - Burnt River Reservations



- **Burnt River Reservations**
 - **Expire March 6, 2016 unless Division 509 rules amended**
 - **Applications filed Sept. 15, 2016**
- **Temporary rules – Division 79 to establish process for extension of Burnt River**
- **Permanent Rules – Division 509 if want to extend must be done by March 6, 2016**
 - **Division 79 update before Division 509**
 - **Permanent rulemaking 4-5 months at minimum**
 - **8-10 months to do both as permanent would exceed March deadline**

Next Steps – Other Reservations



- **Burnt River Reservations**
 - **Expire March 6, 2016**
- **Hood River**
 - **Expire October 2016**
- **Others set to expire 2017+**
- **Temporary rules – Division 79 to establish process for extension of Burnt River**
- **Permanent Rules – Division 509 if want to extend must be done by March 6, 2016**
- **Permanent Rules – Division 79 to establish process for extension of other reservations**

Temporary Rulemaking



- **Temporary Rulemaking**
 - Expedited process
 - Rules advisory committee (RAC), public comment, or hearing not required
- **Actions taken for Division 79 Temporary Rules:**
 - **Held 2 RAC meetings**
 - ✦ **Invited (not all participated): Oregon Cattleman's Association, Freshwater Trust, Association of Oregon Counties, Burnt River Irrigation District, League of Oregon Cities, Special Districts Association of Oregon, Oregon Water Resources Congress, Oregon Farm Bureau, Oregon Departments of Agriculture and Fish and Wildlife.**
 - **Public comment Nov. 12-Nov.16**
 - ✦ **Received 8 comments**

Proposed Rules



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.

- **Establishes procedures to consider the pending requests to extend the Burnt River Reservation.**

- **Do NOT establish procedures for other reservations.**

- **Applications submitted September 15**

Proposed Rules



690-079-0010

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690-079-0160

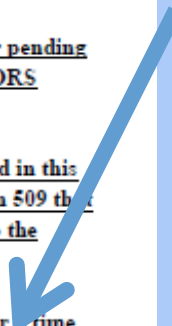
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- **Continues the practice of approving extensions on reservations for up to 20 years.**



Proposed Rules



Attachment 4: Proposed Final Rules
11/19/2015

- (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.

No change to information requirements for application.

- Applications already submitted.

- **Clarifies that the extension will also be conducted via a basin program rulemaking.**

- Consistent with how the reservations were originally established.

Proposed Rules



Attachment 4: Proposed Final Rules
11/19/2015

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- **Follows public comment and hearing procedures**
 - Administrative Procedures Act
 - Basin Program statutes
 - Model rulemaking rules, and land use coordination.
 - Typical procedures for conducting basin program rulemaking.
 - Original reservations conducted this way.

Proposed Rules



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- **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 Commission's rules.**
 - **These reservations were determined to be consistent when originally established.**

Conclusion



- **Existing Division 79 rules – lack of clarity on process due to complex history**
- **Must conduct three rulemakings:**
 - **Temporary Division 79 – Establish process for reviewing Burnt River Applications**
 - **Permanent Division 509 – Burnt River Reservations**
 - **Permanent Division 79 – Establish process for reviewing other extension requests**

Commission Action



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.**

Commission Action- Director's Recommendation



The Director Recommends Alternative 1.

- **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.**