



Oregon

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August 4, 2011

TO: Land Conservation and Development Commission (LCDC)

FROM: Katherine Daniels, Farm and Forest Lands Specialist

SUBJECT: **Agenda Item 9, August 17-19, 2011 LCDC Meeting**

**POSSIBLE ADOPTION OF AMENDMENTS
TO ADMINISTRATIVE RULES: OAR CHAPTER 660, DIVISION 33,
IRRIGATION RESERVOIRS ON FARMLAND (continued)**

I. SUMMARY

On June 22, 2011, the Land Conservation and Development Commission (LCDC) held a public hearing to consider the adoption of amendments to OAR 660-033-0130 and 660-033-0120 Table 1, to clarify the siting of irrigation reservoirs on farmland. While the department had developed recommended amendments with the assistance of an appointed Rules Advisory Committee, during the same period, House Bill 3408 – also addressing irrigation reservoirs – was introduced and passed by the Legislature and in June was signed into law by the Governor. Department staff then revised the recommended amendments to be consistent with and offer additional guidance for HB 3408. The June 8 staff report and attachments include a full discussion of the issues (attached).

At the June 22 meeting, the Governor's Natural Resources Policy Director recommended that the commission not adopt amendments to rules, the public provided testimony and staff responded to questions by the commission. This was followed by a discussion among commission members on the work of the rules advisory committee, the provisions of HB 3408, remaining issues of concern and the potential areas in which the commission could still do rulemaking, if desired. Because the commission lacked a quorum at the end of the discussion, no decisions were made. The purpose of today's agenda item is to continue the discussion with a quorum of commission members to determine whether rulemaking on irrigation reservoirs should be continued or discontinued.

II. ATTACHMENTS

- A. June 8 Staff Report
- B. Public Comment received after June 8



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June 8, 2011

TO: Land Conservation and Development Commission (LCDC)
FROM: Katherine Daniels, Farm and Forest Lands Specialist
SUBJECT: **Agenda Item 7, June 22, 2011 LCDC Meeting**

PUBLIC HEARING AND POSSIBLE ADOPTION OF AMENDMENTS TO ADMINISTRATIVE RULES: OAR CHAPTER 660, DIVISION 33, IRRIGATION RESERVOIRS ON FARMLAND

I. SUMMARY

The Land Conservation and Development Commission (LCDC) will consider the proposed adoption of amendments to OAR 660-033-0130(39) and 660-033-0120 Table 1, to clarify the siting of irrigation reservoirs on farmland. While the department has developed recommended amendments with the assistance of a Rules Advisory Committee appointed by the commission, a competing legislative bill – House Bill 3408 – appears likely to pass the legislature before the scheduled hearing for rule adoption. This bill differs from the recommended rule language in several important respects.

II. RECOMMENDED ACTION

If HB 3408 does not become law, the department recommends that the commission adopt the final proposed amendments to OAR 660-033-0130(39) and 660-03-0120 Table 1 found in Attachment A.

If HB 3408 does become law, the department recommends that the commission **either**: (a) direct staff to prepare proposed rule amendments that are consistent with HB 3408 and also incorporate specific areas of rulemaking identified in section VI below **or** (b) discontinue the rulemaking on irrigation reservoirs altogether.

III. BACKGROUND

Dropping groundwater levels around the state and the designation of limited groundwater areas, together with the desirability of capturing early winter snowmelt runoff, are likely to lead to increasing requests for irrigation reservoirs on farmland. The department understands and supports the critical need for a clear and reasonable process for approving irrigation reservoirs on farmland. Water impoundments – normally farm or stock ponds – are allowed as a farm use at ORS 215.203(2)(b)(G) when located on property that is being farmed, but are not clearly allowable if the impoundment is used to irrigate other off-site farmland. There are provisions at ORS 215.213(1)(w) and 215.283(1)(t) that permit “irrigation canals, delivery lines and those

structures and accessory operational facilities associated with a district.” Legal counsel has advised the department that while this language could be interpreted to allow dam structures, it is less clear whether the resulting impoundment would be allowable. An irrigation reservoir may involve hundreds or even thousands of acres. While this use provides essential infrastructure for irrigated farm operations, it also removes more potential acreage from the farmland base than any other use currently allowed in exclusive farm use zones. For these reasons, and at the request of members of the Board of Agriculture, rulemaking was undertaken with the intent to clarify under what circumstances irrigation reservoirs should be approved.

At its December 2, 2010 meeting, the Land Conservation and Development Commission appointed a rules advisory committee made up of a variety of interests to consider and propose amendments, as appropriate, to OAR 660, division 33 regarding the siting of irrigation reservoirs on farmland. The committee met three times and by March 2011 had developed proposed rule language supported by a majority of the members of the committee.

IV. RULES ADVISORY COMMITTEE WORK

The Irrigation Reservoir Rules Advisory Committee was a diverse group, including representatives of the Oregon Board of Agriculture, Department of Agriculture, Association of Conservation Districts, Umatilla Basin Water Commission, Department of Water Resources, Department of Fish and Wildlife, 1000 Friends of Oregon and a county planner.

We began by reviewing the process that would currently be used to site a proposed irrigation reservoir. Normally, a request for an irrigation reservoir that is not clearly accessory to an on-site farm would be submitted first to the county for land use review. Because so few non-federal irrigation reservoirs have been proposed and reviewed by counties in the past, there is no track record of what specific approaches have been used, but the exceptions process would be one such approach. An irrigation reservoir could involve eminent domain as irrigation districts have eminent domain authority. After an irrigation reservoir is approved by a county, it would then be reviewed by the Water Resources Department, which regulates the issuance of water rights and dam safety. At the same time, the Department of Fish and Wildlife would review any proposal involving an in-stream impoundment affecting fish passage or minimum stream flow and the Division of State Lands would review for any wetlands. Any Goal 5 review process would take place at the county level. The Water Resources Department requires a Land Use Compatibility Statement from counties for an irrigation reservoir.

Reservoirs and water impoundments are a conditional use in forest zones, subject to compatibility review criteria with farm and forest land.

Over the course of three meetings, committee members came to agreement on a number of issues, including the following:

- There should be a clear definition of irrigation reservoirs that excludes water impoundments allowed as a farm use and aquifer recharge projects that do not render land unavailable for farm use. Irrigation reservoirs should only be used for agricultural use and not municipal water use.

- It would be preferable not to make irrigation reservoirs a conditional use and subject to county review standards because this would create too much unpredictability.
- Any county reviews should not duplicate the reviews done by the Water Resources Department, the Department of Fish and Wildlife or the Division of State Lands.
- There is no need to prohibit irrigation reservoirs on high quality farmland because of the need for flexibility in siting and because such farmland is unlikely to be used for reservoir sites as it is usually low-lying and well-drained.
- Potentially conflicting uses, including utility facilities, commercial power generating facilities, park and recreation facilities and destination resorts, should be restricted adjacent to new irrigation reservoirs.

The proposed rule amendments in Attachment A reflect all these points of agreement. Other significant issues raised among some group members were the following:

- There should be compatibility review standards for potential impacts to adjacent farm operations, such as those in ORS 215.296.
- There should be a requirement that more than one potential reservoir site be considered.
- There should be protection standards for significant Goal 5 resources that are not addressed in state agency reviews, because irrigation reservoirs are a “new” use that could conflict with identified significant Goal 5 resources.
- There should be a public hearing at the county level and opportunity for public input.

The proposed rule amendments in Attachment A also reflect the above considerations.

V. HOUSE BILL 3408

House Bill 3408 was introduced to the legislature part way through the rulemaking process. It would amend ORS 215.213(1)(w) and 215.283(1)(t) to add reservoirs to the list of other currently-allowed irrigation-related uses, while excluding parks and other recreational uses from this description, as follows:

“Irrigation **reservoirs**, canals, delivery lines and those structures and accessory operational facilities, **not including parks or other recreational structures and facilities**, associated with a district as defined in ORS 540.505.”

HB 3408 would make irrigation reservoirs not subject to any review criteria and not subject to public hearings or county input. The bill does not define irrigation reservoirs. Irrigation districts could site an irrigation reservoir of any size at any location within an exclusive farm use zone, subject to state agency, but not county, review.

VI. IMPACT OF HB 3408 ON PROPOSED RULE AMENDMENTS

House Bill 3408, if adopted, will reflect legislative intent to greatly streamline the approval process for irrigation reservoirs. As noted above, the bill differs from the proposed rule amendments in several respects, primarily in that the rule amendments would define irrigation reservoirs, create review criteria and restrict potentially conflicting adjacent uses. Because the commission directed staff to develop proposed rule language in conjunction with an appointed

rules advisory committee, and because public notice as well as Measure 56 notice has been provided and public testimony is expected, the commission may wish to discuss the range of options open to it. The commission may choose to discontinue the rulemaking process or it may choose to direct staff to make recommendations for rule amendments that are consistent with the provisions of HB 3408 but that incorporate some portion of the proposed rule language developed by the rules advisory committee and staff.

Although HB 3408, if it passes, will replace portions of the proposed rule amendments and make other portions unnecessary, staff believes that the proposed rule amendments contain several concepts that do not conflict with HB 3408 and would complement it effectively. First, rule amendments could define “irrigation reservoir” just as rules define many other terms used in statute. Current proposed rule language would allow water to be used for irrigation as well as other agricultural purposes and would effectively exempt aquifer recharge projects from being regulated as irrigation reservoirs.

Second, current proposed rule language would restrict potentially conflicting uses adjacent to new irrigation reservoirs. While the bill prevents parks and other recreational structures and facilities from being approved as part of an irrigation reservoir proposal, it does not prevent these uses from being independently proposed immediately adjacent to an irrigation reservoir; nor does it prevent utility facilities, destination resorts or other commercial power generating facilities, such as hydro facilities, from piggy-backing onto irrigation reservoirs that are intended only for agricultural purposes.

Third, potential rule language could provide for public comment and review at the county level in the instance that a county identifies irrigation reservoirs as a conflict for identified significant Goal 5 resources. Because irrigation reservoirs will be a “new” use added to statute, without such rule language, counties will not have the opportunity to assess potential conflicts.

Fourth, legal counsel recommends that rule amendments reference or include a requirement for consistency with existing statutory criteria for siting water impoundments near airports identified in ORS 836.610(1).

Finally, staff proposes housekeeping changes to OAR 660-033-0120 Table 1 for consistency with HB 3408. This would insert “reservoir” language into the current table language for irrigation canals, etc.

In summary, the potential areas of rulemaking are:

- A definition for “irrigation reservoir”
- A requirement for a public hearing and opportunity for comment before the county for identified significant Goal 5 resources for which a reservoir has been identified to be a conflict
- Restrictions on adjacent potentially conflicting uses
- A requirement for consistency with statutory criteria for water impoundments near airports
- Housekeeping changes to OAR 660-033-0120 Table 1

VII. DEPARTMENT RECOMMENDATION

If HB 3408 does not become law, staff recommends that the commission adopt the final proposed amendments to OAR 660-033-0130(39) and 660-033-0120 Table 1 found in Attachment A.

If HB 3408 does become law, staff recommends that the commission **either**:

- (a) direct staff to prepare proposed rule amendments that are consistent with HB 3408 and also incorporate specific areas of rulemaking identified in section VI above; **or**
- (b) terminate the rulemaking process on irrigation reservoirs.

Proposed Motion:

If HB 3408 does not become law:

- I move the commission adopt the final proposed amendments to OAR 660-033-0130 and 660-033-0120 Table 1 found in Attachment A;

If HB 3408 becomes law - either:

- I move the commission direct staff to prepare proposed rule amendments that are consistent with HB 3408 and also incorporate specific areas of rulemaking identified in section VI of this staff report.

OR

- I move the commission terminate the rulemaking process on irrigation reservoirs.

ATTACHMENTS

- A. Proposed Amendments to OAR 660-033-0130(39) and 660-033-0120 Table 1
- B. Public Comment Received Prior to June 8, 2011

The following **final** proposed irrigation reservoir rule language is recommended by department staff. It is a further refinement of the **draft** rule language below that was developed by the irrigation reservoir rules advisory committee and that has been made available to the public on the department’s website and through the Measure 56 landowner notification process. The final rule language provides additional clarification in several areas, without changing the substance of the proposed rule.

Final Proposed Irrigation Reservoir Rule Language

**OREGON ADMINISTRATIVE RULES
CHAPTER 660, DIVISION 033, RULE 120
TABLE 1**

<u>HV</u>	<u>All</u>	
<u>Farm</u>	<u>Other</u>	<u>Uses</u>
		Utility/Solid Waste Disposal Facilities
R16	R16	Utility facilities necessary for public service, including wetland waste treatment systems but not including commercial facilities for the purpose of generating electrical power for public use by sale or transmission towers over 200 feet in height.
R39	R39	Water impoundments for agricultural use as utility facilities necessary for public service.

OAD 660-033-0130

(39) A water impoundment for agricultural use shall be considered a utility facility necessary for public service under ORS 215.213(1)(c) and ORS 215.283(1)(c).

(a) As used in this rule:

(A) “Water impoundment” means the above-ground storage of water that is collected and confined through a man-made system involving dams, dikes, diversions or natural or altered land topography that renders affected land no longer available for cultivation or grazing.

(B) “Water impoundment for agricultural use” means a water impoundment or reservoir not included in ORS 215.203(2)(b)(G) that is used for agricultural purposes or for mitigation required by the Oregon Water Resources Department pursuant to approved agricultural water rights.

(b) For a water impoundment for agricultural use or expansion of a water impoundment for agricultural use to be permitted in an exclusive farm use zone, the governing body or its designate must find that:

(A) The criteria of ORS 215.275 and OAR 660-033-0130(16) are satisfied;

(B) For proposed sites within an area included in the county comprehensive plan on an inventory of significant Goal 5 resources pursuant to OAR 660-023-0020 or 660-023-0030, the long-term environmental, economic, social and energy consequences resulting from the water impoundment for agricultural use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located on other lands that do not include identified significant Goal 5 resources that are protected under the county's comprehensive plan; and

(C) For proposed sites within an area that includes documented fish and wildlife habitat according to the most recently published information from the Oregon Department of Fish and Wildlife and pursuant to the definitions included at OAR 660-023-0090(4)(d) or OAR 660-023-0110(3), the long-term environmental, economic, social and energy consequences resulting from the water impoundment for agricultural use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located on other lands of equal or lesser fish and wildlife value;

(c) Nothing in this rule is intended to require counties to apply local review criteria that may be duplicative of statutory and rule requirements of the Oregon Water Resources Department, the Oregon Department of Fish and Wildlife and other applicable state or federal agencies.

(d) Nothing in this rule is intended to supersede OAR 660-013-0080(1)(f) and ORS 836.623 regulating water impoundments near airports.

(e) The following uses shall not be approved on site or within one-half mile of the average annual high water line of a water impoundment for agricultural use without the approval of an exception to Goal 3 (Agricultural Lands) pursuant to ORS 197.732 and OAR chapter 660, division 4:

(A) Park, campground, golf course or other recreational use as identified in ORS 215.213 or 215.283;

(B) Utility facility necessary for public service, other than a water impoundment for agricultural use;

(C) Commercial power generation facility; or

(D) Destination resort.

Draft Proposed Irrigation Reservoir Rule Language

OAR 660-033-0130

(39) For purposes of this rule, a water impoundment for agricultural use shall be considered a utility facility necessary for public service under ORS 215.213(1)(c) and ORS 215.283(1)(c). A water impoundment for agricultural use shall include water

impoundments and reservoirs not permitted under ORS 215.203(2)(b)(G), that are used exclusively for agricultural uses and mitigation required pursuant to approved agricultural water rights.

(a) As used in this rule “water impoundment” means the above-ground storage of water that is collected and confined through a man-made system involving dams, dikes, diversions or natural or altered land topography that renders affected land no longer available for cultivation or grazing.

(b) For a water impoundment to be permitted in an exclusive farm use zone, the governing body or its designate must find that:

(A) The criteria of ORS 215.275 and OAR 660-033-0130(16) are satisfied;

(B) The long-term environmental, economic, social and energy consequences resulting from the water impoundment for agricultural use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located on:

(i) Other lands that may or may not contain identified Goal 5 resources that are protected under the county’s comprehensive plan; and

(ii) Other lands that may or may not contain documented fish and wildlife habitat pursuant to the definitions included at OAR 660-023-0110(3); and

(C) All other applicable provisions of law are satisfied, including but not limited to local comprehensive plan and zoning ordinance provisions, where not addressed by statutory and rule requirements of the Oregon Department of Water Resources, the Oregon Department of Fish and Wildlife and any other applicable state or federal agencies.

(c) Nothing in this rule is intended to supersede OAR 660-013-0080(1)(f) and ORS 836.623 regulating water impoundments near airports.

(d) The approval of a water impoundment for agricultural use shall not, within one-half mile of the average annual high water line and without the approval of an exception to Goal 3 (Agricultural Lands) taken pursuant to ORS 197.732 and OAR chapter 660, division 4, be a basis for the subsequent approval of an on-site or adjacent water- or land-based:

(A) Park, campground, golf course or other recreational use as identified in ORS 215.213 or 215.283;

(B) Utility facility necessary for public service, other than a water impoundment for agricultural use;

(C) Commercial power generation facility; or

(D) Destination resort.

Mark Gilbert

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May 27, 2011

RE: OAR 660-033-0130

Ms. Daniels

In our conversation of Tuesday May 17, 2011, you assured me that the addition OAR 660-033-0130 # (39) not intended to effect farm ponds or farm irrigation reservoirs, but ONLY to effect large reservoirs for water retention by irrigation districts.

I strongly disagree. The first paragraph is ambiguous. The paragraph should SPECIFICALLY state that farm and agricultural ponds and irrigation reservoirs for individual farm use are NOT included and the limitations of paragraph (C) (d) will not affect small ponds etc.

Otherwise this section will keep me and any other land owner from installing ANY kind of solar or wind power within one-half mile of my EXISTING irrigation pond. That removes over 160 acres for every pond that any farmer/irrigator has.

I do not think any restriction or standoff is needed. Each item should stand on its own merits. Either a large water impound is allowed or it is not. Also, other non-farm uses are allowed, or they are not. The two are separate uses of the land. There should be no "Well sense you have this then you cannot have that."

If this is made UNAMBIGUOUS before it is integrated into the rules, it will make it easier to implement and cause fewer problems down the road for everyone. That is unless it is the intention to further restrict the uses of my land.

Thank you for your time,

Mark Gilbert



Oregon Water Resources Congress

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Item 9 - Attachment B
August 17-19, 2011 LCDC Meeting

June 21, 2011

Re: Public Hearing and Possible Adoption of Amendments to Rules Regarding OAR Chapter 660, Division 33, Irrigation Reservoirs on Farmland

Dear Chair VanLandingham and Members of the Commission:

The Oregon Water Resources Congress (OWRC) is a trade association representing irrigation districts, water control districts, and other water delivery organizations throughout Oregon. On behalf of OWRC, I appreciate the opportunity to provide comments on the proposed amendments to OAR Chapter 660, Division 33.

HB 3408, as amended, passed both the Senate and the House unanimously. As of the writing of this comment letter, the bill is awaiting signature by the Governor. When it becomes law, HB 3408 will amend ORS 215.213(1)(w) and 215.283(1)(t) to make clear that irrigation district reservoirs are uses allowed outright in EFU zones. As reflected in the staff report from Katherine Daniels, HB 3408 is intended to greatly streamline the approval process for irrigation reservoirs associated with irrigation districts, and would clarify that reservoirs, including both dams and their resulting impoundments, are uses allowed outright. As such, assuming HB 3408 is ultimately signed into law, OWRC does not see a need to continue the existing rulemaking.

Moreover, we do not see a need for additional rulemaking activity to further interpret the language in HB 3408.

- "Irrigation reservoir" is a commonly understood term, and there are extensive statutes and rules administered by the Oregon Water Resources Department governing reservoir permitting. Given the requirement to obtain permits from the Oregon Water Resources Department to store irrigation water in reservoirs, further rulemaking to interpret what a reservoir means by the Land Conservation and Development Commission is unnecessary.
- While some may advocate for a additional rulemaking activity to restrict potentially conflicting uses adjacent to new irrigation reservoirs, we feel that such adjacent uses will be adequately reviewed under existing applicable statutes and rules, and that a rulemaking to simply highlight this point is unnecessary.
- Finally, in the event that the OAR 660-033-0120 Table 1 needs revision to make it consistent with HB 3408, we would propose that such change occur as a simple housekeeping change without the need for a more formal rulemaking.

We respectfully request that the Commission terminate the rulemaking on irrigation reservoirs.

Thank you for the opportunity to comment on this rulemaking.

Sincerely,

Anita Winkler
Executive Director

EXHIBIT: 19 AGENDA ITEM: 7
LAND CONSERVATION & DEVELOPMENT
COMMISSION
DATE: 6-22-11
SUBMITTED BY: OWRC

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.

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June 14, 2011

Via Electronic Mail
(through Kathryn Daniels)
Members of the
Land Conservation and Development Commission

Re: Objection to Proposed Irrigation Pond Rule

Dear Members of the Commission:

This firm represents Grabhorn Farms owning farms in Jefferson and Washington Counties. Our client objects to the proposed rule.

Problems with the Proposed New Rule

The proposed rule hurts farmers, and seems to send existing farming policy backward, so those of us on the outside don't understand its purpose. It has also been made, with all due respect, superfluous by the recent passage of HB 3408. We think the proposed rule should be tabled as misguided and unnecessary. If not tabled, we suggest it be significantly revised to achieve whatever purpose it is to serve. But in any case, with all due respect, it should not progress as is, because that would make establishing, maintaining, changing or using irrigation and its delivery infrastructure harder if not impossible. At a minimum, irrigation will become a lot more complicated and expensive if this rule gets legs. Even as the proposed rule relates to irrigation districts, any additional expense a district suffers to "get to yes", particularly for smaller districts, means more cost passed onto farmers. At a certain point, farming loses its viability. The proposed rule, no doubt unintentionally, heads in this direction, contrary to the strong pro farming land use policy in ORS 215.203. The proposed rule significantly undermines ORS 215.203. If we have missed the purpose of the rule, we would like to understand the purpose.

The Proposed Rule is Unnecessary

The proposal has a theme that Oregonians have a land use system that fails to offer farm use protection to irrigation impoundments and infrastructure owned by farmers or an irrigation district. This idea is mistaken. The proposed rule is unnecessary to make siting, maintaining and adjusting farm water impoundments and infrastructure lawful uses. These are all now lawful uses of EFU zoned land. With all due respect, the proposed rule adds confusion to an existing regulatory scheme

EXHIBIT: 20 AGENDA ITEM: 7
LAND CONSERVATION & DEVELOPMENT
COMMISSION
DATE: 6-22-11
SUBMITTED BY: Wendie Kellington

June 14, 2011
Page 2

that, while not written with a grammar teacher's perfection, works. With respect, the proposed rule seems to accomplish only the addition of a whole new layer of bureaucracy as well as impossible and expensive new approval standards to farm water impoundments and infrastructure.

The existing language of ORS 215.203(2)(b)(G)¹ applies to a type of water impoundment. That type of water impoundment is one that is situated on farm use land. The terms farm use land are very broad and means any land zoned for exclusive farm use as well other land used in farming – although ORS 215.203 only applies in EFU zones (this is an example of the imperfect language used). The additional qualification for a water impoundment to fall in ORS 215.203(2)(b)(G) is simply that the water impoundment be owned by the same person as the owner of the land underlying the water impoundment. So an irrigation district or a farmer, are equally protected by this language so long as they own the land the impoundment sits on and the physical impoundment itself. To the extent this language isn't broad enough (it's hard to imagine a farm use related impoundment – farmer or irrigation district owned – not covered by it) this is not the only type of water impoundment that state law makes an allowed farm use. In fact, in my view, no reasonable decision maker familiar with land use laws can interpret this statute to say that a farmer or district owned water impoundment is not a farm use.

Also, there is an idea floating around in some of the legislative history of the proposed rule that irrigation infrastructure is not an allowed farm use. This too is mistaken. State law already includes irrigation infrastructure (owned by farmer or district) as an allowed farm use. This "no-brainer" is clear from at least two different places in state law.

ORS 215.203(1)(a) says that: "Farm use" includes the on-site construction and maintenance of equipment and facilities used for the activities described in this subsection." The term "on-site" does not exclude a water impoundment owned by an irrigation district, even if it's on land that is not zoned EFU. The only condition is that the equipment and facilities have to have their primary point being to deliver water to farms. As such, land underlying a water impoundment, the primary purpose for which is getting irrigation to farms, is quintessentially a farm use of land. The water impoundment and its delivery infrastructure is certainly necessary for the operation of those farms. Farms will shrivel up without water. If someone really disputes this then the rule should be written to make the truism clearer. But we see no justification for making it harder to establish, maintain or alter an irrigation water impoundment or its delivery infrastructure.

Also water impoundments and their delivery infrastructure would be allowed by ORS 215.203(2)(b)(A) which says land is required to be deemed as in the current employment for farm use if it is: "Farmland, the operation or use of which is subject to any farm-related government

¹ ORS 215.203(2)(G) defines as land in the current employment for farm use: "Water impoundments lying in or adjacent to and in common ownership with farm use land * * *"

June 14, 2011
Page 3

program". So, it is clear that the operation or use of land under a farm related government program is statutorily considered to be currently employed for farm use. Irrigation ponds and infrastructure should easily fall into the spectrum of either an operation or a use. Moreover, it is hard to imagine anyone trying to argue irrigation, supplied through an irrigation district -- one of the oldest types of governmental programs in the nation -- is not a governmental program.

Finally, if all this is not enough, the existing language of ORS 215.203(2)(b) is not exclusive, farm use can mean things not on the list. In fact that list is simply is a nonexclusive lists of things that constitute land currently employed for farm uses. This is true from reading the statute as the list starts out:

“(b) ‘Current employment’ of land for farm use *includes* * * *”

There are other places in the ORS 215.203 definition of farm use that makes a water impoundment and all related delivery and supply infrastructure, an allowed use of land and off limits to frisky planners and farm opponents. Take for example the definition of an “accepted farming practice” as that is defined: ORS 215.203(2)(c):

“As used in this subsection, ‘accepted farming practice’ means a mode of operation that is common to farms of a similar nature, necessary for the operation of such farms to obtain a profit in money, and customarily utilized in conjunction with farm use.

No one could seriously argue that irrigation and its delivery infrastructure falls outside of this definition.

Specific Issues With the Proposed Rule

The below reproduces the proposed new rule but with some red lined suggested changes and keyed explanations, all in an effort to make our concerns easier to understand. In the end, we think the proposed rule should not be adopted. Perhaps we have missed the purpose the rule is to serve. If that is the case, we would like to understand the purpose the rule is to serve and have a chance to offer language to achieve those purposes.

Proposed OAR 660-033-0130:

- (39) For purposes of this rule, ~~a water impoundment for agricultural use shall be considered a utility facility necessary for public service under ORS 215.213(1)(c) and ORS 215.283(1)(c). A water impoundment for agricultural use shall include water impoundments and reservoirs not permitted under ORS 215.203(2)(b)(G), that are used exclusively primarily for~~ agricultural uses and mitigation ~~required authorized~~ pursuant to approved ~~agricultural~~ water rights are uses allowed outright under ORS 215.203.

Comment [A1]: As a practical matter, farmers may use their ponds for very much secondary but nevertheless real other types of uses like emergency fire suppression for their homes, for fishing, duck blinds whatever.

June 14, 2011
Page 4

- (a) As used in this rule “water impoundment and reservoirs” means the above-ground storage of water that is collected and confined through a man-made system involving dams, dikes, diversions or natural or altered land topography that renders affected land no longer available for cultivation or grazing.
- (b) For a water impoundment to be permitted in an exclusive farm use zone, the governing body or its designate must find that:

(A) ~~The criteria of ORS 215.275 and OAR 660-033-0130(16)~~ are satisfied;

Comment [A2]: These are all but impossible standards for a rural water impoundment to meet. These standards will require an army of lawyers and consultants and is way overkill.

~~(B) The long-term environmental, economic, social and energy consequences resulting from the water impoundment for agricultural use at the proposed site with measures designed to reduce adverse impacts are not significantly more adverse than would typically result from the same proposal being located on:~~

~~(i) Other lands that may or may not contain identified Goal 5 resources that are protected under the county's comprehensive plan; and~~

Comment [A3]: No water impoundment is likely to ever be able to satisfy this. Even if they could theoretically satisfy these standards the analysis is one of the most expensive and complex in all of Oregon land use. Why lay this at the door of farmers? Laying it on irrigation districts just means irrigation rates higher and farming more expensive.

~~(ii) Other lands that may or may not contain documented fish and wildlife habitat pursuant to the definitions included at OAR 660-023-0110(3); and~~

Comment [A4]: This is totally unnecessary. These are uses permitted outright as a matter of land use law. Any use always has to meet whatever environmental rules including OWD rules that may apply.

~~(C) All other applicable provisions of law are satisfied, including but not limited to local comprehensive plan and zoning ordinance provisions, where not addressed by statutory and rule requirements of the Oregon Department of Water Resources, the Oregon Department of Fish and Wildlife and any other applicable state or federal agencies.~~

Comment [A5]: Why? Who cares? The impoundment can only be used for uses the law allows. Why add this layer of cost and bureaucracy. What this does is ensure well heeled property owners within 1/4 mile or more will object to a farm pond as a way to get rid of a pesky farmer they don't care for, asserting a farm pond will limit their property rights beyond what the law now allows them.

- (c) Nothing in this rule is intended to supersede OAR 660-013-0080(1)(f) and ORS 836.623 regulating water impoundments near airports.

~~(d) The approval of a water impoundment for agricultural use shall not, within one-half mile of the average annual high water line and without the approval of an exception to Goal 3 (Agricultural Lands) taken pursuant to ORS 197.732 and OAR chapter 660, division 4, be a basis for the subsequent approval of an on-site or adjacent water- or land-based:~~

Comment [A6]: No one is going to be able to take an exception to Goal 3 for a farm use which is what an irrigation water impoundment is. This sets up yet another impossible standard.

(A) Park, campground, golf course or other recreational use as identified in ORS 215.213 or 215.283;

Comment [A7]: What is wrong with these if they meet standards?

(B) Utility facility necessary for public service, other than a water impoundment for agricultural use;

Comment [A8]: Ditto to comment No 9 below

(C) Commercial power generation facility; or

Comment [A9]: Are we trying for foreclose micro-hydro here on irrigation canals? Why? They are great environmental policy, consistent with Oregon's strong renewables policy and its 25% RPS, and a great dual use of irrigation infrastructure that keeps down costs of irrigation water for farmers. What a win-win micro hydro is! Why on earth would Oregon want to foreclose this?

June 14, 2011
Page 5

(D) Destination resort

Comment [A10]: No farm pond will ever incent a destination resort. If a developer wants to establish a destination resort, he has a very big legal undertaking with a farm pond being the least of his worries.

With all due respect we hope you will table this rule and not move forward. However, if the commission does decide to press forward we ask that you consider the suggestions above. Thank you for your consideration.

Very truly yours,

Wendie Kellington

Wendie L. Kellington

WLK:wlk
CC: Client



**LEAGUE OF WOMEN VOTERS®
OF OREGON**

June 22, 2011

To: Land Conservation and Development Commission
John Van Landingham, Chair

Re: Rulemaking on Irrigation Reservoirs (OAR 660-033-0130) - Comments

The League of Women Voters of Oregon is a non-partisan, grassroots, political organization that encourages informed participation in government. The League was disappointed by the passage of HB 3408 (2011) as it removes the opportunity for a public hearing with broad public notice as is required by land use actions. However, we still believe that there is a role for this Commission in rulemaking to clearly define the purpose of these reservoirs.

It was clear during testimony that the purpose of these facilities was to assure water for irrigation for our agricultural industry. So adopting rules that protect these projects should be the goal of these rules. We recommend you adopt that portion of the draft rules as follows:

..... a water impoundment for agricultural use shall not.....be a basis for the subsequent approval of an on-site or adjacent water- or land-based:

(A) Park, campground, golf course or other recreational use as identified in ORS 215.213 or 215.283;

(B) Utility facility necessary for public service, other than a water impoundment for agricultural use;

(C) Commercial power generation facility; or

(D) Destination resort.

By adopting these rules, any reservoirs established under HB 3408 will be protected for the use cited.

Thank you for considering these comments.

Sincerely,

Handwritten signature of Robin Wisdom in cursive.

Robin Wisdom
President

Handwritten signature of Peggy Lynch in cursive.

Peggy Lynch
Natural Resources Coordinator

EXHIBIT: 21 AGENDA ITEM: 7
LAND CONSERVATION & DEVELOPMENT
COMMISSION
DATE: 6-22-11 Peggy Lynch
SUBMITTED BY: League of Women Voters



OREGON STATE SENATE
DAVID NELSON
STATE SENATOR
DISTRICT 29

DEPT OF

JUN 23 2011

**LAND CONSERVATION
AND DEVELOPMENT**

June 21, 2011

Oregon Department of Land Conservation and Development
ATTN: Land Conservation and Development Commissioners
635 Capitol Street NE, Suite 150
Salem, OR 97301

Dear Commissioners:

I am writing to request the Land Conservation and Development Commission terminate its rulemaking to clarify the siting of irrigation reservoirs on farmland.

As you are aware, HB 3408-A was unanimously passed by the Legislative Assembly. This bill was introduced in response to the Commission's above noted rulemaking at the request of irrigators who believed the rulemaking was not in concert with a straight interpretation of existing Oregon statutes.

HB 3408-A unambiguously states that irrigation reservoirs are outright permitted uses in any area zoned for exclusive farm use – similar to other components of irrigation water systems including canals, delivery lines, structures and accessory facilities. It would seem the purpose of any impoundment structure is to hold water, and in my view HB 3408-A does not change policy on this point, but provides regulatory consistency among Oregon's 36 counties in the application of ORS 215.213 and ORS 215.283.

HB 3408-A provides the agency a clear and concise legislative interpretation of this statute that should inform future decisions and provide statewide consistency in the application and interpretation of land use law.

As a result of the passage of HB 3408-A, no further rulemaking is necessary and we would respectfully request that the Commission terminate the reservoir rulemaking.

Sincerely,

David Nelson
Oregon State Senator

EXHIBIT: 22 AGENDA ITEM: 7
LAND CONSERVATION & DEVELOPMENT
COMMISSION
DATE: 6-22-11
SUBMITTED BY: DLCD



BOB JENSON
State Representative
DISTRICT 58
UMATILLA COUNTY



HOUSE OF REPRESENTATIVES

REPLY TO ADDRESS INDICATED:

- 900 Court St. NE, H-481
Salem, OR 97301
Phone: (503) 986 - 1458
- 2126 NW Despain Ave.
Pendleton, OR 97801
Phone: (541) 276-5821

DEPT OF

JUN 22 2011

**LAND CONSERVATION
AND DEVELOPMENT**

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HB3408A unambiguously states that irrigation reservoirs are outright permitted use in any area zoned for exclusive farm use – similar to other components of irrigation water systems including canals, delivery lines, structures and accessory facilities. It would seem the purpose of any impoundment structure is to hold water, and in our view HB3408A does not change policy on this point, but provides regulatory consistency among Oregon's 36 counties in the application of ORS 215.213 and ORS 215.283.

HB3408A provides the agency a clear and concise legislative interpretation of this statute that should inform future decisions and provide statewide consistency in the application and interpretation of land use law.

As a result of the passage of HB3408, I do not believe further rulemaking is necessary. If you disagree with this, I would appreciate hearing your rationale.

Sincerely,

Bob Jenson
State Representative, HD 58

Greg Smith
State Representative, HD 57