

Enrolled
House Bill 3002

Sponsored by COMMITTEE ON STREAM RESTORATION AND SPECIES RECOVERY

CHAPTER

AN ACT

Relating to the Oregon Plan; creating new provisions; amending ORS 196.810, 315.138, 498.336, 498.346, 509.600, 509.610, 509.620, 509.625, 509.630, 509.645, 509.910 and 536.580 and sections 2 and 3, chapter 882, Oregon Laws 1999; repealing ORS 498.351, 509.605 and 509.640; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. As used in sections 1 to 3 of this 2001 Act and ORS 509.600 to 509.645 and 509.910:

(1) "Artificial obstruction" means any dam, diversion, culvert or other human-made device placed in the waters of this state that precludes or prevents the migration of native migratory fish.

(2) "Construction" means:

(a) Original construction;

(b) Major replacement;

(c) Structural modifications that increase storage or diversion capacity; or

(d) For purposes of culverts, installation or replacement of a roadbed or culvert.

(3) "Emergency" means unforeseen circumstances materially related to or affected by an artificial obstruction that, because of adverse impacts to a population of native migratory fish, requires immediate action. The State Fish and Wildlife Director may further define the term "emergency" by rule.

(4) "Fundamental change in permit status" means a change in regulatory approval for the operation of an artificial obstruction where the regulatory agency has discretion to impose additional conditions on the applicant, including but not limited to licensing, relicensing, reauthorization or the granting of new water rights, but not including water right transfers or routine maintenance permits.

(5) "In-proximity" means within the same watershed or water basin and having the highest likelihood of benefiting the native migratory fish populations directly affected by an artificial obstruction.

(6) "Native migratory fish" means those native fish that migrate for their life cycle needs and that are listed in the rules of the State Fish and Wildlife Director.

(7) "Net benefit" means an increase in the overall, in-proximity habitat quality or quantity that is biologically likely to lead to an increased number of native migratory fish after a development action and any subsequent mitigation measures have been completed.

(8) "Oregon Plan" means the guidance statement and framework described in ORS 541.405.

SECTION 2. (1) It is the policy of the State of Oregon to provide for upstream and downstream passage for native migratory fish and the Legislative Assembly finds that cooperation and collaboration between public and private entities is necessary to accomplish the policy goal of providing passage for native migratory fish and to achieve the enhancement and restoration of Oregon's native salmonid populations, as envisioned by the Oregon Plan. Therefore, except as provided in ORS chapter 509, fish passage is required in all waters of this state in which native migratory fish are currently or have historically been present.

(2) Except as otherwise provided by this section or ORS 509.645, a person owning or operating an artificial obstruction may not construct or maintain any artificial obstruction across any waters of this state that are inhabited, or historically inhabited, by native migratory fish without providing passage for native migratory fish.

(3) The State Department of Fish and Wildlife shall complete and maintain a statewide inventory of artificial obstructions in order to prioritize enforcement actions based on the needs of native migratory fish. This prioritization shall include, but need not be limited to, the degree of impact of the artificial obstruction on the native migratory fish, the biological status of the native migratory fish stocks in question and any other factor established by the department by rule. The department shall establish a list of priority projects for enforcement purposes. Priority artificial obstructions are subject to the State Fish and Wildlife Commission's authority as provided in ORS 509.625. Unless requested by persons owning or operating an artificial obstruction, the department shall primarily direct its enforcement authority toward priority projects, emergencies and projects described in subsection (4) of this section. The priority project list shall be subject to periodic review and amendment by the department and to formal review and amendment by the commission no less frequently than once every five years.

(4) A person owning or operating an artificial obstruction shall, prior to construction, fundamental change in permit status or abandonment of the artificial obstruction in any waters of this state, obtain a determination from the department as to whether native migratory fish are or historically have been present in the waters. If the department determines that native migratory fish are or historically have been present in the waters, the person owning or operating the artificial obstruction shall either submit a proposal for fish passage to the department or apply for a waiver pursuant to subsection (7) of this section. Approval of the proposed fish passage facility or of the alternatives to fish passage must be obtained from the department prior to construction, permit modification or abandonment of the artificial obstruction.

(5) Consistent with the purpose and goals of the Oregon Plan, the department shall seek cooperative partnerships to remedy fish passage problems and to ensure that problems are corrected as soon as possible. The department and the person owning or operating the artificial obstruction are encouraged to negotiate the terms and conditions of fish passage or alternatives to fish passage, including appropriate cost sharing. The negotiations may include, but are not limited to, consideration of equitable factors.

(6) The department shall submit a proposed determination of the required fish passage or alternatives to fish passage to the commission for approval. The determination may be the result of the negotiations described in subsection (5) of this section or, if no agreement was reached in the negotiations, a determination proposed by the department. If a protest is not filed within the time period specified in ORS 509.645, the proposed determination shall become a final order.

(7)(a) The commission shall waive the requirement for fish passage if the commission determines that the alternatives to fish passage proposed by the person owning or operating the artificial obstruction provide a net benefit to native migratory fish.

(b) Net benefit to native migratory fish is determined under this subsection by comparing the benefit to native migratory fish that would occur if the artificial obstruction had fish passage to the benefit to native migratory fish that would occur using the proposed alter-

natives to fish passage. Alternatives to fish passage must result in a benefit to fish greater than that provided by the artificial obstruction with fish passage. The net benefit to fish shall be determined based upon conditions that exist at the time of comparison.

(c) The State Fish and Wildlife Director shall develop rules establishing general criteria for determining the adequacy of fish passage and of alternatives to fish passage. The general criteria shall include, but not be limited to:

- (A) The geographic scope in which alternatives must be conducted;
- (B) The type and quality of habitat;
- (C) The species affected;
- (D) The status of the native migratory fish stocks;
- (E) Standards for monitoring, evaluating and adaptive management;
- (F) The feasibility of fish passage and alternatives to fish passage;
- (G) Quantified baseline conditions;
- (H) Historic conditions;
- (I) Existing native migratory fish management plans;
- (J) Financial or other incentives and the application of incentives;
- (K) Data collection and evaluation; and
- (L) Consistency with the purpose and goals of the Oregon Plan.

(d) To the extent feasible, the department shall coordinate its requirements for adequate fish passage or alternatives to fish passage with any federal requirements.

(8) A person owning or operating an artificial obstruction may at any time petition the commission to waive the requirement for fish passage in exchange for agreed-upon alternatives to fish passage that provide a net benefit to native migratory fish as determined in subsection (7) of this section.

(9)(a) Artificial obstructions without fish passage are exempt from the requirement to provide fish passage if the commission:

- (A) Finds that a lack of fish passage has been effectively mitigated;
- (B) Has granted a legal waiver for the artificial obstruction; or
- (C) Finds there is no appreciable benefit to providing fish passage.

(b) The commission shall review, at least once every seven years, the artificial obstructions exempted under this subsection that do not have an exemption expiration date to determine whether the exemption should be renewed. The commission may revoke or amend an exemption if it finds that circumstances have changed such that the relevant requirements for the exemption no longer apply. The person owning or operating the artificial obstruction may protest the decision by the commission pursuant to ORS 509.645.

(10) If the fundamental change in permit status is an expiration of a license of a federally licensed hydroelectric project, the commission's determination shall be submitted to the Federal Energy Regulatory Commission as required by ORS 543A.060 to 543A.410.

(11) To the extent that the requirements of this section are preempted by the Federal Power Act or by the laws governing hydroelectric projects located in waters governed jointly by Oregon and another state, federally licensed hydroelectric projects are exempt from the requirements of this section.

(12) A person subject to a decision of the commission under this section shall have the right to a contested case hearing according to the applicable provisions of ORS 183.310 to 183.550.

SECTION 3. (1) The State Fish and Wildlife Director shall establish a Fish Passage Task Force to advise the director and the State Department of Fish and Wildlife on matters related to fish passage in Oregon, including but not limited to funding, cost sharing and prioritization of efforts. The director shall determine the members and the specific duties of the task force by rule.

(2) The department shall provide staff necessary for the performance of the functions of the task force.

(3) A member of the task force may not receive compensation for services as a member of the task force. In accordance with ORS 292.495, a member of the task force may receive reimbursement for actual and necessary travel or other expenses incurred in the performance of official duties.

(4) The task force shall report semiannually to the joint legislative committee created under ORS 171.551, or to the appropriate interim legislative committee with responsibility for salmon restoration or species recovery, to advise the committee on matters related to fish passage.

SECTION 4. ORS 196.810 is amended to read:

196.810. (1)(a) Except as otherwise specifically permitted under ORS 196.600 to 196.905, no person or governmental body shall remove any material from the beds or banks or fill any waters of this state without a permit issued under authority of the Director of the Division of State Lands, or in a manner contrary to the conditions set out in the permit, or in a manner contrary to the conditions set out in an order approving a wetlands conservation plan.

(b) Notwithstanding the permit requirements of this section and notwithstanding the provisions of ORS 196.800 (5) and (12), if any removal or fill activity is proposed in essential indigenous anadromous salmonid habitat, except for those activities customarily associated with agriculture, a permit is required. "Essential indigenous anadromous salmonid habitat" as defined under this section shall be further defined and designated by rule by the Division of State Lands in consultation with the State Department of Fish and Wildlife and in consultation with other affected parties.

(c) No person shall be required to obtain a permit under paragraph (b) of this subsection for prospecting resulting in the removal from or fill of less than one cubic yard of material at any one individual site and, cumulatively, not more than five cubic yards of material within a designated essential indigenous anadromous salmonid habitat segment in a single year. Prospecting shall be conducted only within the bed or wet perimeter of the waterway and shall not occur at any site where fish eggs are present. Removal or filling activities customarily associated with mining shall require a permit under paragraph (b) of this subsection.

(d) No permit shall be required under paragraph (b) of this subsection for construction or maintenance of fish passage and fish screening structures that are constructed, operated or maintained under ORS 498.311, 498.316, 498.326, ~~498.351~~ or 509.600 to 509.645.

(e) Nothing in this section shall limit or otherwise change the exemptions under ORS 196.905.

(f) As used in this section:

(A) "Bed" means the land within the wet perimeter and any adjacent nonvegetated dry gravel bar.

(B) "Essential indigenous anadromous salmonid habitat" means the habitat that is necessary to prevent the depletion of indigenous anadromous salmonid species during their life history stages of spawning and rearing.

(C) "Indigenous anadromous salmonid" means chum, sockeye, Chinook and Coho salmon, and steelhead and cutthroat trout, that are members of the family Salmonidae and are listed as sensitive, threatened or endangered by a state or federal authority.

(D) "Prospecting" means searching or exploring for samples of gold, silver or other precious minerals, using nonmotorized methods, from among small quantities of aggregate.

(E) "Wet perimeter" means the area of the stream that is under water or is exposed as a non-vegetated dry gravel bar island surrounded on all sides by actively moving water at the time the activity occurs.

(2) No governmental body shall issue a lease or permit contrary or in opposition to the conditions set out in the permit issued under ORS 196.600 to 196.905.

(3) Subsection (1) of this section does not apply to removal of material under a contract, permit or lease with any governmental body entered into before September 13, 1967. However, no such contract, permit or lease may be renewed or extended on or after September 13, 1967, unless the person removing the material has obtained a permit under ORS 196.600 to 196.905.

(4) Notwithstanding subsection (1) of this section, the Division of State Lands may issue, orally or in writing, an emergency authorization for the removal of material from the beds or banks or filling of any waters of this state in an emergency, for the purpose of making repairs or for the purpose of preventing irreparable harm, injury or damage to persons or property. The emergency authorization issued under this subsection:

(a) Shall contain conditions of operation that the division determines are necessary to minimize impacts to water resources or adjoining properties.

(b) Shall be based, whenever practicable, on the recommendations contained in an on-site evaluation by an employee or representative of the division.

(c) If issued orally, shall be confirmed in writing by the division within five days.

SECTION 5. ORS 315.138 is amended to read:

315.138. (1) There shall be allowed a credit against tax due under ORS chapter 316, or if the taxpayer is a corporation, under ORS chapter 317, for taxpayers that install fish screening devices, by-pass devices or fishways, when required to do so by ORS 498.306, 498.311 (1)[, *498.351 (1), 509.605 (1)*] or 509.615 (1) **or section 2 of this 2001 Act**, and the diversion is not part of a hydroelectric project required to be licensed under the Federal Energy Regulatory Commission. Except as allowed in subsection (4) of this section, the credit shall be taken in the tax year in which the final certification is issued under subsection (10) of this section.

(2) The credit shall be equal to 50 percent of the taxpayer's net certified costs of installing a fish screening device, by-pass device or fishway. The total credit allowed shall not exceed \$5,000 per device installed.

(3) The credit allowed in any one year shall not exceed the tax liability of the taxpayer.

(4) Any tax credit otherwise allowable under this section which is not used by the taxpayer in a particular tax year may be carried forward and offset against the taxpayer's tax liability for the next succeeding tax year. Any credit remaining unused in such next succeeding tax year may be carried forward and used in the second succeeding tax year. Any credit remaining unused in such second succeeding tax year may be carried forward and used in the third succeeding tax year. Any credit remaining unused in such third succeeding tax year may be carried forward and used in the fourth succeeding tax year. Any credit remaining unused in such fourth succeeding tax year may be carried forward and used in the fifth succeeding tax year, but may not be used in any tax year thereafter.

(5) The credit provided by this section shall be in addition to and not in lieu of any depreciation or amortization deduction to which the taxpayer otherwise may be entitled with respect to the installation of a fish screening device, by-pass device or fishway. The taxpayer's adjusted basis for determining gain or loss shall not be further decreased by any tax credits allowed under this section.

(6) In the case of a credit allowed under this section for purposes of ORS chapter 316:

(a) A nonresident shall be allowed the credit in the same manner and subject to the same limitations as a resident. However, the credit shall be prorated using the proportion provided in ORS 316.117.

(b) If a change in the taxable year of a taxpayer occurs as described in ORS 314.085, or if the Department of Revenue terminates the taxpayer's taxable year under ORS 314.440, the credit allowed by this section shall be prorated or computed in a manner consistent with ORS 314.085.

(c) If a change in the status of a taxpayer from resident to nonresident or from nonresident to resident occurs, the credit allowed by this section shall be determined in a manner consistent with ORS 316.117.

(7) To qualify for the credit the taxpayer must be issued a certificate by the State Department of Fish and Wildlife.

(8) To obtain credit under subsection (1) of this section, any person proposing to apply for certification of a fish screening device, by-pass device or fishway, before installing the fish screening device, by-pass device or fishway, shall file a request for preliminary certification with the State

Department of Fish and Wildlife. The request shall be in a form prescribed by the State Department of Fish and Wildlife. The following conditions shall apply:

(a) Within 30 days of the receipt of a request for preliminary certification, the State Department of Fish and Wildlife may require, as a condition precedent to issuance of a preliminary certificate of approval, the submission of plans and specifications. After examination thereof, the State Department of Fish and Wildlife may request corrections and revisions to the plans and specifications. The State Department of Fish and Wildlife may also require any pertinent information necessary to determine whether the proposed fish screening device, by-pass device or fishway is in accordance with State Department of Fish and Wildlife requirements.

(b) If the State Department of Fish and Wildlife determines that the proposed fish screening device, by-pass device or fishway is in accordance with State Department of Fish and Wildlife requirements, it shall issue a preliminary certificate approving the fish screening device, by-pass device or fishway. If the State Department of Fish and Wildlife determines that the fish screening device, by-pass device or fishway does not comply with State Department of Fish and Wildlife requirements, the State Department of Fish and Wildlife shall issue an order denying certification.

(c) If within 90 days of the receipt of plans, specifications or any subsequently requested revisions or corrections to the plans and specifications or any other information required pursuant to this section, the State Department of Fish and Wildlife fails to issue a preliminary certificate of approval and the State Department of Fish and Wildlife fails to issue an order denying certification, the preliminary certificate shall be considered to have been issued. The capital investment must comply with the plans, specifications and any corrections or revisions thereto, if any, previously submitted.

(d) Within 30 days from the date of mailing of the order, any person against whom an order is directed pursuant to paragraph (b) of this subsection may demand a hearing. The demand shall be in writing, shall state the grounds for hearing and shall be mailed to the State Fish and Wildlife Director. The hearing shall be conducted in accordance with the applicable provisions of ORS 183.310 to 183.550.

(9) Any fish screening device, by-pass device or fishway that is installed pursuant to ORS 498.311 (2) *[or alterations made pursuant to ORS 498.351 (2) to (6) shall]* **is** not *[be]* eligible for the credit provided in subsection (1) of this section.

(10) Upon completion and pursuant to application for final certification, final certification shall be issued by the State Department of Fish and Wildlife if the fish screening device, by-pass device or fishway was constructed and installed in accordance with State Department of Fish and Wildlife requirements. Final certification shall include a statement of the costs of installation as verified by the State Department of Fish and Wildlife. The credit allowed under this section shall be claimed first for the tax year of the taxpayer in which final certification is issued.

(11) Pursuant to the procedures for a contested case under ORS 183.310 to 183.550, the State Department of Fish and Wildlife may order the revocation of the certificate issued under this section of any taxpayer, if it finds that:

(a) The certificate was obtained by fraud or misrepresentation; or

(b) The holder of the certificate fails to meet State Department of Fish and Wildlife requirements.

(12) As soon as the order of revocation under this section has become final the State Department of Fish and Wildlife shall notify the Department of Revenue of such order.

(13) If the certificate of a fish screening device, by-pass device or fishway is ordered revoked pursuant to subsection (11) of this section, all prior tax relief provided to the holder of the certificate by virtue of the certificate shall be forfeited and the Department of Revenue shall proceed to collect those taxes not paid by the certificate holder as a result of the tax relief provided to the holder.

(14) If the certificate of a fish screening device, by-pass device or fishway is ordered revoked pursuant to subsection (11) of this section, the certificate holder shall be denied any further relief

provided under this section in connection with the fish screening device, by-pass device or fishway, as the case may be, from and after the date that the order of revocation becomes final.

(15) In the event that the fish screening device, by-pass device or fishway is destroyed by flood, natural disaster or act of God before all of the credit has been used, the taxpayer may nevertheless claim the credit as if no destruction had taken place.

(16) Fish screening devices, by-pass devices or fishways *[which]* **that** are financed by funds obtained from the Water Development Fund, pursuant to ORS 541.700 to 541.855, shall not be eligible for the credit under any circumstances.

(17) The State Department of Fish and Wildlife shall adopt rules for carrying out the provisions of this section and report to the interim committee created under ORS 171.605 to 171.640 to make studies of and inquiries into state revenue matters.

SECTION 6. ORS 498.336 is amended to read:

498.336. Nothing in ORS 498.306, 498.311[, 498.351, 509.605] or 509.615 **or section 2 of this 2001 Act** shall be construed:

(1) To limit the eligibility of a person required to install and operate fish screening or by-pass devices to obtain funding from the Water Development Fund pursuant to ORS 541.700 to 541.855.

(2) To limit the acquisition or acceptance of any federal funds available for the installation, operation, maintenance, improvement or repair of fish screening or by-pass devices on water diversions in this state, regardless of the size of the diversion.

SECTION 7. ORS 498.346 is amended to read:

498.346. The State Fish and Wildlife Commission may maintain a suit to enjoin any person, including governmental agencies of this state and political subdivisions of this state, from violating the provisions of ORS 498.306[,] **or** 498.311 [*or 498.351*]. The circuit court for any county in which are situated any waters in which any such violations are threatened has jurisdiction of the suit authorized by this section.

SECTION 8. ORS 509.600 is amended to read:

509.600. (1) [*It is unlawful*] **A person may not** willfully or knowingly [*to*] destroy, injure or take [*food*] fish within 600 feet of any fishway, except as permitted by subsection (2) of this section [*or in the case of angling under ORS 498.216*]. Actions that violate this section include, but are not limited to:

(a) Hindering, annoying or disturbing fish entering, passing through, resting in or leaving such fishway, or obstructing the passage of fish through the fishway at any time or in any manner.

(b) Placing anything in the fishway.

(c) Using any fishing gear within 600 feet of the fishway.

(d) Taking fish at any time anywhere within 600 feet of the fishway.

(e) Doing any injury to the fishway.

(2) The State Fish and Wildlife Commission may [*grant permits to take fish other than those fish classified under the family salmonidae*] **by rule or by issuance of permits authorize the taking of fish** within 600 feet of any fishway [*in a manner that will not otherwise violate paragraph (a) of subsection (1) of this section*].

SECTION 9. ORS 509.610 is amended to read:

509.610. (1) Subject to ORS 509.645, when the State **Department of Fish and Wildlife** [*Director*] requires [*a fishway*] **fish passage** to be provided pursuant to [*ORS 509.605, the owner or occupant of a dam or*] **section 2 of this 2001 Act, the person owning or operating an** artificial obstruction shall keep the [*fishway in repair and open and free from obstruction to the passage of anadromous or food fish at all times*] **fish passage in such repair as to provide adequate fish passage of native migratory fish at all times.**

(2) Each day of neglect or refusal to comply with subsection (1) of this section, after notification in writing by the [*director*] **department**, constitutes a separate offense.

(3) A person owning or operating an artificial obstruction is responsible for maintaining, monitoring and evaluating the effectiveness of fish passage or alternatives to fish passage.

SECTION 10. ORS 509.620 is amended to read:

509.620. [Where] **If**, in the judgment of the State **Department of Fish and Wildlife**, **fish passage is not functioning as intended or** [Commission, any fishway] is inadequate, as constructed under [ORS 509.605 or otherwise] **section 2 of this 2001 Act**, the **State Fish and Wildlife Commission** may condemn the [fishway] **fish passage** and order [a new fishway] **new fish passage** installed in accordance with plans and specifications determined by the [commission] **department**.

SECTION 11. ORS 509.625 is amended to read:

509.625. (1) The State **Department of Fish and Wildlife** [Commission] may determine or ascertain by inspection of any [dam or] artificial obstruction whether it would be advisable to construct **fish passage**, or order the construction pursuant to [ORS 509.605] **section 2 of this 2001 Act** [by the owners thereof, of fishways over the dam or] **of fish passage, at the artificial** obstruction. [The commission may construct or order the construction, pursuant to ORS 509.605, of such number of fishways in any stream inhabited by anadromous or food fish as is deemed adequate to provide a good and sufficient passageway for such fish.] **Without affecting other remedies to enforce the requirement to install fish passage, if the State Fish and Wildlife Commission determines that an emergency exists, the commission may order the construction, pursuant to section 2 of this 2001 Act, of fish passage in the waters of this state inhabited by native migratory fish as deemed adequate to provide passage for native migratory fish.**

(2) Where [a fishway] **fish passage** has [heretofore] **previously** been constructed with or without the approval of the commission and has proved useless or inadequate for the purposes for which it is intended, the commission may improve or rebuild such [fishway] **fish passage**. However, such construction or reconstruction shall not interfere with the prime purpose of the [dam or] **artificial** obstruction. This subsection [shall] **may** not be construed to require the improvement or rebuilding of [fishways] **fish passage** by the commission.

(3)(a) **The commission may order a person owning or operating an artificial obstruction on the priority list created pursuant to section 2 of this 2001 Act who has been issued a water right, owners of lawfully installed culverts or owners of other lawfully installed obstructions to install fish passage or to provide alternatives to fish passage if the commission can arrange for nonowner or nonoperator funding of at least 60 percent of the cost.**

(b) **Notwithstanding paragraph (a) of this subsection, the commission may order installation of fish passage or alternatives to fish passage without regard to funding sources:**

(A) **If the person owning or operating the artificial obstruction is already subject to an obligation to install fish passage or to provide alternatives to fish passage under section 2 of this 2001 Act;**

(B) **If the commission declares an emergency under this section; or**

(C) **If the person owning or operating the artificial obstruction has not been issued a water right or if the artificial obstruction has been otherwise unlawfully installed.**

(4) **If a person who owns or operates an artificial obstruction and who is required to provide fish passage under section 2 of this 2001 Act fails to provide fish passage in the manner and time required by the State Department of Fish and Wildlife, the commission may remove, replace or repair the artificial obstruction or any parts of the obstruction at the expense of the owner or operator.**

SECTION 12. ORS 509.630 is amended to read:

509.630. The State **Department of Fish and Wildlife** [Commission] may determine or ascertain by inspection of any natural obstruction whether it would be advisable to construct [fishways] **fish passage** over or around such natural obstruction. If it is deemed advisable the **State Fish and Wildlife Commission** may construct [fishways in any stream inhabited by anadromous or food fish adequate to provide a good and sufficient passageway for such fish] **fish passage that provides adequate passage for native migratory fish in the waters of this state inhabited by native migratory fish.**

SECTION 13. ORS 509.645 is amended to read:

509.645. [(1) Any owner or occupant of a dam or artificial obstruction may file a protest with the Water Resources Commission within 10 days after receipt of notification from the State Fish and

Wildlife Director as provided in ORS 509.605 (2), or within 10 days after receiving notice of the requirement by the State Fish and Wildlife Commission under ORS 509.640, on the ground that providing the dam or artificial obstruction with a fishway or providing the dam with hatchery facilities as required by the State Fish and Wildlife Commission, as the case may be, would impair or be detrimental to the public interest.]

[(2) Within a reasonable time after the filing of the protest under subsection (1) of this section, the Water Resources Commission shall hold a public hearing thereon. The Water Resources Commission shall give written notice of the hearing to each owner or occupant of the dam or artificial obstruction, who is known to or can be reasonably ascertained by the Water Resources Commission, and to the State Fish and Wildlife Commission at least 10 days prior to the hearing.]

[(3) The Water Resources Commission, after the hearing, shall make a determination as to whether providing the dam or artificial obstruction with a fishway or providing the dam with hatchery facilities as required by the State Fish and Wildlife Commission, as the case may be, would impair or be detrimental to the public interest. The determination shall be binding upon each owner or occupant of the dam or artificial obstruction and the State Fish and Wildlife Commission. The determination shall approve the requirement of the fishway or the hatchery facilities, as the case may be, approve the requirement subject to conditions specified in the determination or disapprove the requirement. If each owner or occupant of the dam or artificial obstruction complies with the determination, such owner or occupant shall be deemed not in violation of ORS 509.605 or 509.640, as the case may be.]

[(4) In determining whether providing the dam or artificial obstruction with a fishway or providing the dam with hatchery facilities as required by the State Fish and Wildlife Commission, as the case may be, would impair or be detrimental to the public interest, the Water Resources Commission shall have due regard for:]

[(a) The state water resources policy formulated under ORS 536.295 to 536.350.]

[(b) The considerations set forth in ORS 536.310.]

[(5) In the event protests are filed with the Water Resources Commission under both subsection (1) of this section and ORS 498.351, the Water Resources Commission may consider and determine the protests in a combined proceeding under this section and ORS 498.351.]

(1) A person owning or operating an artificial obstruction may request alternative dispute resolution at any point in the process of determining fish passage requirements.

(2) A person owning or operating an artificial obstruction may file a protest with the State Fish and Wildlife Commission within 30 days from the receipt of the State Department of Fish and Wildlife determinations under section 2 of this 2001 Act. The person shall identify the grounds for protesting the department's determinations.

(3) The commission may, after sufficient opportunity for public review and comment, approve, deny or modify the proposed determinations.

SECTION 14. ORS 509.910 is amended to read:

509.910. (1) The State Fish and Wildlife Commission may maintain an action for an injunction to enjoin and restrain any person, municipal corporation, political subdivision or governmental agency of this state from violating any of the provisions of ORS 509.130, 509.140, 509.505, [509.605,] 509.610, 509.615 and 509.625 **and section 2 of this 2001 Act.**

(2) Any action authorized by this section shall be tried in the circuit court of the county in which the violation occurs **or in Marion or Multnomah County.**

(3) If the defendant is a corporation with its principal office and place of business in a county other than in which the waters flow or are situated, such action shall be deemed an action of local nature and service of summons made on a corporation in any county where the corporation has its principal office and place of business. If it is a foreign corporation, service may be made on the statutory agent but if there is no such statutory agent then upon the Secretary of State as in other cases provided by law.

SECTION 15. ORS 536.580 is amended to read:

536.580. Nothing in ORS 509.645, 536.220 to 536.540 or 543.225, as enacted by chapter 707, Oregon Laws 1955, nor in the amendments made by chapter 707, Oregon Laws 1955, to ORS 225.290,

225.300, 261.325, 261.330, [509.605,] 509.610, 509.625, [509.640,] 537.170, 537.200 (1969 Replacement Part), 543.050 or 543.230, nor in sections 38, 41, 43, 45 or 50 of chapter 707, Oregon Laws 1955, **nor in section 2 of this 2001 Act** shall be construed to take away or impair any right to any waters or to the use of any waters vested and inchoate prior to August 3, 1955.

SECTION 16. Section 2, chapter 882, Oregon Laws 1999, is amended to read:

Sec. 2. For the period beginning on [the effective date of this 1999 Act] **July 30, 1999**, and ending June 30, 2001, the State Fish and Wildlife Commission shall not initiate action under ORS [498.351, 509.605,] 509.610, 509.620[,] **or 509.625 [or 509.640] or section 2 of this 2001 Act** with respect to an existing hydroelectric project operating under a state or federal license issued before [the effective date of this 1999 Act] **July 30, 1999**, except as part of the process of reauthorization under the provisions of ORS chapter 543A.

SECTION 17. Section 3, chapter 882, Oregon Laws 1999, is amended to read:

Sec. 3. (1) Notwithstanding ORS [498.351, 509.605,] 509.610, 509.620[,] **or 509.625 [or 509.640] or section 2 of this 2001 Act**, for the period beginning on [the effective date of this 1999 Act] **July 30, 1999**, and ending June 30, 2001, the State Fish and Wildlife Commission may enter into a memorandum of understanding that waives the requirements of [ORS 498.351 or 509.605] **section 2 of this 2001 Act** for any new project or modification of an existing project if:

(a) The commission determines, after sufficient opportunity for public review and comment, that alternative mitigation proposed by the project owner or operator would provide a net benefit to wild anadromous and other migratory native fish; and

(b) The proponent of the alternative mitigation submits a memorandum of understanding for approval by the commission on or before January 1, 2001.

(2) Any proposed alternative passage and mitigation for the project in lieu of providing [a fishway] **fish passage** under [ORS 498.351 or 509.605] **section 2 of this 2001 Act** shall not include a hatchery component or the introduction of exotic fish species within the project area.

SECTION 18. (1) There is created the Salmon Recovery Task Force consisting of 13 members. Members shall be persons who are well-experienced with and very knowledgeable about salmon recovery and the Oregon Plan. Members shall be appointed jointly by the Governor, the President of the Senate and the Speaker of the House of Representatives and shall include:

- (a) **One member of the Senate;**
- (b) **Two members of the House of Representatives;**
- (c) **One representative of the Department of Environmental Quality;**
- (d) **One representative of the State Department of Agriculture;**
- (e) **One representative of the State Forestry Department;**
- (f) **One representative of the State Department of Fish and Wildlife;**
- (g) **One representative of the Oregon Watershed Enhancement Board;**
- (h) **One representative of the Indian tribes;**
- (i) **One representative of the sportfishing community;**
- (j) **One representative of the commercial fishing community;**
- (k) **One representative of local governments; and**
- (L) **One representative of the environmental and conservation community.**

(2) **The Governor, the President of the Senate and the Speaker of the House of Representatives shall make every effort to encourage the involvement, in an advisory capacity to the task force, of persons from federal agencies that are involved in salmon recovery efforts. Members of the Legislative Assembly who are appointed to the task force may act in an advisory capacity only.**

(3) **The task force shall:**

(a) **Define “recovery” for purposes of restoring anadromous salmonid populations to a point at which the populations may be removed from endangered or threatened status under the federal Endangered Species Act of 1973 (P.L. 93-205, 16 U.S.C. 1531 to 1544);**

(b) Develop and coordinate a scientific workshop with the Independent Multidisciplinary Science Team;

(c) Establish criteria for evaluation of salmon recovery; and

(d) Develop legislation for recommendation to the Seventy-second Legislative Assembly.

(4) The task force is subject to the provisions of ORS 171.605 to 171.635 and has the authority contained in ORS 171.505 and 171.510.

(5) The task force shall use the services of permanent legislative staff to the greatest extent practicable.

(6) A member of the Legislative Assembly who is appointed to the task force shall be entitled to an allowance as authorized by ORS 171.072 from funds appropriated to the Legislative Assembly. Other members of the task force are not entitled to compensation but may receive actual and necessary travel or other expenses incurred in the performance of their official duties as provided in ORS 292.495.

(7) All agencies, departments and officers of this state are directed to assist the task force in the performance of its functions and to furnish such information and advice as the members of the task force consider necessary to perform their functions.

(8) Official action by the task force as outlined in subsection (3) of this section shall require the approval of a majority of the nonadvisory members of the task force. All legislation recommended by official action of the task force must indicate that it is introduced at the request of the task force. Such legislation shall be prepared in time for pre-session filing pursuant to ORS 171.130.

(9) The task force shall report to the joint legislative committee established under ORS 171.551 or an interim committee as appropriate.

SECTION 19. Section 18 of this 2001 Act is repealed on December 31, 2002.

SECTION 20. The State Fish and Wildlife Director shall report to the Governor, the Speaker of the House of Representatives, the President of the Senate and the joint interim committee established pursuant to ORS 171.551 or the appropriate interim legislative committee with responsibility for salmon restoration or species recovery:

(1) Prior to the adoption of rules relating to fish passage;

(2) Prior to the establishment of the general criteria for determining the adequacy of fish passage and of alternatives to fish passage required to be established under section 2 (7)(c) of this 2001 Act; and

(3) Semiannually on the progress that the director has made in implementing sections 1 to 3 of this 2001 Act.

SECTION 21. ORS 498.351, 509.605 and 509.640 are repealed.

SECTION 22. This 2001 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2001 Act takes effect on its passage.

Passed by House May 29, 2001

Repassed by House June 30, 2001

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Chief Clerk of House

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Speaker of House

Passed by Senate June 27, 2001

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President of Senate

Received by Governor:

.....M,....., 2001

Approved:

.....M,....., 2001

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Governor

Filed in Office of Secretary of State:

.....M,....., 2001

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Secretary of State