

BEFORE THE OREGON WATER RESOURCES DEPARTMENT **OWRD**

In the Matter of Water Right Application G-17592, in the name of GOLDEN RULE FARMS INC.	PROTEST OF PROPOSED FINAL ORDER TO DENY APPLICATION G-17592
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INTRODUCTION

This protest is filed on behalf of the above-named applicant, Golden Rule Farms Inc. (hereafter "Golden Rule"), pursuant to ORS 537.621(8), OAR 690-310-0160, and OAR 690-002-0030. Golden Rule requests a contested case hearing.

The Oregon Water Resources Department ("OWRD" or the "Department") is proposing to deny Golden Rule's amended Application G-17592 to appropriate water for the irrigation of 952.26 acres from 8 wells (Briggs Well #10 – Briggs Well #17), at a rate of 15.9 cubic feet per second (cfs) in the Anderson Valley area of the Malheur Basin (the "Application"). OWRD proposes to deny the Application based on its assertion that groundwater is not available because "groundwater will not likely be available within the capacity of the resource." Proposed Final Order ("PFO"), p. 2. OWRD also proposes to deny the application because the proposed use of groundwater "will likely cause injury to senior water users." *Id.* The PFO separately asserts that the proposed use does not comply with "rules of the Water Resources Commission not otherwise described above," though the rules to which this statement refers are never discussed or explained. *Id.*, p. 3. For the reasons provided below, these findings and the PFO are deficient and in error. Therefore, Golden Rule requests that the PFO be modified and that the Application, as amended, be approved.

On October 26, 2012, Golden Rule filed an application for 80.2 cfs from 30 wells for 4180.60 acres located within the Malheur Lake Basin and Malheur Basin. The initial application was filed after discussions with and at the suggestion and direction of OWRD's Watermaster Tony Rutherford. The application was expensive, totaling \$28,500 just in fees paid to the Department. Based on discussions with the Department, Golden Rule had every reason to expect that the application would be approved. In recent conversations, Ivan Gall has indicated to Golden Rule that the scope of the initial application created immediate "red flags" for the

Department. But, those red flags were not expressed to Golden Rule in advance of submitting the application nor were they clearly explained to Golden Rule for many years after, in part it is believed, because the “red flags” or “reasons for denial” kept changing.

From the outset, and over the past seven years, Golden Rule sought to work cooperatively with OWRD to secure a water right. After an unexpected initial review proposing denial of the application—unexpected because of the prior conversations with OWRD staff indicating that submission of an application of this size and extent was a good plan—Golden Rule modified the application to address OWRD’s concerns about its potential impact. Then, after years of seeking to further address the initial review and groundwater availability concerns in what was to become the Greater Harney Valley Groundwater Area of Concern (“GHVGAC”)¹, Golden Rule reduced the size of the application, substantially. Among other things, the amended Application eliminated all lands within the GHVGAC, changing the proposed place of use and points of appropriation to be located entirely within the administrative and geographically distinct Malheur Basin. Golden Rule also cut the rate and number of wells, such that the total amended Application request was reduced to less than twenty percent of the originally requested volume and less than twenty-five percent of the requested volume.

Though this substantial reduction should have led to approval, Golden Rule faced further negative groundwater reviews in 2019. Those reviews attempted to connect the remaining application to the GHVGAC, though the proposed place of use and points of appropriation are located entirely outside of that administrative area and the data shows Anderson Valley to be separate in geography, geology, and hydrogeology between the two areas.

Despite the Department’s contrarian groundwater reviews in 2019, Golden Rule made numerous mitigation proposals in an effort to address OWRD’s concerns by offsetting the proposed use. Each proposal was rejected for internal reasons that were constantly changing. In more than one instance, these unknowable and changing views led to the rejection of mitigation plans that would have reduced groundwater use within the GHVGAC, i.e., the very area which OWRD now declares to be so critically impacted that it cannot approve the Application. In other

¹ The GHVGAC was created by administrative rule, with an effective date of April 15, 2016. OAR 690-512-0020.

instances, the mitigation proposal was rejected based on a "same source" assessment, wherein what was determined to be the "same source" was constantly changing.

While Golden Rule reduced its application and proposed mitigation plans, it watched OWRD approve other, later-filed groundwater applications that cumulatively amounted to nearly 7000 acres and 21,000 acre-feet of annual withdrawals for irrigation within what was to become the GHVGAC. *See* Exhibit A (list of applications approved by OWRD), Exhibit B (map of water rights approved by OWRD). During this time, in light of the approvals of these later-filed applications, its own efforts to reduce and mitigate the proposed use, and OWRD's initial support for the application, Golden Rule invested more than 3 million dollars in the Anderson Valley property, drilling wells and installing seven pivots of varying sizes.

Despite nearly seven years of effort, substantial reductions and mitigation efforts proposed, and OWRD's approval of many other applications during this timeframe, the Department now proposes to deny Golden Rule's application. The resulting three-paged PFO is not supported by substantial evidence; is, without explanation, inconsistent with agency rules or officially stated positions and prior agency practice; does not comply with the law; and is outside the range of discretion delegated to OWRD. It is also substantially lacking in details which would allow Golden Rule to reasonably identify or discern all potential bases for this Protest. For each of these reasons, which are explained further below, the PFO is deficient and in error. Golden Rule therefore requests that OWRD issue a final order modifying its findings and approving the Application.

The elements of a protest, as required by OAR 690-310-0160(1) and OAR 690-002-0030(1), are addressed as follows:

1. Protestant's Name and Address and Telephone Number (OAR 690-310-0160(1)(a); OAR 690-002-0030(1)(c)).

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2. Description of the Protestant's Interest in the PFO (OAR 690-310-0160(1)(b)).

Protestant Golden Rule is the applicant, and is therefore directly and adversely affected by the PFO to deny the request for use of groundwater for irrigation of 952.26 acres in Anderson Valley. Golden Rule is further directly and adversely aggrieved by the Department because it was OWRD who first advised Protestant to make the application and then failed to process it in a reasoned, consistent, and lawful manner despite approving other later-filed applications that cumulatively account for nearly 7000 acres and more than 19,000 acre-feet of water use *per year* and despite Golden Valley's proposal to reduce and mitigate for the proposed use.

3. Detailed Description of How the Action Proposed in the PFO Would Impair, Be Detrimental to or Adversely Affect or Aggrieve the Protestant's Interest (OAR 690-310-0160(1)(c)).

Golden Rule intends to make economic use of the real property in question through the use of water for irrigation of crops. Denial of Application G-17592 will significantly adversely affect and aggrieve Golden Rule by depriving it of the planned economic use of the property, of its ability to obtain the economic return and benefit of the purchase of the property, and of its ability to obtain the economic return anticipated during development of the water rights (which occurred in reliance on the Department's anticipated approval).

Golden Rule has also offered to offset the requested use by reducing groundwater rights within the GHVGAC. Golden Rule purchased those water rights for the purpose of transferring them out of the GHVGAC and to reduce the impact of groundwater uses in the GHVGAC, after discussions regarding this plan with OWRD. The Department's rejection of the proposed mitigation therefore harms users in the GHVGAC, including Golden Rule, and deprives Golden Rule of the ability to utilize the property and water rights the company purchased within the GHVGAC for the purpose of transferring water rights out of the most impacted areas of the GHVGAC.

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4. **Detailed Description of How the PFO is in Error or Deficient and How to Correct the Alleged Error or Deficiency (OAR 690-310-0160(1)(d)); Statement of Facts Sufficient to Show that the Protestant is Entitled to the Relief or Action Requested (OAR 690-002-0030(1)(a)).**

For reasons described below, the PFO is in error and deficient. The Department should correct the errors and deficiencies by issuing a final order approving the Application.

A. OWRD Wrongly Concluded that Groundwater is Not Available.

OWRD was in error to find that groundwater was not available and to propose to deny the Application, as further explained below.

OWRD is required to determine whether water is available prior to approving an application for groundwater use. OAR 690-310-0130(1)(b). Groundwater availability is one of four criteria reviewed by the Department to determine whether it may presume that the proposed use will ensure the preservation of the public welfare, safety, and health as described in ORS 537.525. ORS 537.621(2). If the presumption is established and not otherwise overcome, the Department approves the proposed use. *Id.* Where the Department finds that the presumption is not established, it may make specific findings to demonstrate that the proposed use will not impair or adversely affect the public welfare, safety, and health under ORS 537.525 and propose approval of the application with appropriate modifications or conditions. *Id.*; OAR 690-310-0140(2).

As a part of its water availability determination, OWRD considers whether water is available within the capacity of the resource to support the requested use. This analysis stems from the policy that "waters of the state shall be allocated within the capacity of the resource and consistent with the principle that water belongs to the public to be used beneficially and without waste...." OAR 690-410-0070(1); *see also* ORS 537.525(3) ("Beneficial use without waste, within the capacity of the resource, shall be the basis, measure and extent of the right to appropriate ground water."). OWRD has defined *capacity of the resource* to be "the ability of a ... groundwater resource to sustain a balance of public and private uses without causing over-

appropriation or otherwise significantly impairing the function or character of the resource.”
OAR 690-400-0100(4).

Here, the PFO relies upon a groundwater review dated October 10, 2019 (hereafter “GR”), to find that groundwater is not available for the proposed use. The GR is in error in a number of respects.

At the outset, because the GR acknowledges that OWRD does not know whether the groundwater resource is over appropriated (*see* GR, Section B.1.a.), OWRD did not have the basis to conclude that groundwater is not likely to be available within the capacity of the groundwater resource for the proposed use. *See* GR, Section B.1.b.; PFO, p. 2. OWRD’s rules state that the capacity of the resource hinges on the level of groundwater appropriation. OAR 690-400-0100(4) defines capacity of the resource to be “the ability of a ... groundwater resource to sustain a balance of public and private uses without causing over-appropriation or otherwise significantly impairing the function or character of the resource.” Here, the GR does not find that the groundwater resource is over-appropriated. To the contrary, it states that OWRD *does not know* whether the resource is over-appropriated. Therefore OWRD cannot find that groundwater is not available within the capacity of the resource (and thus deny the Application) because it does not know whether the resource is over-allocated.

The GR also includes a number of remarks related to groundwater availability and to support denial of the Application. These remarks explain that the GR believes the proposed wells (points of appropriation or POAs) are connected to the GHVGAC and that the proposed use will exacerbate declines within the GHVGAC. The groundwater justifies this view based on the location of the proposed wells, which are determined to be within 0.5 and 2.5 miles of the GHVGAC, and a belief that they are within a similar hydrogeological setting as the GHVGAC. The GR also takes the position that the GHVGAC is experiencing significant, persistent declines across the area as a whole and in the Virginia Valley area in particular, and asserts that the proposed use would exacerbate these declines. Both of these assertions lead OWRD to find that groundwater is not available within the capacity of the resource. These assertions, and the PFO’s

reliance upon them to find that groundwater is not available, are erroneous in a number of respects.

To start, the GR is incorrect to assert that the whole of the GHVGAC and neighboring areas (a term that the GR never defines) is experiencing “significant, persistent groundwater declines.” The GHVGAC has variable geology, hydrology, rainfall, water use, water levels, discharge, and recharge across distinctive sub-regions. OWRD’s rules account for these distinctions, prescribing varying approaches to regulation and processing applications within the different regions of the GHVGAC. OAR 690-512-0020(8) (explaining a distinct application process for permits in the Northwest and South sub-areas). The GHVGAC rules further acknowledge that groundwater is not fully allocated within the GHVGAC, and that there are different levels of decline (or lack of decline) within the GHVGAC. OAR 690-51-0020(1) groundwater is fully allocated in *some areas* of the basin); OAR 690-512-0020(1) (“groundwater levels are declining in *areas* of the GHVGAC”). Therefore, it is best to read the GHVGAC rules as a precautionary approach limiting further uses within the area pending completion of the USGS Study. The rules do not necessarily equate to a finding of “significant, persistent declines” within the whole of the GHVGAC. The USGS Study that followed the GHVGAC rules and designation similarly determined that there is variability within the GHVGAC and that not all areas are experiencing the same level or type of drawdown or use. For all of these reasons, OWRD was in error to conclude that proximity to the GHVGAC necessarily support a determination that groundwater is not available or that the groundwater resource proposed for use is experiencing the types of declines being experienced in *some areas* of the GHVGAC. Broad-based assertions about the GHVGAC may be relevant for policy and state-wide discussions, but they are not a basis for evaluating a localized groundwater application.

Furthermore, because the OWRD rules acknowledged variability across the GHVGAC region, the GR should have evaluated the area of the proposed use as distinct from the regional aquifer and independently assessed the local aquifer and its unique characteristics to determine groundwater availability. The GR is in error to assert that the groundwater resource proposed for use is going to experience significant, persistent declines simply because it is “near” the

GHVGAC, and is further in error to rely on this remark to find in Section B.1 and the PFO that groundwater is not available. OWRD

Next, the GR is incorrect to assert that the proposed wells are in a hydrogeological setting that is similar to the GHVGAC and, more specifically, that is similar to Virginia Valley. As previously explained, the GHVGAC rules and USGS Study that followed confirm that the GHVGAC is composed of many different geologic and hydrogeologic provinces. Therefore, it is inaccurate to claim that the area of the proposed use is in a hydrogeological setting similar "to GHVGAC." The proposed wells are in fact located within two major geologic provinces, being older volcanic rocks and voltage basalts. This distinct geologic province runs through a part of the GHVGAC and beyond the GHVGAC's borders into Anderson Valley – the location of the proposed use and wells. The Anderson Valley flats are recharged by surface water runoff from highlands located to the south, which in addition to the above attributes; make Anderson Valley unique and distinct from other areas within and nearby the GHVGAC from a geologic and hydrogeologic perspective. Virginia Valley, which runs to the north-northeast of Anderson Valley and is the area with which OWRD most closely connects the area of the proposed use, is its own unique area as well. It is located in an alluvial valley that drains the basin from the Malheur Lake, and is composed primarily of quaternary sedimentary deposits. It is clear that there are significantly different geological and hydrogeological settings dominating Anderson Valley as compared to Virginia Valley.

OWRD was therefore incorrect to assert that there are similarities in the hydrogeologic setting as between the GHVGAC and Anderson Valley, and between Virginia Valley and Anderson Valley. Furthermore, OWRD should have evaluated the hydrology of the proposed wells with areas of like geology and hydrogeology and water use in order to substantiate its conclusions about groundwater availability.

The GR next remarks that "available water level data" demonstrates that the surface water divide between the Malheur and Malheur Lake administrative basins does not serve as a groundwater divide, that the proposed wells are part of the same groundwater flow system as portions of the GHVGAC, and more specifically, that groundwater flows north-northeast through

the proposed area of use into Virginia Valley. These statements are not sufficiently supported by available data and contradict available data in certain regards.

Virginia Valley and Anderson Valley are in different geographic areas, separated by topographic highlands. The mere fact groundwater flows from the highlands to the lowland flats of Anderson Valley, and thus in the general direction of Virginia Valley, does not mean that groundwater is connected between these areas—as the GR would seem to assume. More work on the local area geology and hydrogeology than what is referenced in the GR is needed before the two areas can be lumped together as a single hydrogeologic unit.²

As it is, available data suggests that the groundwater in Virginia Valley is coming from two sources, one of which is younger water recharged from Malheur Lake and the other of which is older groundwater, presumably deeper confined or semiconfined water bearing zones. Neither of these sources would logically be connected to groundwater recharging Anderson Valley from the highlands to its south. Furthermore, each of the Anderson Valley wells that the GR references (HARN1509, HARN1556, HARN1557) show a higher elevation static water level than the wells in Virginia Valley. This is evidence that these two areas are hydrogeologically distinct. Without more data to support a contrary finding, the available data is contrary to OWRD's inference that Anderson and Virginia Valley are a single hydrogeological unit.

The GR further seeks to support its theory of a single hydrogeologic unit by contending the Anderson Valley wells are showing a general decline though there are no active groundwater rights within the water availability basin where the proposed use is located. This statement is incorrect in a number of ways. First, OWRD is wrong to assume and assert that there are no uses in Anderson Valley. The fact that there are no permitted water rights (which seems to be the basis for this assertion) in the area does not mean water is not being used. Golden Rule is aware of at least one other use of which OWRD should have been aware when it conducted the GR. Aerial photos indicate that this water use—a 160 acre pivot—has been established and irrigated

² In another generalization, the GR asserts that Virginia Valley is “immediately north” of the proposed use. “Immediately north” is in fact 2 to 5 miles away. Therefore, the connection between the two is not as “immediate” as the GR seems to suggest and the distance is further reason to conduct more work before simply lumping these areas together.

as far back as 1987. In addition, as the Department is well aware, Golden Rule has been using water in the Anderson Valley area, across a portion of the land proposed for use in Application G-17592. Therefore, it is directly contrary to the available evidence to declare that there are no uses in Anderson Valley. This single fact undermines the entire line of analysis used in the GR to assert that the slight declines in some Anderson Valley wells demonstrate connectivity to Virginia Valley.

Moreover, the Anderson Valley wells referenced in the GR do not show a general decline. To the contrary, the hydrographs with the longest record show no decline; whereas others with a short record (about 2 years) show a pattern consistent with irrigation and climatic cycles, with some initial decline and then a recharge, but not a "general decline." OWRD's position that the Anderson Valley groundwater resource is suffering from a general decline absent any water use is simply incorrect. Thus, this line of analysis does not support the finding that Anderson Valley is in the same hydrogeologic unit as Virginia Valley, or any other part of the GHVGAC.

As the GR admits, the declines in Virginia Valley are severe and persistent. Furthermore, as demonstrated by the recent isotope study, the Virginia Valley water levels rise and fall with the decadal fluctuation of Malheur Lake and the allowed density of pumping wells. Neither is the case for Anderson Valley. This is additional evidence that Virginia Valley is hydrogeologically distinct from Anderson Valley. The GR incorrectly determined that groundwater is not available within the capacity of the resource because it incorrectly assumed that the groundwater resource in the area of the proposed use is connected to the groundwater sources in Virginia Valley.

Taken altogether, the groundwater availability remarks are contrary to the data evaluated in the GR, are inconsistent with OWRD's rules, and ignore and are inconsistent with readily available data. For the reasons explained above, the record does not support OWRD's overarching assertion that Anderson Valley is part of the regional aquifer of which the GHVGAC is a part and therefore will suffer from generalized declines, or that Anderson Valley is part of a single hydrogeologic unit with Virginia Valley and that uses there will exacerbate the

persistent decline in Virginia Valley. Thus, the GR does not support the PFO's finding that groundwater is not available within the capacity of the resource.

In addition to the other errors in the GR noted above, it is not OWRD's normal practice to evaluate groundwater applications within the context of an entire aquifer for purposes of determining groundwater availability or the capacity of the resource, as the GR does here. Rather, OWRD's practice is to evaluate the target or localized aquifer proposed for use in order to determine groundwater availability. Within that area, OWRD considers geology, hydrogeology, precipitation, other uses, and any other factors that impact groundwater availability. As an example, in the Deschutes basin aquifer—which is also experiencing declines across the regional aquifer—OWRD evaluates water availability within the target area of the proposed use, i.e., within the immediate area surrounding the proposed well(s), despite the interconnectedness of the regional aquifer, in order to propose approval of groundwater uses. This is standard practice for the Department. Therefore, even if Anderson Valley is arguably connected to a regional aquifer that includes the area of the GHVGAC and Virginia Valley, a point that Golden Rule does not hereby concede, OWRD still should have evaluated the local aquifer, not the overall characteristics of the regional aquifer, to determine whether water was available for the proposed use.

An evaluation consistent with OWRD's normal practice would have led to a different result. As explained above, the Anderson Valley area is geologically and hydrogeologically distinct from other areas within and near the GHVGAC. It is also experiencing limited appropriations compared with other areas of the GHVGAC and, even with appropriations comparable to those proposed in the Application, has higher sustained water levels, indicating that groundwater is stable across the Valley. OWRD's failure to adhere to its standard practice for evaluating the localized, target aquifer, as opposed to the entire regional aquifer when making its groundwater availability determination, is an unexplained departure from its normal practice, which is in and of itself a violation of law. Here, that violation also resulted in a substantial error that, if corrected, should lead to approval of the proposed use.

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B. OWRD's Decision to Deny Application G-17592 Is An Unexplained Inconsistency with Its Approval of Numerous Other Water Right Applications in the Same Area.

The Department's denial of Application G-17592 is an unexplained departure from its normal practice, and is therefore in error, as demonstrated by the following three examples: 1) after the date the Application was filed, in 2012 and before adopting the GHVGAC rules, the Department approved 34 groundwater applications for a total of nearly 7000 irrigated acres and 21,000 acre-feet/year within the area of the GHVGAC, but did not approve the Application; 2) the Department approved a similar Application G-17851 following adjustments like those made by Golden Rule here, and that application was contained entirely within the GHVGAC; and 3) in June 2019, the Department unconditionally approved a 160 acre groundwater right for irrigation in the Anderson Valley despite noting a the same alleged potential connection to Virginia Valley and GHVGAC that it cites as the basis for denial of the Application.

First, between the time the Application was filed and the date the GHVGAC rules were adopted, the Department approved 34 groundwater applications for a total of nearly 7000 irrigated acres and annual volume of more than 19,000 acre-feet within or near the GHVGAC. See Exhibit A. The combined, approved volume and acres of these rights grossly exceeds the volume and acres requested by Golden Rule, even in its initial application. With Application G-17592 scaled back to less than twenty-five percent of its original request, and to an area entirely outside of the GHVGAC, the Department cannot reasonably take the view that groundwater is not available when it approved so many applications for so much water within the allegedly groundwater limited area of the GHVGAC previously. It also cannot reasonably explain why it did not approve the larger initial application while it still contained the areas within what is now the GHVGAC. Based on these facts, the Department cannot reasonably sustain the proposed denial. The Department must treat this application as it did so many others and approve the use.

Second, without explanation for its inconsistent decision making, OWRD denied Golden Rule's application while approving Application G-17851. Application G-17851 was filed within the same timeframe, requested a large rate of water across a significant number of acres, received a similar initial groundwater review, proceeded with reductions analogous to those made by Golden Rule, and was approved.

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Application G-17851 requested groundwater use of 34.76 cfs on 2073.95 acres. Golden Rule initially sought 80.2 cfs for approximately 4180.60 acres in Application G-17592, though it amended that amount early on as well. The groundwater reviews for Golden Rule's initial Application G-17592 and Application G-17851 were completed in tandem. Mike Zwart, the groundwater reviewer, noted that he was making similar findings in the groundwater review for both. In response to an initial negative groundwater review, the applicant reduced Application G-17851 to 10.606 cfs, and 636.37 acres. Golden Rule later made an even more dramatic reduction, as compared to its initial application; it reduced the request to 952.26 acres and 15.9 cfs. Golden Rule also narrowed its application such that it would only be located entirely outside of the GHVGAC. The Department then approved Application G-17851, and it is now a certificated water right. In contrast, Application G-17592 remained on administrative hold while Golden Rule sought to obtain approval, and after further reductions and changes, was denied. As between the two applications, if groundwater availability were the true issue, OWRD should have approved Application G-17592. Application G-17851 is in an area of documented and significant water level declines within the GHVGAC, i.e., Weaver Springs, and Golden Rule's Application is not. The PFO and resulting outcome is exactly the opposite of one might expect under these circumstances. The PFO unjustifiably subjects Golden Rule to inconsistent and harsher treatment than OWRD applied to the holders of what is now the certificated water right that began as Application G-17851.

As further evidence of unjustifiable and unequal, disparate treatment of Golden Rule, in June 2019 the Department approved an application for 480 acre-feet of groundwater per year for irrigation of 160 acres within Anderson Valley. This permit, Permit G-18226, is believed to authorize use of water that has been ongoing without authorization since circa 1987. In support of its approval, OWRD relied on a 2016 groundwater review that assessed the groundwater conditions and availability within Anderson Valley in a manner similar to that of the October 2019 groundwater review for Application G-17592. But, instead of finding that groundwater would not be available within the capacity of the resource or that injury would occur, the groundwater review proposed approval subject to normal, groundwater permit conditions. OWRD cannot reasonably justify the disparate results of the decisions based on its groundwater reviews; it cannot justify denial of Application G-17592 and issuance of Permit G-18226.

In treating Application G-17592 differently and more harshly than it has treated other applications, without reason or explanation, OWRD's PFO is in error. ORS 183.484(5). Moreover, the proposed denial is an abuse of discretion and violation of law. *See* ORS 183.484(5)(b)(B)-(C).

C. OWRD Erred in Finding that the Proposed Use will Cause Injury.

The PFO also errs with regard to its determination regarding injury. In the first instance, the GR fails to evaluate injury in a manner that meets OWRD's officially stated position as to what constitutes injury in the groundwater context. As a result, OWRD fails to make findings that support the GR's asserted "determination" that the proposed use "will not likely be available in the amounts requested without injury to prior water rights." GR, p. 3. Further, the remarks that are provided are inconsistent with all available data or are irrelevant to the issue of injury. For example, OWRD impermissibly evaluates impacts to junior, rather than senior water rights. For each of these reasons, the PFO is not supported by substantial evidence, is inconsistent with the agency's rules and officially stated positions, and was issued in violation of law.

Initially, the GR appears to be operating independent of OWRD's rules and official position as to what injury means and how it is to be applied in the groundwater context. OWRD's rules define injury as "another, existing water right not receiving previously available water to which it is legally entitled." OAR 690-380-0100(3). In officially published interpretations, including legal filings with the Office of Administrative Hearings, OWRD has explained that in the context of groundwater, injury means that a senior groundwater appropriator must experience "substantial or undue interference." Substantial or undue interference means "the spreading of the cone of depression of a well to intersect . . . another well, or the reduction of the ground water gradient and flow as a result of pumping, which contributes to . . . [t]he ground water level being drawn down to the economic level of the senior appropriator(s); or [o]ne or more of the senior ground water appropriators being unable to obtain either the permitted or customary quantity of the ground water, whichever is less, from a reasonably efficient well that fully penetrates the aquifer where the aquifer is relatively uniformly permeable...." OAR 690-008-001(8)(b)-(c).

Neither the PFO nor the GR make a finding that any well belonging to a senior appropriator will experience substantial or undue interference as a result of the proposed use. The GR simply remarks that “*junior* groundwater rights near the proposed POA locations have decline conditions that would be triggered earlier if the proposed additional use was approved.” GR, p. 3 (emphasis added). But, these remarks do not support the GR’s “determination” that the proposed use is likely to cause injury to *prior* water rights. Junior groundwater appropriators cannot experience substantial or undue interference because, by definition, only senior groundwater appropriators can experience injury. Even though the GR form states that it is only “prior water rights” that can be injured (*see* GR, p. 3) there are no remarks concerning even one senior groundwater right. Beyond this, the GR remarks that wells in Virginia Valley, which as noted previously, are between 2 and 5 miles to the north-northeast, would “likely” experience “declines” beyond those they are already experiencing. *Id.* Even if one were to accept these statements as true, the generalized drawdown scenario they present does not equate to a finding of substantial or undue interference and injury to senior groundwater appropriators. A generalized drawdown is not the same as substantial or undue interference with a senior water right.

The possibility of an injury occurring at some unspecified well and in some unspecified, future timeframe also is not a basis for denying an application. OWRD is prevented from allocating water to a proposed new use where the use “*would* injure the exercise of existing water rights or permits.” OAR 690-410-0070(2)f). It cannot deny the proposed use based on speculation or general ideas about a potential impact. OWRD must find actual injury to existing senior water rights in order to deny the application on this basis. In the absence of specific findings regarding the condition of senior wells and pumping activities, and specific findings regarding the impact of the proposed use on those wells and water rights, the GR has no basis to deny the Application for the reason of “injury.”

Beyond its failure to assess the application and proposed use consistent with its rules and officially stated positions on what constitutes injury, OWRD is required to support its decision with substantial evidence. ORS 183.484(5)(c). The speculation, conjecture and contradictory

remarks evaluated in the discussions above are not substantial evidence.³ Further, it is speculative and contrary to available data to claim that uses permitted in Anderson Valley will exacerbate water right holders' declines in the Virginia Valley. As explained before, one group of wells in Virginia Valley is recharged from Malheur Lake where the water level rises and falls with the decadal fluctuation of Malheur Lake and the allowed density of pumping wells. The other group of wells, farther to the east in Virginia Valley, appear to be drawing from older groundwater in what appear to be deeper confined or semi-confined water bearing zones. It is far from clear that either of these water bearing zones, or wells in either of these zones, will be impacted by uses in the hydrogeologically distinct and geographically distant Anderson Valley area. Indeed, the available data suggest just the opposite.

In any case, none of groundwater availability remarks or the available data actually demonstrate that injury will (or is likely to) occur as a result of the proposed use. Whether as a result of OWRD's failure to evaluate injury in accordance with its rules and official position, or as a result of OWRD's failure to evaluate the proposed use consistent with all available data, the PFO is in error to conclude that groundwater is not available as a result of likely injury from the proposed use.

D. OWRD Erred in Imposing the GHVGAC Rules On An Application for Use Outside the GHVGAC.

On January 26, 2018, Golden Rule requested that the initial application be amended to limit the place of use and appropriation to an area completely outside of the GHVGAC (and Malheur Lake Basin). As a result, the Application is now located entirely within a separate administrative basin from that where the GHVGAC is located; it is in the Malheur Basin. OAR 690, Division 510. Nonetheless, OWRD is treating the Application as if it is part of the GHVGAC and the Malheur Lake Basin. This is unlawful and an abuse of discretion. Only where the Oregon Water Resources Commission ("Commission") has adopted rules applicable to the administrative basin and area where the Application is located, may such restrictions apply.

³ To the extent that the Department has approved junior uses in Anderson Valley or Virginia Valley, it contradicts its posture that *water is not available* for the proposed use and that a new use would cause injury.

ORS 537.620 and ORS 537.621 describe the process OWRD may use to review a groundwater application for completeness; compliance with statutes and rules; and confirmation that the proposed use will ensure the preservation of the public welfare, safety and health as described in ORS 537.525. At no point in this process is OWRD given authority to apply rules enacted for a different administrative basin to the groundwater application.

ORS 537.525(9) is clear that it is only upon the action of the Commission to adopt rules like those put in place for the GHVGAC in the Malheur Basin, that OWRD may lawfully restrict groundwater uses on the basis of concerns about regional groundwater levels. This process requires that the rules be supported by findings of declining groundwater levels, interference among wells, overdraw of groundwater supplies, and other determinations before the Commission may act under its police powers to limit uses within designated groundwater areas so as to preserve the public welfare, safety, and health. *Id.*; *see, other examples of these processes in* ORS 536.410 (regarding withdrawals of unappropriated waters), OAR 690-085-0020 (regarding designation of serious water management problem areas), OAR 690, Division 10 and ORS 537.730 to ORS 537.742 (regarding critical groundwater area designations). The Commission has not undertaken this process for the groundwater underlying Anderson Valley. The application of rules from another basin and groundwater area to an application in Anderson Valley undermines the integrity and purpose of the statutory process, and such act is unlawful.

Here, OWRD had ample opportunity to include Anderson Valley in the regional groundwater area of concern, the GHVGAC. Anderson Valley is in fact located within the USGS Study Area of which the GHVGAC is a part. But, notably, it was not included in the GHVGAC rules. It therefore, is not subject to the GHVGAC rules and prohibition of further groundwater appropriation. Despite this fact, the GR evaluated the Application as if it were part of the GHVGAC.

OWRD must follow the law. It is attempting to do by fiat what it has not done by rule – it is trying to clump this application in with the GHVGAC in order to deny it. OWRD must provide a full and fair public process leading to the publication of rules specific to Anderson Valley and the Malheur Basin before it may restrict applications on the basis of concerns regarding a regional groundwater aquifer. OWRD's attempt to treat the Application as if it were

within the GHVGAC without going through this process is outside the range of discretion delegated to it by law and is unlawful.

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E. The GR is Internally Inconsistent.

Among the many other errors in the GR, the apparent lack of consistency in how the GR is evaluating the proposed wells undermines its conclusions. More specifically, the GR finds that the water bearing zones are all connected, but then asks that the well production zone be screened in the upper alluvium or sealed into the lower basalts. Such a construction measure suggests that the Department sees these two units as separate aquifers with separate characteristics in water flow, water level, recharge areas and final discharge. This of course is contrary to the review, including the overall position that there is a hydraulic connection between Anderson Valley and the GHVGAC.⁴ This internal inconsistency undermines the rationale of the review and calls into question the issue of whether the denial is based on substantial evidence.

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F. OWRD Did Not Evaluate All Available or Relevant Data.

Based on the water levels reviewed, it would appear that the data OWRD used is skewed toward areas of the GHVGAC that are known to have significant draw down issues. Without explanation, OWRD failed to evaluate data from a number of other Harney County wells available for review that are nearby and within similar geological formations to those in Anderson Valley, including: HARN1547, HARN1509, HARN51571, HARN1556, HARN1557, HARN1548, HARN1562, HARN1482 and HARN1474. Only three of these wells were evaluated by OWRD (HARN1509, HARN1556, HARN1557). Of the other six wells, only one shows significant drawdown due to pumping (HARN1482). That well is shallow, used for livestock on the U.S. Bureau of Land Management public lands, and has minimal yield. With some exceptions, a few of the other wells show on the order of 1 to 2 feet of drawdown over the period of observation, which varied. A couple of wells shows water levels staying static or even rising. Most of these wells show a higher elevation static water level than the wells in Virginia

⁴ In addition, Golden Rule's authorized representative, John Short, coordinated with the OWRD Groundwater Review Section to confirm that the proposed wells would be sealed into the lower basalts and explained that the application would only require three wells, not eight. This information does not appear to have been incorporated into the GR.

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Valley. Arguably, this data would support a finding that water level declines are not an issue in Anderson Valley, which is in a similar geological province to these wells. It would also further support a finding that there is a hydrogeological and geological divide between Anderson Valley and Virginia Valley. Finally, it would suggest that OWRD was incorrect to speculate that the proposed use would result in significant water level declines in the area of the proposed use.

OWRD failed to include an analysis or even a reference to any of these wells, despite having the data readily available to do so. This suggests that OWRD's review was biased toward finding a connection with areas of the GHVGAC with draw down issues and toward denial of the Application. The failure to include and evaluate available and relevant data also indicates that the proposed denial is not supported by substantial evidence and is inconsistent with OWRD's policy and practices. ORS 183.484(5)(b), (c).

G. OWRD's Rejection of Golden Rule's Mitigation & Off-set Proposals Was Inconsistent with its Official Position, Practice and Rationale for Denial of the Application.

Golden Rule proposed multiple variations of mitigation proposals to off-set all or part of the proposed amended Application in order to obtain a water right. OWRD rejected the proposals at every turn, in violation of ORS 183.484, its own policies and practice. These rejections undermine the PFO, further confirming that it was not supported by substantial evidence.

Golden Rule proposed mitigation to off-set the proposed amended use. The mitigation offered took the form of cancelled or transferred water right certificates that were located within the GHVGAC. Some of the certificated water rights were located in Weaver Springs, others were in the general GHVGAC area, and others were on the south side of Malheur Lake. OWRD determined that each of these water rights did not pull water from the "same source" as the groundwater proposed for appropriation in Anderson Valley. This, among other reasons, was the basis for rejection of the mitigation proposals.

OWRD's basis for rejection of these proposals is inconsistent with OWRD's approval of many other transfers and mitigation off-sets within the GHVGAC. For approximately three years following the designation of the GHVGAC, OWRD allowed transfers of groundwater

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within and across the GHVGAC, treating it as a single groundwater area. OWRD has not explained in any official manner or in this case, its departure from this position and practice. OWRD's basis for rejection of the offset proposals is also inconsistent with OWRD's position in the GR for this Application. Here, OWRD is arguing that the groundwater in Anderson Valley is connected to the GHVGAC. If that is correct, how can OWRD reject a mitigation proposal using certificated water rights from within the GHVGAC? OWRD's rejection of the offset proposals was inconsistent with its policies and practice, and inconsistent with its own reasoning for denying the Application.

Furthermore, OWRD is making its "same source" evaluation from preliminary, not yet peer reviewed or published data that it insists the public not cite or rely upon. *See e.g.*, USGS Power Points, dated 2018-2019, presented to the local Groundwater Advisory Committee (asserting that the data is "Not for Citation or Distribution"). OWRD cannot have it both ways. Either the data is usable, or it is not.

In sum, OWRD's evaluation of Golden Rule's offset proposals was inconsistent with its positions and practice in a number of ways, none of which have been explained. It was also inconsistent with its rationale for denying the Application. If OWRD were to have seriously considered the mitigation proposals, the Application likely would have been approved. As it is, OWRD's approach to these proposals and the resulting PFO are in error.

5. Detailed Description of How to Correct the Error or Deficiency (OAR 690-310-0160(2)(d)); Statement of Specific Relief or Action Requested (OAR 690-002-0030(1)(a) & (b)).

Golden Valley requests that OWRD modify the PFO; make findings that groundwater is available to support the proposed use, that the proposed use will not cause injury, and that the Application does comply with the rules of the Water Resources Commission; and issue a Final Order approving the amended Application.

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6. Citation of Legal Authority to Support the Protest, if Known (OAR 690-310-0160(2)(e); OAR 690-002-0030(1)(d)).

Legal authority known to the Protestant at this time includes the statutes and rules listed under "Authority" in the PFO, p. 1, and the following:

- ORS 537.505 to ORS 537.796 pertaining to groundwater.
- ORS 536.410 regarding withdrawals of unappropriated waters.
- ORS Chapter 183 pertaining to agency orders.
- OAR Chapter 690 Division 002 relating to protests and contested case hearings.
- OAR Chapter 690 Division 010 relating to critical groundwater areas.
- OAR Chapter 690 Division 085 relating to serious water management problem areas.
- OAR Chapter 690 Division 310 relating to water right applications, protests and contested case hearings
- OAR Chapter 690 Division 400 relating to state water resources policy.
- OAR Chapter 690 Division 410 relating to state water resource management.
- OAR Chapter 690 Division 510 relating to the Malheur Basin Program.
- OAR Chapter 690 Division 512 relating to the Malheur Lake Basin Program and Greater Harney Valley Groundwater Area of Concern.
- Oregon Constitution, Article 1, Section 20 relating to equality of privileges and immunities.

7. Protest Fee (OAR 690-002-0030(1)).

Please deduct the protest fee of \$410.00 for the Protestant/Applicant Golden Rule from Schwabe, Williamson & Wyatt's account with the Oregon Water Resources Department.

8. **Request for Contested Case Hearing (OAR 690-002-0010(6)).**

Golden Rule requests a contested case hearing.

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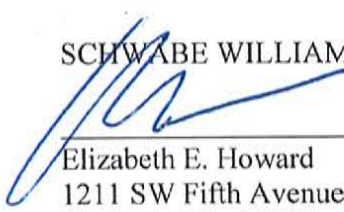
CONCLUSION

The above described facts and legal arguments demonstrate that Golden Rule is entitled to relief. The specific action requested is that the Department issue a Final Order approving the Application as amended. A contested case hearing is requested. However, Golden Rule welcomes the opportunity to engage in informal discussions to seek a resolution of this matter with the Department prior to proceeding to a contested case hearing, should that be an option.

Golden Rule reserves the right to raise additional issues that could not be readily identified or reasonably ascertained during the time allowed for filing this Protest or due to the abbreviated form of the PFO.

Dated: March 6, 2020.

SCHWABE WILLIAMSON and WYATT



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Of Attorney for Protestant Golden Rule Farms LLC

**GOLDEN RULE FARMS LLC PROTEST
WATER RIGHTS FILED FOR AND PERMITTED WITHIN GHVGAC AFTER 10-26-2012**

OWRD No.	Source (Basin)	Permit Holder	Priority Date	Acres Primary Supp'l	Rate (cfs)	Duty (Acre- feet)	Offset Water? (per OAR 690-512-0020)
G-17273 [App. G-17751]	Malheur Lake	James & Sue Gilmour	01/17/2014	126.2	2.1	3.0/ acre	No. (Permit issued 07/17/2014)
G-17264 [App. G-17608] T-12411 affects POU and add'l POD's [Cancels Cert. 91448]	South Fork Malheur River	Golden Rule Farms Inc.	12/20/2012	206.0	0.70	3.0/ acre	No. (Permit issued 07/03/2014)
G-17647 [App. G-18129]	Donner und Blitzen River	Ortley Brothers Inc.	08/11/2015	426.0	5.33	3.0/ acre	No b/c in sub-area of GHVGAC, but permit condition may require future offset. (Permit issued 08/30/2016)
Cert. 91815	Anderson Valley	Steven C. Helms	06/07/2013	64.2	0.61	3.0/ acre	No. (Permit issued 05/15/2014)
G-18226 [App. G-18193]	Malheur	3J Cattle Co.	02/19/2016	160.0	2.0	3.0/ acre	No. (Permit issued 06/26/2019)
G-17097 [App. G-17627]	Sage Hen Creek	Carolyn Carlson	02/07/2013	188.39	3.0	3.0/ acre	No. (Permit issued 10/31/2013)
G-17153 [App. G-17641]	Malheur Slough	Fred E. Teutsch (Issued)	03/26/2013	80.0	1.0	3.0/ acre	No. (Permit issued 04/17/2014)

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**GOLDEN RULE FARMS LLC PROTEST
WATER RIGHTS FILED FOR AND PERMITTED WITHIN GHVGAC AFTER 10-26-2012**

OWRD No.	Source (Basin)	Permit Holder	Priority Date	Acres Primary Supp'l		Rate (cfs)	Duty (Acre-feet)	Offset Water? (per OAR 690-512-0020)
		Edwin Enszt & Shelley Enszt (Current)						
G-17220 [App. G-17646]	Malheur Slough	Amanda Zraggen (Issued) Amanda Tyler (Current)	04/12/2013	80.0		1.0	3.0/acre	No. (Permit issued 05/15/2014)
G-17230 [App. G-17688]	Malheur Slough	Bo Thorenfeldt	06/27/2013	160.0		2.0	3.0/acre	No. (Permit issued 05/15/2014)
G-17244 [App. G-17644]	East Cow Creek	Don Toelle & John Toelle	04/02/2013	71.8	199.6	4.52 – 1.2/primary; 3.32/suppl	3.0/acre	No. (Permit issued 05/29/2014)
G-17279 [App. G-17776]	Cow Creek	Ronald & Donna Wedel	02/27/2014	200.0		3.33	3.0/acre	No. (Permit issued 08/07/2014)
G-17299 [App. G-17679]	Curtis Creek	DSL	05/28/2013	125.2		2.09	3.0/acre	No. (Permit issued 09/12/2014)
G-17317 [App. G-17705]	Malheur Lake	DSL	07/19/2013	347.8		5.8	3.0/acre	No. (Permit issued 11/26/2014)
G-17318 [App. G-17706]	Malheur Lake	DSL	07/19/2013	250.4		4.17	3.0/acre	No. (Permit issued 11/26/2014)

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G-17319 [App. G-17707]	Malheur Lake	DSL	07/19/2013	125.2	2.09	3.0/ acre	No. (Permit issued 11/26/2014)
G-17320 [App. G-17708]	Malheur Lake	DSL	07/19/2013	125.2	2.09	3.0/ acre	No. (Permit issued 11/26/2014)
G-17331 [App. G-17791] T-13244 (under review) add'l POA's	Malheur Lake	Stephen F. Roth (Issued) Roger Sheley (Current Owner)	03/10/2014	195.0	2.44	3.0/ acre	No. (Permit issued 06/26/2015)
G-17350 [App. G-17698]	Ninemile Slough	DSL	07/08/2013	125.2	2.09	3.0/ acre	No. (Permit issued 02/12/2015)
G-17372 [App. G-17711]	East Fork Silvies River	Jesse T. Van de Stroet	08/12/2013	549.4	6.87	3.0/ acre	No. (Permit issued 03/19/2015)
G-17363 [App. G-17717]	Ninemile Slough	DSL	08/28/2013	125.2	2.09	3.0/ acre	No. (Permit issued 05/14/2015)
G-17375 [App. G-17777]	Malheur Slough	Mike Taylor & Virginia Taylor	02/28/2014	160.0	2.0	3.0/ acre	No. (Permit issued 05/14/2015)
G-17373 [App. G-17722]	Malheur Slough	Mike Taylor & Virginia Taylor	09/23/2013	395.0	4.9	3.0/ acre	No. (Permit issued 05/14/2015)
G-17486 [App. G-17753]	Sage Hen Creek	Broken R. Ranch LLC (Issued)	01/13/2014	309.8	3.87	3.0/ acre	No. (Permit issued 08/28/2015)

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**GOLDEN RULE FARMS LLC PROTEST
WATER RIGHTS FILED FOR AND PERMITTED WITHIN GHVGAC AFTER 10-26-2012**

OWRD No.	Source (Basin)	Permit Holder	Priority Date	Acres Primary Supp'l	Rate (cfs)	Duty (Acre- feet)	Offset Water? (per OAR 690-512-0020)
T-13110 (under review) changes POU and add'l POA's		Travis Singhose & Kelly Singhose (Current Owner)					
G-17593 [App. G-17649] T-12116 add'l POA's	Sage Hen Creek	John M. Peila III	04/12/2013	80	1.33	3.0/ acre	No. (Permit issued 04/13/2016)
G-17765 [App. G-17799]	Malheur Slough	Bo Thorenfeldt	03/19/2014	693.0	8.66	3.0/ acre	No b/c in sub-area of GHVGAC, but permit condition may require future offset. (Permit issued 06/08/2017)
Cert. 93372	Malheur Slough	John Ensiz Farms LLC	10/29/2012	135.0	1.69	3.0/ acre	No. (Permit issued 12/30/2016)
G-17928 [App. G-17677] T-12566 changes POU and add'l POA	Cote Slough	William & Lori Peila	05/28/2013	173.6	5.30 – Well 6; limited to 2.65 from Wells 2 & 3, total not to exceed cumulativ	3.0/ acre	No. (Permit issued 02/14/2018)

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**GOLDEN RULE FARMS LLC PROTEST
WATER RIGHTS FILED FOR AND PERMITTED WITHIN GHVGAC AFTER 10-26-2012**

OWRD No.	Source (Basin)	Permit Holder	Priority Date	Acres Primary	Acres Supp'l	Rate (cfs)	Duty (Acre- feet)	Offset Water? (per OAR 690-512-0020)
						e total of 5.30 cfs		
G-18115 [App. G-17771] T-12690 add'l POA's	Little Rock Creek	Badger Ventures, LLC	02/24/2014	124.4	121.4	3.01; further limited to 2.07- primary; 2.02 - supp.	3.0/ acre	No. (Permit issued 01/08/2019)
Cert. 94217	Silver Creek	Phillip Singhose & Lorissa Singhose	05/01/2013	160.0		2.5	3.0/ acre	No. (Permit issued 05/09/2014)
Cert. 94246	Silver Creek	Phillip Singhose & Lorissa Singhose	12/09/2013	59.7		0.75	3.0/ acre	No. (Permit issued 05/15/2014)
Cert. 94875	Not listed	Nicholas Scott & Ladell Scott	07/24/2013	160.0		2.67	3.0/ acre	No. (Permit issued 02/12/2019)
Cert. 94562	Poison Creek Slough	Loretta Zelle & James Campbell	11/19/2012	9.8		0.11	3.0/ acre	No. (Permit issued 06/05/2014)
Cert. 94852	Silver Creek	William & Lori Peila	12/16/2013	160.0	155.2	2.62; further limited to 2.62- primary; 2.59 - supp.	3.0/ acre	No. (Permit issued 12/16/2014)

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**GOLDEN RULE FARMS LLC PROTEST
WATER RIGHTS FILED FOR AND PERMITTED WITHIN GHVGAC AFTER 10-26-2012**

OWRD No.	Source (Basin)	Permit Holder	Priority Date	Acres Primary Supp'l	Rate (cfs)	Duty (Acre- feet)	Offset Water? (per OAR 690-512-0020)
G-17861*	Dry Creek	Roaring Springs Ranch Inc.	May 15, 2014	246.83	3.09	3.0/acre	No requirement in proposed permit draft.

* OWRD's Proposed Final Order for Application G-17861 was issued on January 27, 2020 therefore, no permit has been issued; however, the PFO proposed to approve. The acres, rate, and duty under this application are not included in the totals below.

Total Acres of irrigation water rights permitted by OWRD after 10/26/2012: 6,972.49 (6,351.49 primary/621.0 supplemental)

Total Volume permitted by OWRD for *primary* acres after 10/26/2012: 19,054.47 acre-feet/year

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OAR 690-512-0020

Exhibit 1
TOWNSHIPS WITH LIMITED GROUNDWATER LEVEL DATA IN
OR NEAR THE GREATER HARNEY VALLEY AREA

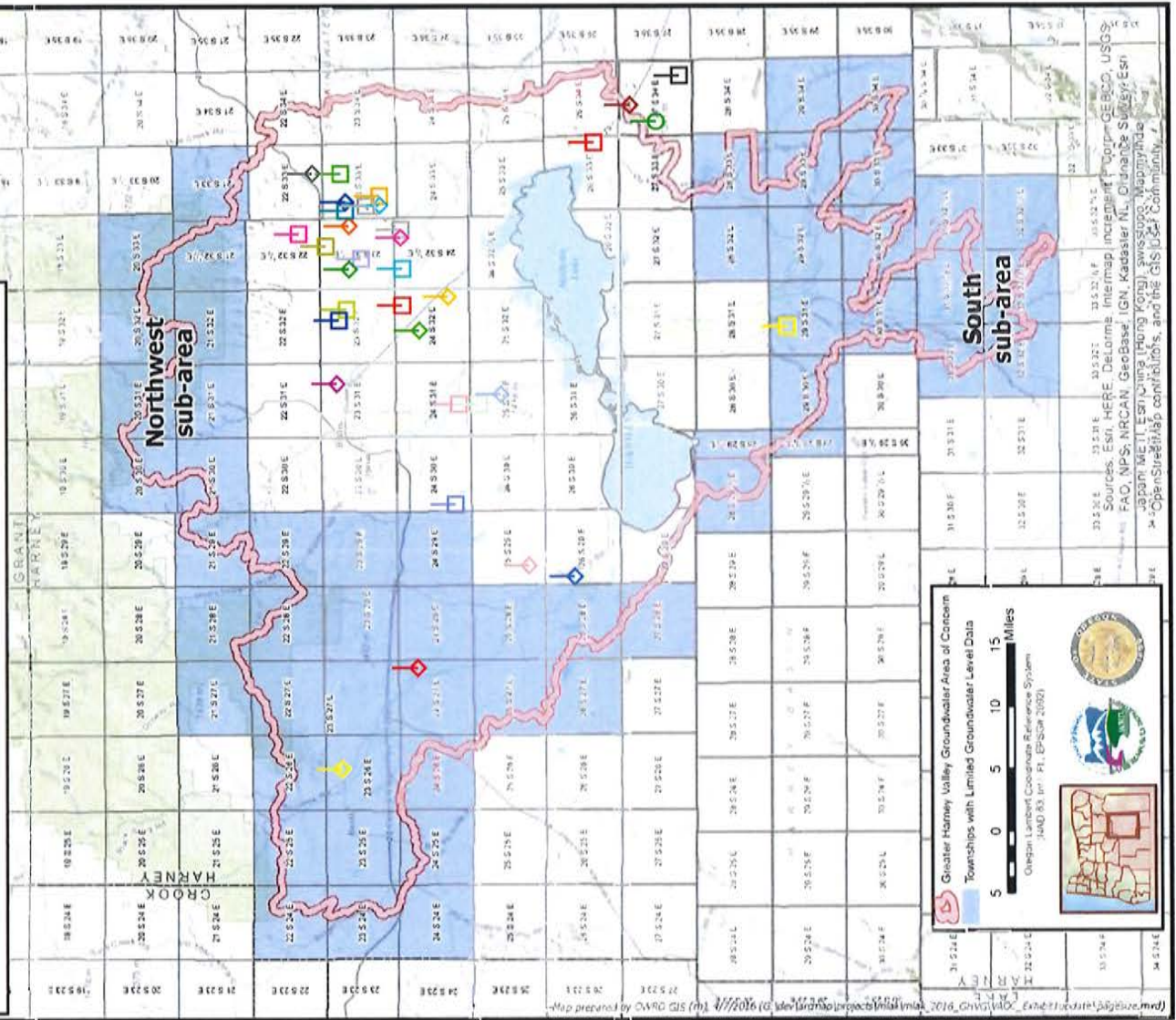


Exhibit B to Golden Rule Protest

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*1/27/2020 - FO issued to approve application after well construction is fixed

CERTIFICATE OF FILING

I certify that on March 6, 2020, I hand delivered the PROTEST OF PROPOSED FINAL ORDER TO DENY APPLICATION FOR EXTENSION OF PERMIT G-17592 to the Oregon Water Resources Department at 725 Summer St. NE, Suite A, Salem, Oregon 97301.

Dated: March 6, 2020.


SCHWABE WILLIAMSON and WYATT

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