# Comments on Agenda Item G: Voluntary Agreement Draft Guidance

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## Source of My Comments

I have had more than a decade of experience in state environmental regulation applications when I was Wetlands Program Manager for the Department of State Lands. I have experience in enforcing state law. I also have more than a decade and a half experience in the development and administration of state led voluntary approaches to addressing natural resource matters. First as the Governor's Watershed Enhancement Board Program Manager on Governor Kitzhaber's Natural Resource Office staff during the development of the Oregon Plan for Salmon and Watersheds and subsequently as Deputy Director of the Oregon Watershed Enhancement Board upon its establishment by the 1999 Oregon Legislature. In that role I was fully engaged in assisting the development of voluntary groups of watershed councils and working on the extent and limits of their role in natural resource conservation and management. It is from this perspective that I am commenting on the proposal before the Commission.

It is natural for an agency that has a long history of regulatory responsibility to view future actions through the lens of history. I would argue that both the citizenry and the agency view of the Department and Commission's roles are antithetical to the notion of voluntary action. That could be one reason why ORS 537.745 has not been used since it was enacted in 1955. While it is encouraging to see the consideration of the application of the statutory provision in the Harney basin, I contend it is been presented as just a veiled additional regulatory tool, clearly not led by the groundwater using public.

Much of the foundation for locally-led efforts come from the writings of Elanor Ostrum and Daniel Kemmis. They have developed a different view of the role of ecology and local democracy that is based on the principles of cooperation and mutual benefit for all. While their concepts are not the only way to address natural resource use, they have been foundational for the Oregon Plan approach. Your challenge is to evaluate the intersection between the regulatory authority responsibility for the public waters of the state and the encouragement of locally-led approaches to sharing the public water resource.

I argue that the proposed guidance being offered is biased by the regulatory lens of the agency staff which is understandable. I would urge you to consider another view of the opportunity presented by the 1955 statute**. The argument is not over the outcome and accountability; it is about the methods of achieving the mutually desired outcome**.

## Legislative Authority

There are two main issues raised by the proposal drafted by the Department:

1. The role of the Department in developing Voluntary Agreements, and

2. The relationship between current proposals for Critical Groundwater Area designation and management and a Voluntary Agreement.

From a careful reading of the statute, I would suggest that beyond the general role of the Department to advise the Commission, the best role for the Department in developing Voluntary Agreements is as technical advisors**. The statute is clear that such agreements are between "any irrigation district, drainage district, other district organized for public purposes or other public corporation or political subdivision of this state" and the Water Resources Commission.** The statute does identify the elements and requirements for such an agreement and the policy objectives necessary to be accomplished by such agreements.

The statute is clear that the Commission could "encourage, promote and recognize voluntary agreements" The most significant step the Commission could take, in my opinion, to "**encourage and promote**" agreements would be to be clear that the groundwater users were leading the conversation with the Department staff acting as technical assistance not regulators. Separation from the Department's regulatory role in designating and defining proposed control measures under critical groundwater Management statutes is critical to ensure the role is to encourage or promote groundwater use reduction agreements. By tying the proposed guidance to Critical Groundwater Management designations the notion of "voluntary" appears to dissolve.

The language of the statute is also clear that such an agreement "shall control in lieu of a formal order or rule of the commission under ORS 537.505 (Short title) to 537.795 (ORS 537.505 to 537.795 supplementary) and 537.992 (Civil penalties)". I would argue that this language specifically allows Voluntary Agreements to provide alternative approaches to those anticipated by the Department under Critical Groundwater Area designations currently being discussed. **I would further argue that the proposed guidance, particularly the section on" Groundwater Use" is inappropriate given the broad nature of the statute**. **The language in the current draft presupposes a critical groundwater designation which is not a presumption of the statute.**

## Areas of Concern with the Proposed Guidance

The proposed "MINIMUM PARTICIPATION LEVEL" has two elements that discourage voluntary action. The first is the establishment of a minimum participation tied to a regulatory provision (Permissible Total Withdrawal). The language of participation and the entire section of "Groundwater Use" (PERMISSIBLE TOTAL WITHDRAWAL AND TARGET FOR VOLUNTARY REDUCTION) carries a presumption of the department setting the parameters for reduction in both a regulatory setting (PTW) and in a non-regulatory setting (TVR). I suggest this is an inappropriate role for the Department in aa Voluntary Agreement among groundwater users. A better construct would be to have the Department advise, if requested the consequences of a proposed level of reduction. This would make the role technical and responsive to voluntary proposals rather than prescriptive.

The role of the Department is very important if you wish for any kind of voluntary approach to work. My experience has been that technical comment and review is often appreciated (when asked for) but the response to "requirements" by agency staff is often viewed as just another regulatory mandate.

My suggestions are not meant to minimize the importance of technical agency expertise in matters such as groundwater conditions and trends. My experience has shown that if people have good information they can come up with creative solutions that are responsive to legal, policy and technical requirements if they see that the technical information they are provided can help them to identify necessary policy goals to accomplish.

I urge the Commission to use the technical staff in their best manner, as technical experts. Make sure that their role in voluntary actions are technical in nature and separate, to the extent possible, their regulatory role from their technical advisory role. In my opinion the proposed "guidance" mixes the regulatory and advisory roles of the Department staff and will be a damper on voluntary action rather than encouragement or promotion.

The following proposal tries to simplify the guidance and separate the regulatory role from the development of voluntary actions.

## Proposed Alternative Guidance Language

As a result, I would suggest the Draft Guidance be reorganized more like the following:

### General Applicability

Voluntary agreements may be entered into in any area of the State of Oregon by parties holding valid groundwater permits and/or certificates issued by the Oregon Department of Water Resources.

### Groundwater Users

(1) Parties of a voluntary agreement may include
   (a) individuals, corporations, associations, firms, partnerships, limited liability companies, joint stock companies, public and private municipal corporations, political subdivisions, the state, and any agencies thereof, the federal government and any agencies thereof and federally recognized Indian tribes; and
   (b) districts, corporations, or political subdivisions organized for public purposes.

### Groundwater Rights of the Proposed Agreement

The parties to the Agreement will provide a map showing:

1. Land ownership and boundaries of the Agreement area.
2. The groundwater rights by point of appropriation and place of use as documented in permit or certificate issued by Oregon Water Resources Department.

In addition to the maps, the parties will provide a list of all permits and certificates and the conditions associated with them including authorized duty and a calculation of the total maximum volume of water permitted subject to the proposed Agreement.

## Resolution of Groundwater Rights

The Department of Water Resources will cooperate to ensure that the map(s) and list information is consistent with their records. Any discrepancies such as alleged forfeited rights will be resolved in the first year of the Agreement.

## Use from Unauthorized Wells

Parties to a voluntary agreement may only withdraw water from wells listed as authorized points of appropriation on water rights participating in the voluntary agreement. Withdrawal of water from any other well by any party is a basis for a finding that the parties are not substantially complying with the agreement.

## Groundwater Reservoir

The proposed Agreement will provide a description of the "same groundwater reservoir" by description of the hydrogeological setting and irrigation practices involved. The proposed Agreement will include a map showing the extent of the reservoir subject to the proposed Agreement.

## Documentation of Use

Within the first year of the proposed Agreement, the parties shall establish, to the Department's approval, an adequate method for documenting actual annual use of all groundwater applied under the specified permits/certificates. The monitoring may be by totalizing flow meters or other equally accurate means of documenting actual use.

## Purpose of Voluntary Agreement

The proposed Agreement shall clearly state the purpose and goal for reducing the actual use of groundwater. The Goal needs to be measurable and accountable through annual monitoring of actual use. The Goal can be described in terms of a Target for Voluntary Reduction or the total amount of groundwater that the parties propose to accomplish and the time frame over which the reductions will occur. The unit of measurement for the target for voluntary reduction is acre-feet.

## Overuse Adjustments

Upon the completion of annual reporting of groundwater use the parties shall report actual change of use compared to proposed change.

Based on water use reporting by the parties that shows overuse of groundwater from that proposed, the parties will add the amount of overuse to the reductions

proposed for the following year.

Failure to meet proposed reductions for more than three irrigation seasons will be grounds for the Commission to terminate the Agreement.

If the Department determines from other evidence that the parties appear to have exceeded the agreed water use limit in a given year, the Department will report to the parties and the Commission of that independent finding. The Commission will consider the Department findings along with the parties response to the findings in a consideration to amend, terminate or take other action on the Agreement.

At no time will underuse result in an increase to the agreed water use limit.

## Duration

The agreement will include the specific period of time over which groundwater use will be reduced and the proposed Agreement will be in effect.

## Commission Review and Action

The proposed Voluntary Agreement shall be accompanied with proposed findings "consistent with the intent, purposes and requirements of ORS 537.505 (Short title) to 537.795 (ORS 537.505 to 537.795 supplementary) and 537.992 (Civil penalties), and in particular ORS 537.525 (Policy), 537.730 (Designation of critical ground water area) to 537.740 (Filing rules designating critical ground water area) and 537.780 (Powers of Water Resources Commission)" shall be presented to the Water Resources Commission.

The Parties shall provide the Commission with a proposed agreement among the parties in the form of a legally binding contract, agreement, or other documentation that binds the parties to the terms and conditions of the Voluntary Agreement. The agreement must provide a provision that binds successors in interest to the involved properties to the agreement. The Agreement shall include a provision that Department staff may enter the property of a party for the purposes of water level measurement, collecting flow meter readings, and ensuring that the flow meters are properly functioning as appropriate. The agreement will contain provisions to address conditions of overuse, addition of parties, amendment process to address changed conditions, and criteria and process for termination of the agreement.

The Commission may require additional terms prior to of necessary for approval if the Commission determines that the terms are reasonably necessary to ensure that the goals of the agreement will be achieved. The Commission will review, approve, approve with conditions, or not approve the proposed Voluntary Agreement by majority vote.

## Agreement Modification After Approval

Voluntary agreements may be subject to amendment if the Commission is

provided evidence and determines changed conditions have made the continuance of the agreement a detriment to the public welfare, safety and health. The parties then may agree to amend the agreement to the satisfaction of the Commission as an alternative to termination ["Agreement Termination" (b)]. The Commission's approval of an amendment is an order in other than contested case.

## Additional Parties

Voluntary agreements may be amended to add parties to the agreement. Additional holders of water rights of record within the subarea or area of an existing voluntary agreement may join the voluntary agreement. New parties must comply with all provisions of the voluntary agreement.

Addition of parties will be petitioned to the Water Resources Commission with a showing that the additional parties agree to the terms and conditions of the approved agreement, use the same reservoir, and have the consent of all existing parties.

## Party Termination

With approval of the Commission, voluntary agreements may be amended to remove parties who request removal as long as target for voluntary reduction is not changed. Any party terminating their involvement in the agreement will become subject to any existing groundwater control measures pertaining to the geographic location of their water right.

## Water Right Transactions

Voluntary agreements must be amended and approved by the Commission and all parties to the agreement if any water right subject to the agreement is modified by a water right transaction in a way that changes the amount of water available to the agreement or changes the places of use subject to the agreement. Such transactions include, but are not limited to, changes to the place of use, changes to the points of appropriation, or splitting of a right.

## Agreement Termination

Any agreement approved by the Commission may be terminated by the lapse of time as provided in the agreement, by consent of all parties to the agreement, or by the Commission if the Commission finds, after investigation and a public hearing upon at least 30-days' notice, that:

(a) The agreement is not being substantially complied with by the parties;

(b) Changed conditions have made the continuance of the agreement a detriment to the public welfare, safety and health or contrary to the intent,

purposes and requirements of the Ground Water Act of 1955.

## Appeal Process

The Commission's approval of or refusal to approve a voluntary agreement is an order in other than contested case.

September 8, 2025

To the Water Resources Commission;

Thank you for the opportunity to speak with you regarding the forthcoming voluntary agreements for Blitzen-Voltage area. As requested by the Commission, we will not remark upon the specific policy proposals contained in the Division 512 rules, the place-based integrated water resources plan for our community, or the Department's guidance for voluntary agreements. We understand that our comments on those topics are not invited and will not be considered by the Commission at this time. Instead, we will take this opportunity to share information with you about our efforts to develop voluntary agreements to sustainably manage groundwater in the Blitzen-Voltage area of the Harney Basin.

Most importantly we want to inform you that we anticipate bringing voluntary agreements before the Commission in December for a decision consistent with ORS 537.745 and intend to coordinate with the Department prior to that. Since this process has never been done before, we wanted to make you aware of our intentions well in advance of asking you to make a decision. We look forward to working with the Department and Commission to ensure that you have sufficient information upon which to base your decision.

First, we would like to provide a little bit of information about who we are since we have not previously had the opportunity to speak to the Commission directly. We are here as representatives of groundwater users in our area, but it is important to note that we are working collectively on a voluntary agreement with other groundwater users and no single person can effectively speak on behalf of all of us. We take this responsibility seriously and need to be mindful of not speaking or making commitments for other groundwater users in our area.

My name is Jacob Davis and I have lived in the Donner Blitzen for 47 years – my whole life. I'm a third generation farmer in the Donner Und Blitzen area. my grandpa come to the Donner Blitzen in the 50s and he raised my dad and his siblings. My dad has lived here in the Donner Blitzen for 70 years – his whole life. My parents went out on their own in 1997 instead of being in the partnership with my grandpa and my uncle. He started developing where they currently live, my wife and I come back to work for my parents in 2002 and in 2012 we went out on our own and started developing from scratch. I am the father of four kids that I would like to pass our place on to. My parents would also like to keep their farm in our family. I've been married to my wife for 21 years now. We help out in kids ministry because our faith is very important to us. I also serve on the Crane grade school board and I am involved in helping out with 4-H and the youth livestock show in our county, all four of

our kids are involved with 4-H and the youth livestock show and they're all four involved with the day-to-day operations on our farm and our ranch. We are irrigating around 1000 acres between hay ground and irrigated pasture pivots with ground water , my parents are a little bigger than we are ,our children help us put up pay farm and work cows we rely on our children real heavily, especially in the summertime. I said I was a third generation farmer rancher in the Donner Blitzen, but I'm actually a fourth generation farmer rancher total my great granddad ranch in Idaho ,It is not a job for us. It's a livelihood at least that's what it is for my dad and for me, when you asked me when I was a little kid what I wanted to be I wanted to be just like my dad I wanted to farm and Ranch. I'm getting to live out my dreams. I'm really hoping that Whatever four of my kids wanna come back or if they all want to. come back they will get the same opportunity to live their dream like I have

I am Erick Keerins, a 4th generation rancher's son who grew up in Izee, Oregon on a century farm established in 1886 in Grant County. My wife, Christy, is a 3rd generation USA farmer's daughter who grew up in Terrebonne, Oregon. In 2018, we purchased property in Princeton, Blitzen-Voltage area with the intention of settling down, starting a second career and establishing some roots near family. Due to being Active Duty Coast Guard, we moved about every two years on average and wanted to establish a home for our children, place to come back to with lasting memories, connection and a connection to a rural small community. In 2021, after 22 years of service, I retired from the US Coast Guard and began working along with my wife and six children to fulfill the dreams and goals we had established. We raise hay, cows, pasture pigs, chickens and other livestock. I have not been as involved in the community as Christy, due to dedicating majority of my time to establishing fields, building a home, and all associated home base operation infrastructure. I support Christy in her endeavors as small animal 4-H leader, 4-H livestock committee member, Food Systems member, and local raw milk producer. She participates in the local Hines and Burns farmers markets, Fall/Christmas bazars and is active with the Chamber of Commerce events sponsored though out the year.

My name is Erik Steen and my wife Laura and son Aksel run and operate on my wife's 5th generation family farm/ranch in the Diamond and Princeton area. The ranch was established in the 1890's and is a listed century farm. We are in our late 30's and have taken over the operation with all the expenses 5 years ago. Just last year we purchased two more pivots in the Blitzen area. My wife is a valued employee of the Harney district hospital, in the surgery department. My son is a first grader in Diamond elementary school. As a family operation we raise hay and cattle. Last year I was awarded young farmer/rancher of the year by the Harney County chamber of commerce. We, as a family, greatly appreciate the land and its resources. We work tirelessly to apply conservation methods wherever is needed and preventively to insure a strong ecological foundation for the next generation.

We appreciate your time and effort, and we will  always remain stewards of the land and water resources.

Groundwater in our portion of the basin is primarily recharged through the Donner Und Blitzen River, precipitation and snowpack on the Steens mountain, and tributaries from the southern portion of the basin. Our groundwater is distinct from the groundwater recharging the Silvies, Northeast-Crane, Silver Creek, and Weaver Springs portions of the basin and the geology, well yield, water chemistry, and groundwater levels are different from other parts of the basin. Our area comprises the “southern region” of the USGS groundwater budget study. We still have many questions about groundwater sources and flow paths in our part of the basin and we look forward to partnering with the Department and other scientific experts to answer these outstanding questions.

For nearly a decade the Department has been expressing interest in voluntary joint action with groundwater users in our basin, including in areas where groundwater levels are reasonably stable, like the Blitzen-Voltage area. ORS 537.525 states a preference for voluntary joint action between the Commission and groundwater users. It is with knowledge of that statutory preference that we are embarking on this important effort. As a reminder for all of us, the Department and Commission have the responsibility to adhere to and achieve the following substantive goals contained in ORS 537.525:

1. Provision be made for the final determination of relative rights to appropriate ground water everywhere within this state and of other matters with regard thereto through a system of registration, permits and adjudication.
2. Rights to appropriate ground water and priority thereof be acknowledged and protected, except when, under certain conditions, the public welfare, safety and health require otherwise.
3. Beneficial use without waste, within the capacity of available sources, be the basis, measure and extent of the right to appropriate ground water.
4. All claims to rights to appropriate ground water be made a matter of public record.
5. Adequate and safe supplies of ground water for human consumption be assured, while conserving maximum supplies of ground water for agricultural, commercial, industrial, thermal, recreational and other beneficial uses.
6. The location, extent, capacity, quality and other characteristics of particular sources of ground water be determined.
7. Reasonably stable ground water levels be determined and maintained.
8. Depletion of ground water supplies below economic levels, impairment of natural quality of ground water by pollution and wasteful practices in connection with ground water be prevented or controlled within practicable limits.

9. Whenever wasteful use of ground water, impairment of or interference with existing rights to appropriate surface water, declining ground water levels, alteration of ground water temperatures that may adversely affect priorities or impair the long-term stability of the thermal properties of the ground water, interference among wells, thermal interference among wells, overdrawing of ground water supplies or pollution of ground water exists or impends, controlled use of the ground water concerned be authorized and imposed under voluntary joint action by the Water Resources Commission and the ground water users concerned whenever possible, but by the commission under the police power of the state except as specified in ORS 537.796 (Rules regarding low temperature geothermal appropriations), when such voluntary joint action is not taken or is ineffective.
10. Location, construction, depth, capacity, yield and other characteristics of and matters in connection with wells be controlled in accordance with the purposes set forth in this section.
11. All activities in the state that affect the quality or quantity of ground water shall be consistent with the goal set forth in ORS 468B.155 (State goal to prevent ground water contamination).

Groundwater users in our area assembled for the first time in May to talk about and work on voluntary agreements and have met two times since then. Most of the groundwater users in our area had not heard of voluntary agreements before we met in May. Prior to April of this year most of us had the expectation that the Department would not propose regulation in our area based on existing data, previous communications between Department staff, and what was communicated publicly in meetings. The process has been difficult to follow, but we believe that we can bring a cohesive and cooperative strategy with the support of groundwater users in our area.

What we intend to bring to you in December is a voluntary agreement for the Blitzen-Voltage area, or the “southern region” as it is called in the USGS groundwater budget report. We will detail how these voluntary agreements are consistent with state law and policy and how they will contribute to a truly integrated and coordinated approach that achieves the substantive goals of the Commission and Department. Most groundwater users in our area were not consulted in the drafting of the voluntary agreement guidance, but we will refrain from speaking about the contents of the guidance as requested. We understand that this is a new opportunity for Oregon and there are a lot of questions about how this will work.

We sincerely look forward to partnering with the Commission and Department to maintain reasonably stable groundwater levels, balance different beneficial uses of groundwater, and ensure perpetual use of the Blitzen-Voltage groundwater reservoir. We sincerely believe that voluntary joint action with the Commission will ensure consistency with state law and policy, the Integrated Water Resources Strategy, the place-based integrated water resources plan, and the Department's new strategic plan. The forthcoming voluntary agreements will foster a cooperative approach with groundwater users and will lead towards a truly integrated and coordinated approach for sustainable and adaptive groundwater management in the Blitzen-Voltage groundwater reservoir. We hope to become a model for other parts of the state and across the West.

Attached to these comments are the following documents:

- A "situation assessment" assessing the possibility of developing voluntary agreements for the Blitzen-Voltage drainage area;
- The results of the independent assessment of the opportunities and barriers for voluntary agreements, including a review by legal professionals about key policy questions.

Sincerely,

Jacob Davis

Erick Keerins

Erik Steen

**September 8, 2025**

**To:** Water Resources Commissioners

**From:** Representative Mark Owens, Representative Ken Helm, Senator Kathleen Taylor, Senator Todd Nash, Senator Anthony Broadman

**Subject:** Funding for the Deschutes Basin Water Bank in light of recent legislative accomplishments

Dear Water Resources Commissioners;

We are writing this letter to request that the Commission consider approving funding to the Deschutes River Conservancy for the Deschutes Basin Water Bank Feasibility Study in the requested amount of $330,000. We respectfully ask you to reconsider the Department's recommendation to deny funding for this project in light of important new information from the 2025 legislative session that elevates the importance and timeliness of this project. We appreciate you considering our comments on this matter.

In the 2025 legislative session our offices championed the passage of HB 3806, which authorizes the Commission to approve a Deschutes River water bank pilot program. Once approved by the Commission, the water bank will help balance water needs in the Deschutes basin using an innovative and adaptive new model for sharing water. We were eager to support this place-based approach to policymaking, especially given the broad and diverse support of basin and statewide stakeholders and the ability to tailor solutions to the specific conditions and needs of this basin. The submittal of the application precedes the outcomes of this legislative session, but this newly authorized pilot approach with a sunset date of January 2, 2034 increases the need for funding and state support.

During this session the Legislature also worked closely with the Department to enact modifications to the Feasibility Study and Water Project Grants and Loans programs (HB 3364). Improvements to the funding programs were informed by Department initiated assessments of factors affecting participation in and effectiveness of its funding programs. In our communication with the Department, legislators expressed a desire to ensure that the Feasibility Study Grant program has sufficient flexibility to bridge the gap between planning and implementation, including needed study, planning, assessment, coordination, and design work. The fund, which was originally called the Water Conservation, Reuse and Storage Investment Fund, has been renamed the Water Project Feasibility Fund in recognition that we want to invest in the full suite of water solutions, not just engineered solutions.

Through HB 3364, ORS 541.566 was amended as follows: (1) A [*planning*] study receiving a grant or payment for direct services under ORS 541.561 **may include activities necessary to assess the type, location, design, cost or other factors affecting the feasibility of a project described in ORS 541.561**. **Specific activities** may include, but [*is*] **are** not limited to: [List of types of studies that may be funded]." This language was purposefully left open ended. The list of studies has been updated to be more inclusive, but it is important to note that the list is not exhaustive as the Legislature cannot anticipate all of the different types of projects that might emerge from planning efforts. The Feasibility Study Grant program should be used to fund ideas and concepts that emerge from various planning efforts, including collaborative basin planning efforts, to inform eventual implementation. These "bridging" activities are necessary to accommodate the diversity of projects that might emerge and the complexity of taking a good idea from concept to implementation. Along with the passage of HB 3364 we were also pleased to support an additional allocation to the Feasibility Study Grant fund in the amount of $1,000,000.

The Department did not recommend the Deschutes Water Bank for funding based on the conclusion that it was considered implementation and not an assessment of feasibility. Given that HB 3806 is for a pilot program, we believe that the purpose of the pilot very much aligns with the legislatively authorized purpose of the fund and that proposed activities align with the updated statutory language. A water bank is a new approach for Oregon and will benefit from a study phase and associated efforts to inform the design of the water bank. If and when this becomes a permanent program it might more clearly cross the threshold of being considered implementation. We invite and encourage the Department and Commission to invest in assessing the feasibility of water banking through an applied approach in the Deschutes Basin. This is a timely and important opportunity to work collectively to set the Deschutes basin up for success.

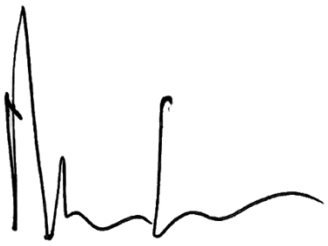
We would also like to invite the Department and Commission to continue efforts to design and administer grant programs in such a way as to ensure there is no "daylight" between concept and implementation of water projects, especially those that emerge from integrated and collaborative basin-wide approaches that balance many different needs and interests. Concepts with potential basin-wide benefits and broad community support should be prioritized. We have been encouraged by the Department's leadership to identify and implement process improvements for its funding programs. This is challenging work and we look forward to partnering with you to remove barriers as they are identified and jointly ensure accountability to desired instream and out-of-stream outcomes.

In conclusion, we invite the Commission to reconsider the recommendation regarding funding for the Deschutes Basin Water Bank Feasibility Study in light of this new information and recent legislative accomplishments. This is a worthy project and a timely opportunity to make progress on a promising yet unproven new concept for Oregon. We are greatly appreciative of Department-led efforts to evaluate and improve upon their grant funding opportunities and broader efforts to support innovative approaches in water management. We look forward to continuing to track progress and support the work of the Department and community to ensure the success of this approach for the Deschutes Basin and the state as a whole.

Thank you all for your public service.

Signed,

Representative Mark Owens, HD 60



Representative Ken Helm, HD 27

Senator Todd Nash, SD 29

Senator Kathleen Taylor, SD 21

Senator Anthony Broadman, SD 27

# Potential for Voluntary Agreements: Situation Assessment for the Lower Blitzen Voltage Subarea

## Background

Between January and June 2025 a situation assessment was performed to understand the potential for voluntary agreements in the Lower Blitzen Voltage Subarea. As a part of this situation assessment, 9 landowners in the Lower Blitzen Voltage Subarea were interviewed to gather observations on groundwater conditions in their subarea, better understand their irrigation operations and opportunities for voluntarily reducing water use, elicit their feedback on the draft rules, and to assess their interest in forming a voluntary agreement. Information was also gathered from meetings of the Rulemaking Advisory Committee, public hearings, and available written materials. Three initial meetings have been held with groundwater users in this area and a first draft of a voluntary agreement has been drafted for the Lower Blitzen Voltage Area. A draft of the voluntary agreement for the Lower Blitzen Voltage Area is expected in September 2025 with a desire to bring it before the Water Resources Commission in December. A summary of the key takeaways is included here. Identifying information about the interviewees has been removed. All information collected from interviewees is kept confidential. The groundwater users have requested that no drafts of voluntary agreements be shared without their unanimous consent.

## Interest in Forming a Voluntary Agreement

- Nearly all groundwater users interviewed in the Lower Blitzen Voltage Subarea are strongly interested in entering into a voluntary agreement. There may be an interest in forming a separate or connected voluntary agreement for the former Windy Point area. See below for the proposed process.

## Groundwater Conditions in the Lower Blitzen Voltage Subarea

- Groundwater users would like to delineate the Lower Blitzen Voltage Subarea as a distinct groundwater management area for purposes of forming a voluntary agreement. This area may include a small portion of the Northeast-Crane area south of Windy Point. This area may also include the Upper Blitzen Subarea. The boundaries are actively being discussed. Generally there is support for inclusion of the entire “southern region” of the USGS groundwater budget, though individuals near boundary lines would like to invite further discussion.
- There are approximately 16-24 groundwater users in the Lower Blitzen Voltage Subarea.
- The Lower Blitzen Voltage Area is recharged by precipitation in the uplands and recharge from Donner Und Blitzen River. This area is distinct from the Silvies River and Silver Creek areas. There is variability in the subsurface, with many different theories and questions about the directional flow of groundwater, the saturated thickness and yield of the various aquifers, recharge potential of Steens Mountain, the hydraulic connection with other parts of the basin, the role of faults in the flow of water, and many other things. Some groundwater in this area is believed to be fairly modern. Generally well yield is very good and high yield wells are completed at relatively shallow depths. Some believe that the Voltage

Basalts are highly transmissive and receive a significant amount of recharge from the Steens Mountain.

- Groundwater users interviewed are not concerned about groundwater level declines in this area. Groundwater level declines have been minimal and are not uniform across the Lower Blitzen Voltage Subarea. Some wells have increased during their period of record. Some wells have risen above reference levels set by the Department. Some wells chosen by the Department to be representative appear to be anomalous and are not considered representative by groundwater users interviewed. There are questions about the Department's selection process and concern that it might be biased towards inclusion of concerning data with the purposes of reinforcing certain narratives about this part of the basin.
- There is a desire to better understand hydraulic connection between the Lower Blitzen Voltage Subarea and the Northeast Crane Subarea. The link between these areas is not supported by groundwater users in this area and more discussion is warranted. Without the declines in the Weaver Springs Subarea or the Northeast-Crane Subarea and the determination that this is all one groundwater reservoir it does not appear to groundwater users interviewed that there would be problems in the Lower Blitzen Voltage area. Some believe that the west side of the "southern region" (the area west of the Donner Und Blitzen floodplain and west of 205 belongs in a separate area given differences in water quantity and quality. There are questions about the connection between the Lower Blitzen Voltage area and the Warm Springs Valley.
- Groundwater users interviewed are not aware of any domestic well users in the immediate area who have observed concerning declines, had to deepen their well due to declines, or expressed concern. There is an interest in ensuring adequate and safe supplies for human and livestock consumption. There is an interest in ensuring adequate and safe supplies for human and livestock consumption. No concerns were expressed about the groundwater quantity or quality for Blitzen Voltage area, with the exception of "pockets" of water close to and west of 205.
- Groundwater users believe that groundwater in this area is generally stable, with some pockets of water that did not appear to have a sustainable yield and questions about the differences in groundwater quantity and quality in different portions of the Subarea.
- There is a desire to engage with groundwater scientists to better understand aquifer properties in the Lower Blitzen Voltage area, especially where claims made by scientists do not correspond with local ecological knowledge. This presents an opportunity for partnership to better understand the groundwater system, but groundwater users sense a hesitance from the Department to actively engage them on their outstanding questions or uncertainties. They feel that their contributions and questions have largely been ignored or that Department staff spend most of their time defending the science or defending their decisions rather than engaging groundwater users to develop a shared understanding.
- Groundwater users expressed an interest in retroactively and proactively addressing other known issues in some aquifers, including well construction issues as well as water quality issues. They wondered if the Department had an interest and willingness to partner on other issues or if the Department was only focused on regulating groundwater users. By focusing just on regulation, some groundwater users expressed that the State did not actually seem

interested and invested in holistic water management in this area to ensure the long-term health of the groundwater system and groundwater users.

## Agricultural Operations and Opportunities for Voluntary Water Reductions

- Groundwater use varies from groundwater user to groundwater user depending on their soil, where they are located, interannual variability in weather, microclimate, irrigation technology, level of experience, capacity, crops, proximity to surface water, and many other factors. All groundwater users report being able to grow their crops with 2.5 acre feet, though sometimes they need or want the flexiblity to go above this amount. Groundwater users are concerned about losing their rights if they do not use the full duty allocated, especially if they are publicly reporting groundwater use to the state. They are concerned that information they share will be used against them.
- The irrigation infrastructure amongst groundwater users varies in this area, though most are using pivots. There are some groundwater users who are still on wheel lines and have the opportunity to upgrade irrigation infrastructure, but are hesitant to make costly upgrades without a sense of certainty that they will not be regulated off and lose those investments.
- Groundwater users expressed interest and excitement about joining together, being more connected to one another and exchanging ideas about how to better manage groundwater. Groundwater users see a lot of opportunity to effectively manage the resource and look forward to working together and learning from one another, but also see that it will require a lot of active effort given that farmers and ranchers are historically pretty independent.
- Groundwater users expressed the desire for greater flexibility in how and where they use their water and indicated many opportunities to reduce groundwater use with greater flexibility.
- Some groundwater users grow crops and have livestock, some just grow crops. Some groundwater users primarily use what they grow for their own livestock and would have to purchase feed if they were not producing it. Much of what is produced stays within the local, state, and regional economy and is important source of high-quality feed for local ranching communities.
- Everyone interviewed is deeply rooted in the community. Most groundwater users have a desire to include their children and grandchildren in their operations and to have the younger generations inherit their operations. They are concerned that this may no longer be possible with the proposed regulations. They expressed an appreciation and respect for their neighbors and the culture in this part of the basin that prioritizes looking out for one another and supporting one another.
- Groundwater users noted that their operations not only provide for them and their families, but also contribute to their identity and sense of belonging in their community. They feel a strong sense of duty to contribute to regional, national, and international food security. They are proud of the contributions they make to the local community and economy. They believe they are good stewards of the land and water resources and are open and willing to improve their practices. For most groundwater users working on their farms is how they spend all of their time and they are deeply dedicated to the agricultural way of life. It is more than a way to make a living, it is their full-time job, their hobby, their social life, their home, and their family life. Most of them have not considered other lines of work and do not

have an interest or desire in pursuing opportunities outside of their current operations as it provides a sense of fulfillment and purpose and they are good at what they do.

- Groundwater users offered up the following actions for reducing water use:
    - Temporary fallowing
    - Crop rotations / delayed planting
    - Alternate crops
    - Irrigation technology / sprinkler packages
    - Temporarily or permanently reducing acreage
    - Data driven management/more active management
    - Experimentation
    - Deficit irrigation
- Having security and flexibility would allow groundwater users to implement water savings measures. Groundwater users are generally motivated to improve their operations to maximize yield with the least amount of water.

## Feedback on Proposed Rules

[redacted]

[redacted]

[redacted]

## Requests for Technical Information

Groundwater users requested the following information to aid in their development and implementation of a voluntary agreement:

- What data will the Department use to analyze groundwater level trends? How does it make a determination that a well is "representative"? What if we have additional data that tells a different story? What if we believe that some of the wells that have been chosen as representative are not actually representative?
- What can the Department share about the spring discharge at Sodhouse Springs and how it might be affected by historic groundwater use and recent transfers into this area?
- What are the legal and technical bases for including the Donner Und Blitzen Subarea in the critical groundwater area and enforcing significant reductions? Request for this in writing.
- Why did the Department say that things were fine in this area and were not proposing any reductions and now they are proposing 39% reductions? What happened? Where can the basis for this decision be found?
- Why did the Department change the boundaries? Why isn't Windy Point its own separate area or included in the Lower Blitzen Voltage area? What is the rationale for separating the Upper Blitzen area from the Lower Blitzen Voltage area?
- What does the Department know about the boundary between the Lower Blitzen Voltage area and the Silver area? What is happening on the west side of this area?
- What is the actual hydraulic connection between the Lower Blitzen Voltage area and the Northeast-Crane area? What is the data and information the Department is using to support this conclusion? Request to talk with the Department about their data and parameters in the model.

## Voluntary Agreement Process Overview

| | |
|---|---|
| October-December 2024 | Review OWRD guidance; collect contact information and begin outreach; research voluntary agreements and develop templates; develop materials to support development of voluntary agreements; review and summarize relevant information from RAC meetings; gauge landowner interest in voluntary agreements; identify 2-3 subareas for development of voluntary agreements. |
| January-June 2025 | Conduct outreach and organize groundwater users, conduct a situation assessment for the Blitzen Voltage Subarea, including one-on-one interviews with groundwater users; host scoping meetings to |

| | |
|---|---|
| | begin drafting of voluntary agreements; develop initial draft of voluntary agreements. |
| June-September 2025 | Review, revise, and refine voluntary agreements; continue outreach to groundwater users; connect groundwater users with resources to continue drafting a voluntary agreement; work with groundwater users to present intent to file a voluntary agreement to the Water Resources Commission at their September meeting. |
| September-December 2025 | Initiate coordination with the Water Resources Department to review the voluntary agreement and proactively work through any issues; prepare for presentation to the Water Resources Commission at their December meeting. |
| December 2025-Onward | Assuming adoption at the December Commission meeting, support ongoing implementation and coordination of the Voluntary Agreement. |

# Voluntary Agreements Analysis

## A Review of Oregon's Voluntary Agreements Statute for the Harney Community-Based Water Planning Collaborative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## *About Environmental Defense Fund*

One of the world's leading international nonprofit organizations, Environmental Defense Fund (edf.org) creates transformational solutions to the most serious environmental problems. To do so, EDF links science, economics, law, and innovative private-sector partnerships. With more than 3 million members and offices in the United States, China, Mexico, Indonesia and the European Union, EDF's scientists, economists, attorneys and policy experts are working in 28 countries to turn our solutions into action.

## *About Culp & Kelly, LLP*

Culp & Kelly, LLP is a mission-driven law and policy firm that is focused on supporting innovation and change in western natural resources management, serving the communities, industries, NGOs, farmers, ranchers, and entrepreneurs that are leading the way to a more vibrant, resilient, sustainable American West.

## *Purpose and Scope of Analysis*

Environmental Defense Fund engaged Culp & Kelly, LLP to provide research, analysis and support services related to collaborative groundwater management strategies and policies relevant to the Harney Basin in Oregon. Directed by EDF staff and informed by the Harney Community-Based Water Planning (CBWP) Collaborative, this work consisted of an analysis of Oregon Revised Statute 537.745, which authorizes the use of voluntary agreements, and analysis and review of how such agreements might be developed and implemented in the Harney Basin to address groundwater overdraft.

## *Disclaimer*

The information provided in this report is for general informational purposes only. This information does not, and is not intended to, constitute legal advice. Readers of this report should contact their attorney to obtain advice with respect to the application of any particular legal interpretation, policy, or concept discussed in this report related to Harney CBWP Collaborative strategies.

## *Acknowledgements*

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# Executive Summary

The Harney Basin in southeastern Oregon is roughly 5,240 square miles and is characterized by a semi-arid climate, with mountainous areas receiving greater than 30 inches of precipitation per year, while parts of the valley receive less than 10 inches. Groundwater development in the lowlands has increased substantially over the past few decades, creating an imbalance in the region's water budget.

Where needed to ensure sustained water supplies for existing users and protection of important natural resources, the Water Resources Commission adopts basin programs to set policies for managing administrative basins. Restrictions are typically limited to new uses, except in very severe situations such as critical groundwater areas. Within the Malheur Lake administrative basin, the Commission established the Greater Harney Valley Groundwater Area of Concern (GHVGAC) "to ensure that groundwater in the GHVGAC is appropriated within the capacity of the resource and that new appropriations of groundwater assure the maintenance of reasonably stable groundwater levels and prevent depletion of the groundwater resource."[1] Due to continued overdraft and groundwater level declines in many parts of the GHVGAC, additional regulatory measures, restrictive/corrective controls, and other management options are being considered.

There are two approaches under Oregon law for instituting controls for groundwater use: (1) area designations (Groundwater Administrative Areas / Critical Groundwater Areas) and commission rulemaking, and (2) joint action with groundwater users through "voluntary agreements."[2] Both approaches are being considered within the GHVGAC to address groundwater declines and overdraft issues. The use of voluntary agreements is still untested in Oregon, however, so there are significant uncertainties related to how voluntary agreements would be developed, implemented and what they should contain.

O.R.S. § 537.745 authorizes the Water Resources Commission to "encourage, promote and recognize voluntary agreements among ground water users from the same ground water reservoir." The statute creates an opportunity for groundwater users to implement locally defined measures to manage groundwater use, so long as those measures are consistent with the intent, purposes, and requirements of Oregon's Groundwater Act.

The statute provides minimal guidance for the process and substantive requirements for voluntary agreements. In basic terms, a voluntary agreement must (1) be between groundwater users of the same groundwater reservoir, (2) be consistent with Oregon's groundwater laws and policies and (3) be in writing and filed with the Commission. Upon approval, the agreement controls in lieu of a formal order or rule of the Commission until terminated pursuant to (a) agreement terms, (b) the consent of the agreement parties or (c) an order of the Commission if the Commission finds that the agreement is not being substantially complied with or that changed conditions make continuance of the agreement a detriment to the public welfare,

[1] OAR 690-512-0020(1).

[2] ORS §§ 537.525, 537.745

safety, or health, or contrary to the intent, purposes, and requirements of Oregon's Groundwater Act.

Within these basic requirements, there is likely a wide variety of options as to the geographic scope and subject matter scope of a specific voluntary agreement. A voluntary agreement could, for example, establish management objectives for specific areas of concern, informed by relevant statutory management objectives and local hydrologic, environment, and community considerations. A voluntary agreement could also potentially integrate restrictive/corrective controls on water use, mechanisms for compensating economic hardship associated with water use restrictions, and flexible, incentive-based options in a combined package to balance hydrologic, community, and economic impacts and encourage groundwater user buy-in. (Agreements undertaken in specific basins in Nevada and California could provide model terms.)

However, given the uncertainties around substantive content and procedures for implementing a voluntary agreement, there are a variety of legal risks that an agreement may face. On one hand, voluntary agreements may face challenges from groundwater pumpers that have elected not to join a voluntary agreement. This occurred in basins in Nevada and California, with the agreements and plans ultimately upheld by the reviewing court.[3] On the other hand, the Commission must be able to approve a filed voluntary agreement based on the statutory criteria, and it must have a sufficient basis for that approval or it may face a challenge from the Attorney General's office or another branch of government. There is also likely to be counterpressure around the robustness of a voluntary agreement — some stakeholders may challenge an agreement for going too far, while others may challenge it for not going far enough to satisfy statutory requirements and management obligations.

There are several open questions about how far a voluntary agreement in Oregon could potentially go in relation to Oregon's groundwater laws and regulatory structure. However, a voluntary agreement is in the best position possible to be legally supportable and successful if it does the following:

- Defines a specific management area, thoroughly explaining how it is based primarily on hydrogeologic characteristics, and, as applicable, explaining how/why other factors inform the boundaries.

- Includes as parties to the agreement all groundwater users within the defined area that will be affected by any new water use requirements or restrictions.

- Includes actions and commitments that will make a measurable improvement or arrest any further decline in groundwater levels over a specified period of time.

[3] In Nevada, based on specific aspects of Nevada law, the court determined that the non-joining groundwater users were subject to the terms of the management plan. In California, the court determined that the non-joining groundwater users must be exempted from the terms of the management agreement; however, because of the incentives offered as part of the agreement, all of the non-joining groundwater users eventually opted into the agreement over the following two decades of implementation. More information about each of these case studies is available in **Appendix B**.

- Includes a thorough explanation of how the terms of the agreement (area boundary and actions and commitments of the parties) are consistent with the state's groundwater laws and policies and how they will advance overarching management objectives of assuring maintenance of reasonably stable groundwater levels and preventing depletion of the groundwater resource.

The details of these components are hydrologically and legally technical and involve consideration of a variety of highly local values. Identifying and evaluating priority locations, strategies, and hydrologic, social, and environmental values will be an important next step in exploring the possibility of using voluntary agreements to implement management strategies in the Harney Basin.

# Introduction

The Harney Community-Based Water Planning Collaborative is currently undertaking a place-based approach to water planning.[4] The Collaborative has been working together to gather information, identify strategies, and determine in-stream and out-of-stream water needs to help develop solutions to help meet the area's water needs now and into the future.[5] As part of this effort, the Collaborative is exploring how one or more voluntary agreements under Oregon Revised Statutes (O.R.S.) § 537.745 might be utilized to implement the identified strategies for groundwater management. O.R.S. § 537.745 authorizes the Water Resources Commission to "encourage, promote and recognize voluntary agreements among ground water users from the same ground water reservoir." The statute creates an opportunity for groundwater users to implement locally defined measures to manage groundwater use, as long as those measures are consistent with the intent, purposes, and requirements of Oregon's Groundwater Act. However, the use of voluntary agreements in this context is still untested. Consequently, there are significant uncertainties related to development and implementation of voluntary agreements for the purpose of groundwater management.

Several questions and concerns were raised by Collaborative stakeholders regarding voluntary agreements, from the development and approval of voluntary agreements to the different types of strategies and stakeholder roles that could be included in a voluntary agreement. Some of those questions are addressed in this report. However, many of those questions depend on the specific location, types of uses, groundwater users and other stakeholders that may be included in a specific agreement, so are not addressed in detail here. Stakeholder questions that were raised for the report team, along with initial responses, considerations and/or potential next steps are summarized in **Appendix C**.

### Oregon Water Policy and Management Entities

**Oregon State Legislature:** sets water use management and policies.

**Water Resources Commission:** sets water policies and regulations in accordance with state laws. Oregon statute also authorizes voluntary joint action by the Water Resources Commission and groundwater users to address declining groundwater levels, overdrawing groundwater supplies and other specific groundwater management issues.

**Water Resources Department:** administers the state's laws, regulations, and policies allocating water resources and managing supplies within the state.

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[4] "Place-based integrated water resources planning (also known as place-based water planning) is a voluntary, locally initiated and led effort, in which a balanced representation of water interests work in partnership with the state to understand and meet their instream and out-of-stream water supply needs." The Oregon Water Resources Department provides guidance for and partners with local communities in these planning efforts and provides financial, technical, and planning assistance. Oregon Water Resources Dept., *Place-Based Integrated Water Resources Planning*, https://www.oregon.gov/owrd/programs/planning/placebasedplanning/pages/default.aspx.

[5] HC Watershed Council, CBWP, http://hcwatershedcouncil.com/community-based-water-planning/

To provide foundational context on voluntary agreements and how they might be an approach to implementing management strategies in the Harney Basin, this report provides a high-level overview of the current management framework in the region, the voluntary agreements statute O.R.S. § 537.745, and discusses application of the statute in the context of Harney Basin CWBP Collaborative's planning effort and recommended management actions. While this report does not provide specific recommendations related to implementing any given strategy or actions, it does identify legal considerations related to specific elements that might be incorporated into a potential future voluntary agreement and discusses ways to mitigate the various legal uncertainties/risks.

Additionally, there are several examples of voluntary agreements and other collaborative groundwater planning and management efforts around the West that may provide useful lessons and examples for implementing Harney strategies. Various examples are discussed throughout this report where specific elements are relevant to the Harney planning context. Additional case study information, along with links to the full example agreements and plans where available, is in **Appendix B**.

**O.R.S. § 537.745**
**Voluntary agreements among ground water users from same reservoir**

(1) In the administration of ORS 537.505 to 537.795 and 537.992, the Water Resources Commission may encourage, promote and recognize voluntary agreements among groundwater users from the same groundwater reservoir. When the commission finds that any such agreement, executed in writing and filed with the commission, is consistent with the intent, purposes and requirements of ORS 537.505 to 537.795 and 537.992, and in particular ORS 537.525, 537.730 to 537.740 and 537.780, the Commission shall approve the agreement. Thereafter, the agreement, until terminated as provided in this subsection, shall control in lieu of a formal order or rule of the commission under ORS 537.505 to 537.795 and 537.992. Any agreement approved by the Commission may be terminated by the lapse of time as provided in the agreement, by consent of the parties to the agreement or by order of the commission if the commission finds, after investigation and a public hearing upon adequate notice, that the agreement is not being substantially complied with by the parties thereto or that changed conditions have made the continuance of the agreement a detriment to the public welfare, safety and health or contrary in any particular to the intent, purposes and requirements of ORS 537.505 to 537.795 and 537.992.

(2) When any irrigation district, drainage district, other district organized for public purposes or other public corporation or political subdivision of this state is authorized by law to enter into agreements of the kind referred to in subsection (1) of this section, the commission may approve such agreements as provided in subsection (1) of this section. Any such agreement approved by the commission shall have the same effect and shall be subject to termination in the same manner and for the same reasons set forth in subsection (1) of this section.

This report does not contain a specific proposal for a Harney Basin voluntary agreement. It provides an overview of how a voluntary agreement could potentially incorporate groundwater management strategies being considered by stakeholders in the Harney Basin and discusses legal considerations that will be important in the future if/when groundwater users determine a voluntary agreement is a preferred approach for implementing one or more groundwater management strategies.

# Groundwater Management in the Harney Basin

Oregon's Groundwater Act of 1955 governs the use and management of groundwater within the state. Except for certain exempt uses, water users must obtain a permit or license from the Water Resources Department to use water from any source, whether surface water from lakes or streams or from groundwater. The Water Resources Commission adopts basin programs to set policies for managing administrative basins where restrictions on uses are needed to ensure sustained supplies for existing users and protection of important natural resources. Restrictions are typically limited to new uses, except in very severe situations such as critical groundwater areas.

This section provides a high-level overview of the statutory management standards and basin program rules relevant to the Harney Basin.

## Management Goals and Objectives

A variety of increasingly specific management goals and objectives govern the appropriation, use and management of water resources in basins around Oregon. The following statutory, regulatory, and planning goals and objectives apply to the Greater Harney Valley Groundwater Area of Concern:

### *Statutory*

The following policies are set in statute and apply statewide. As discussed further below, any voluntary agreement must be consistent with these and other statutory policies.[6] The general policy of the Groundwater Act is "that there be reasonable public control of all water in the state for the preservation of the 'public welfare, safety and health.'"[7] That general policy is accomplished through:

- The beneficial use of ground water without waste, within the capacity of available sources (O.R.S. § 537.525(3));
- The preservation of adequate and safe supplies of ground water for human consumption (O.R.S. § 537.525(5));
- The preservation of reasonably stable ground water levels (O.R.S. §537.525(7));

[6] O.R.S. § 537.525(2), (3), (5), (6), (7), (8) (*note:* summarized/restated from statutory provisions).

[7] *Doherty v. Oregon Water Resources Director*, 308 Ore. 543 (1989) (citing O.R.S. § 537.525).

- The prevention of the depletion of ground water supplies below economic levels, the impairment of natural water quality, and wasteful practices (O.R.S. § 537.525(8)).

These statutory policies and terms are interpreted and applied by the Director of the Water Resources Department through regulations and department orders.

### *Regulatory*

The Director of the Water Resources Department has the authority to promulgate rules to carry out their functions (which may apply statewide or within specific areas within the state) and may determine on a case-by-case basis if groundwater supply is overdrawn (or about to be overdrawn) or groundwater levels are declining excessively.[8] The department has adopted definitions for these terms, which apply statewide (see call-out box).

The determination of what constitutes excessive declines and/or overdraw in a given basin is based on "the exercise of administrative expertise and judgment based on information derived from experts."[9] and what is ultimately determined to be the "capacity of available sources" or "reasonably stable" may include consideration of both local hydrologic conditions and community-specific values.[10]

The management goals and objectives specific to the Greater Harney Valley Groundwater Area of Concern are:[11]

- Ensure that groundwater in the GHVGAC is appropriated within the capacity of the resource; and,
- New appropriations of groundwater assure the maintenance of reasonably stable groundwater levels and prevent depletion of the groundwater resource.

It is important to note that quantitative standards for both the *capacity of the available resources* and *reasonably stable groundwater levels* have not been determined for the GHGAC. Voluntary agreement terms may supplement regulations that apply to the area covered by the voluntary agreement, and they may override/change regulations upon Commission review of rules and promulgation of new rules, as applicable.

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[8] O.R.S. § 537.730(1); *see also*, *Doherty v. Oregon Water Resources Director*, 308 Ore. 543 (1989) (stating that "Overdrafting of available ground water supply is legislatively declared to affect public health, safety, and welfare. Excessive decline in ground water levels or interference between wells are also legislatively declared to affect public health, safety and welfare.")

[9] Doherty v. Oregon Water Resources Director, 308 Ore. 543 (1989).

[10] CBWP Collaborative Meeting Discussion with Justin Iverson (May 2022).

[11] OAR § 690-512-0020(1) (*note:* summarized/restated from regulatory provisions).

## OAR § 690-008-0001
## Definition and Policy Statements

(4) "***Declined Excessively***" means any cumulative lowering of the water levels in a ground water reservoir or a part thereof which:

(a) Precludes, or could preclude, the perpetual use of the reservoir; or
(b) Exceeds the economic pumping level; or
(c) Constitutes a decline determined to be interfering with [senior surface water]; or
(d) Constitutes a lowering of the annual high water level within a ground water reservoir, or part thereof, greater than 50 feet below the highest known water level; or
(e) Results in ground water pollution; or
(f) Constitutes a lowering of the annual high water level greater than 15% of the greatest known saturated thickness of the ground water reservoir. the saturated thickness shall be calculated using pre-development water levels and the bottom of the ground water reservoir, or the economic pumping level, whichever is shallower.

...

(6) "***Excessively Declining Water Levels***" means any ongoing lowering of the water level in a ground water reservoir or part thereof which:

(a) Precludes, or could preclude, the perpetual us of the reservoir; or
(b) Represents an average downward trend of three or more feet per year for at least 10 years; or
(c) Represents, over a five year period, an average annual lowering of the water level by 1% or more of the initial saturated thickness as determined by observation or investigation in the affected area; or
(d) Results in water quality deterioration.

(7) "***Overdraw***" means to artificially produce water, in any one-year period, from a ground water reservoir, or part thereof, at an annual rate that:

(a) Exceeds the average annual recharge to that ground water supply over the period of record; or,
(b) Reduces surface water availability resulting in:
  (A) One or more senior appropriators being unable to use either their permitted or customary quantity of surface water, whichever is less; or
  (B) Failure to satisfy an adopted minimum streamflow or instream water right with an effective date senior to the causative ground water appropriation(s).
(c) Reduces the availability of surface waters that have been:
  (A) Withdrawn with an effective date senior to the priority dates of the causative ground water appropriations; or
  (B) Restrictively classified with an effective date senior to the priority date(s) of the causative ground water appropriations.

### *Planning – Desired Conditions (Draft Harney Basin Groundwater Portion of Integrated Water Plan, Draft 5)*

Collaborative planning efforts may also establish area-specific management goals and objectives. Collaborative planning can define additional/more specific goals and objectives for a region, which can guide cooperative efforts. Collaborative plans, unless accompanied by implementing regulations or agreements, do not have the force of law. Voluntary agreement terms could integrate all or some of the planning goals and desired conditions identified in a region-specific collaborative plan, which could provide a way to implement and enforce actions to achieve the Desired Conditions.

The Draft Harney Basin Groundwater Portion of the Integrated Water Plan (currently in development through the Harney Community-Based Water Planning Collaborative effort) includes the following desired conditions:[12]

- Sustainably managed supply of quality water for people, the economy, and the environment.

**Groundwater Supply**

- Recharge: Rebalance the groundwater budget by reducing the groundwater deficit (recharge is currently less than discharge by approximately 110,000 afy).
- Groundwater storage: Reduce the draw on storage by adjusting agricultural groundwater use (which use dominates discharge of groundwater, much of which was stored in the aquifer millennia ago).
- Groundwater level change: Help stabilize deep and shallow groundwater (recognizing that desired conditions for groundwater level changes depend entirely on location in the basin since changes are variable).

**Groundwater Quality:**

- Groundwater is of adequate quality for municipal, domestic, irrigation and stockwater purposes and to support groundwater dependent ecosystems and species.

**Groundwater Uses:**

- Out-of-stream groundwater uses.
- Agricultural Irrigation Use: Agricultural users reduce their groundwater use considerably, with more significant reductions in the area(s) of acute decline, while maintaining a vibrant agriculture community.
- Domestic Use: Domestic water is available at depths that are affordable to drill to assured water production, and water quality meets drinking water standards.

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[12] Harney Community-Based Water Planning Collaborative, Harney Basin Groundwater Portion of Integrated Water Plan, Draft 5 (Jun. 2022), https://docs.google.com/document/d/1QR1VklV24u5gYa85d9mEhD8m1ZCpHMMZ/edit?usp=sharing&ouid=100956322340406543697&rtpof=true&sd=true (***Note*** some of the desired conditions are summarized or restated from the Draft Plan)

- Stockwater Use: Stockwater wells have adequate quantity and quality of groundwater on a year-round basis.
- Municipal Use: The towns of Burns and Hines can maintain their consistent, safe supply of quality drinking water and ensure that supply meets both present and future needs of residences and businesses within their jurisdictions. In unincorporated areas, alternative domestic water supplies (i.e., community wells or connection to municipal supplies) does not result in increased groundwater use. *[combined/restated from Plan description]*
- Commercial and Industrial Use: Maintain sufficient supply for future commercial and industrial uses. *[restated in goal form from Plan description]*
- Burns Paiute Tribal Uses: Assure supply of groundwater quality and quantity for the Tribe.

**Instream groundwater uses:**

- Groundwater Dependent Ecosystems and Species: GDEs are protected, restored and maintained now and in the future by reducing the decline of groundwater and monitoring spring discharge in a consistent manner.

## Management Strategies

To achieve these statutory, regulatory, and planning goals and objectives, the Harney Community-Based Water Planning Collaborative is exploring several strategies and actions. Voluntary agreements have been identified as one approach to implement some of these actions. A full list of the recommended actions that may be feasible through voluntary agreements, along with notes and considerations related to including them in a voluntary agreement, is in **Appendix A**.

The main types of actions that the Collaborative is exploring that could potentially be integrated into a voluntary agreement include:

- Data collection, monitoring, and reporting protocols and standards, and a process to review the data sources and standards and update protocols, e.g., standards, roles/responsibilities, funding, and procedures related to water rights information, groundwater diversion and use data, OpenET, hydrologic conditions, drought information, and use of information in decision-making, monitoring progress, and determining when/what additional actions may be needed.

- Enforcing existing well construction standards, groundwater use permits standards, water use limits, and other regulatory controls.

- Implementing water use limitations for existing uses, e.g., encouraging conservation measures across sectors, implementing irrigation conservation, utilizing incentives for conservation.

- Identifying and collaboratively seeking supportive funding sources for ongoing monitoring, assessment of management approaches, and implementing management strategies like alternative water delivery mechanisms, support for domestic well owners, and financial support to incentivize/offset economic impacts of reductions in groundwater use.

# Voluntary Agreements

Voluntary agreements are authorized in Oregon's groundwater laws as a way to take joint actions between groundwater users in the same reservoir and the Commission to address declining groundwater levels and overdrawing of groundwater supplies.

## Overview of O.R.S. §537.745

Oregon's statutory groundwater policy authorizes voluntary joint actions between groundwater users from the same groundwater reservoir and the Water Resources Commission to address impending or existing declining groundwater level decline and overdrawing of groundwater supply overdraft, whenever possible, with the Commission having authority to control groundwater use whenever such voluntary joint action is not taken or is ineffective.[13] The formal mechanism to implement such voluntary joint actions is through a voluntary agreement

[13] "Whenever wasteful use of ground water, impairment of or interference with existing rights to appropriate surface water, declining ground water levels, alteration of ground water temperatures that may adversely affect priorities or impair the long-term stability of the thermal properties of the ground water, interference among wells, thermal interference among wells, overdrawing of ground water supplies or pollution of ground water exists or impends, controlled use of the ground water concerned be authorized and imposed under voluntary joint action by the Water Resources Commission and the ground water users concerned whenever possible, but by the Commission under the police power of the state except as specified in ORS 537.796, when such voluntary joint action is not taken or is ineffective." ORS 537.525(9).

among groundwater users that is reviewed and approved by the Water Resources Commission.[14] The Commission must approve filed agreements that are "consistent with the intent, purposes and requirements" of Oregon's Groundwater Act of 1955 (O.R.S. §§ 537.505 - 537.795 and 537.992), and enforcement/civil penalties authorities and limitations (O.R.S. § 537.992), and in particular the following statutory sections:

- The Legislature's groundwater policy (O.R.S. § 537.525).
- Critical groundwater area statutes (O.R.S. §§ 537.730 - 537.740).
- Water Resources Commission powers, rules, and limitations on authority (O.R.S. § 537.780).

Read together, these three statutory references promote management of Oregon's groundwater in a manner that avoids overdrawing the resource and causing groundwater level declines. A voluntary agreement is an approach that gives local groundwater users a role in determining the methods to do so, in joint action with the Commission.

Upon approval, the agreement controls for the relevant aspects of administration and management of groundwater resources in the defined area "in lieu of a formal order or rule of the commission" until terminated. Termination may occur by lapse of time as provided in the agreement, by consent of the parties to the agreement, or by order of the Commission if the Commission finds (1) that the agreement is not being substantially complied with by the parties or (2) that changed conditions have made the agreement a detriment to the public welfare, safety and health or contrary in any particular to the intent, purposes and requirements of the Groundwater Act of 1955.[15] However, if joint voluntary action either is not taken or it is ineffective at maintaining reasonably stable groundwater levels or achieving the other stated management policies, the Commission may control the use of groundwater via regulatory actions undertaken through a rulemaking process.[16] For example, regulatory actions may include designating a critical groundwater area and adopting rules to restrict/limit existing and future uses to stabilize the resource, prescribe a preference for certain uses over others, etc.[17]

Note that the Water Resources Commission has not promulgated rules to implement O.R.S. § 537.745 nor provided any other formal policy statements or guidance.

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[14] ORS 537.745(1) authorizes the Commission to "encourage, promote and recognize voluntary agreements among ground water users from the same ground water reservoir."

[15] ORS 537.745(1).

[16] ORS 537.525(9), 537.730, 537.735, 537.745(1).

[17] ORS 537.730, 537.735. *See also* OWRD 2010, Water Rights in Oregon - An Introduction to Oregon's Water Laws; OWRD, Justin Iverson, *Presentation to Harney CBWP Collaborative, Groundwater Statutes and Rules* (Sept. 2020). Critical Groundwater Areas may be designated where the Commission finds certain groundwater conditions exist; notably, where groundwater levels are declining or have declined excessively in the area; there is a pattern of substantial interference between wells and/or surface water rights; or available groundwater supply is being or is about to be overdrawn.

## Potential Scope and Approach Options for Voluntary Agreements

Within these guiding management policies, voluntary agreements are typically discussed as a substitute for, or supplement to, a CGWA designation and rules. Thus, existing CGWA rules can be looked to as a possible template for scope and content of a voluntary agreement. Such an agreement might include:

- Subbasin or subarea objectives, agreement purpose (i.e., to achieve reasonably stable water levels and prevent the aquifer from excessively declining)[18]
- Definitions and general requirements (i.e., what does 'reasonably stable water level' mean within the specific subbasin/subarea? What water budget/sustainable annual yield will achieve reasonably stable water level in the subbasin/subarea?)
- General requirements (i.e., defines total annual yield limitation, irrigation season limitations, restrictions on new applications for appropriation from certain areas/reservoirs within the subbasin/subarea)
- Subarea boundaries, objectives/limitations (i.e., definition of subareas within the subbasin, subarea annual yield limitations and methodologies)
- Exemptions (i.e., O.R.S. § 537.545 exempt uses, other exempt uses like schools)
- Requirements, duties, standards for existing water uses (i.e., limitations or conditions on certain existing uses like annual allotments, flow meters, uniform standards for flow meter specifications/installation/maintenance, water use reporting)
- Distribution of available annual yield (i.e., determining annual allocation based on the annual available resource, considering factors such as priority, type of use, etc.)
- Adaptive management (i.e., periodic review of progress, yield limitation, effectiveness of tools)
- Partnerships with state or federal agency programs to address economic impacts of reduced rates of groundwater pumping
- Alternative water management strategies such as increasing groundwater recharge or increasing irrigation efficiency
- Enforcement/Violation policy and procedures

A potentially important distinction between the voluntary agreements approach and the more traditional CGWA rulemaking approach that imposes regulatory requirements is the

[18] As noted above, quantitative standards for reasonably stable water levels have not been defined within the area.

ability of the voluntary agreement to bundle water management strategies. This means that a voluntary agreement can bundle regulatory curtailment of groundwater pumping with strategies to help off-set either the need for--or the economic impact of--reduced groundwater pumping. Such strategies may range from increasing groundwater recharge in hydrologically-appropriate areas to transitioning some irrigated lands to other income-producing or productive uses compatible with a water-secure and robust agricultural operation. These types of decisions regarding what are appropriate strategies to include in a voluntary agreement are necessarily determined by local hydrologic conditions, the needs and preferences of water users, and the collaborative work and dialogue among the community of people engaged in creating the voluntary agreement.

While much of the discussion related to voluntary agreements has typically centered around regulatory requirements because a voluntary agreement must meet the minimum floor of reversing groundwater decline, a voluntary agreement can also create a powerful vehicle for marshalling state and federal resources to address water data shortcomings, economic impacts on agricultural irrigators, or other community needs. Voluntary agreements simply provide a locally-driven approach to developing the requirements as an alternative to the traditional, narrower Commission rulemaking process. In either approach, the requirements are implemented and enforced by the Department upon approval (of a voluntary agreement) or promulgation (of regulatory restrictions). The opportunity that a voluntary agreement presents is to bundle water management strategies informed by water data with a variety of locally-developed approaches to implement reduced groundwater pumping in ways that can maintain agricultural incomes and sustain rural communities.

Bundling a set of actions together, even where one action may not otherwise require Commission approval, could help identify and coordinate funding and technical assistance among state and federal agencies, local communities, and affected agricultural producers. In the case of the San Pedro Riparian National Conservation Area, faced with significant water management challenges but no specific driving regulatory requirement, local governments and

federal agencies agreed to a coordinated monitoring and adaptive management process to plan, fund, and implement actions to meet shared water objectives. In the case of Mojave Basin, stakeholders were able to develop and implement a groundwater allocation marketing framework that facilitated new water uses with water right changes in a flexible way without increasing water demand, resulting in a more workable process that the state was otherwise not authorized to do itself. (See Appendix B for additional information on these case studies.) A voluntary agreement that includes a suite of programs or strategies to help address the economic impacts on agricultural irrigators or rural communities, bundled with regulatory tools that do require Commission approval could not only help transition to sustainable groundwater use, but may be persuasive that further Commission-driven regulatory action is not needed.

## Legal Elements, Constraints and Considerations

### *Geographic Scope*

Many stakeholders have raised the question of the appropriate and legally supportable geographic scope for a potential voluntary agreement under O.R.S. § 537.745. The statute states that "[t]he voluntary agreement must be among users of the *same ground water reservoir*."[19] *Ground water reservoir* is defined within the same chapter to mean "a designated body of standing or moving ground water having exterior boundaries which may be ascertained or reasonably inferred."[20] This statutory term is arguably inexact, given the uncertainties inherent in defining boundaries for hydrogeological systems, particularly those without clear structural boundaries.

Interpretation of this term could potentially generate different boundaries for defining ground water reservoirs. Boundaries could potentially involve a mix of hydrologic, geologic, and administrative factors (i.e., areas of high concentrations of groundwater withdrawals), but they should have a firm basis in hydrogeologic or physical boundaries to be the most legally supportable. The context of the Groundwater Act, legislative history and general maxims of statutory construction may be looked to in interpreting the intended legislative intent and meaning of the term "ground water reservoirs". Elsewhere in the Groundwater Act, the term "ground water reservoir" is used to refer to a distinct source of groundwater, typically for the purposes of determining and administering the relative rights from each distinct source.[21] Throughout Oregon's water laws and regulations there are other terms also used to refer to distinct sources of groundwater or areas of groundwater use, such as "aquifer" [22] and "ground water basin or reservoir."[23]

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[19] ORS 537.745(1) (emphasis added)
[20] ORS 537.515(6)
[21] See, i.e., ORS §§ 537.665 (Investigation of ground water reservoirs; defining characteristics and assigning names and numbers); 537.675 (determination of rights in several reservoirs or of critical ground water area in same proceeding).
[22] See, i.e., OAR 690-200-0050. Note that this section specifically only applies to well construction standards in Chapter 690, Division 200, but is provided here as an example of a general definition used by the Department in other contexts. See also, Water Resources Commission Order 55-1088, *In the Matter of the Withdrawal of Aquifers Within the Designated Woodland, Edison, Victor Point Area* (2001).
[23] See, i.e., ORS 537.135 (relating to the use of water stored/recharged in any "ground water basin or reservoir")

Use of these various terms over time follows our growing understanding of groundwater science. Groundwater is not confined in perfectly contained underground 'rivers,' or 'reservoirs' as we think of them in the surface water context. Groundwater and surface water are different parts of a hydrological cycle which involves "the continuous movement of water above, on, and below the surface of the Earth."[24] This matters because it supports a variety of considerations being incorporated into the determination of the boundaries for a groundwater reservoir — not only one type of hydrogeologic boundary matters, but also other hydrologic, geologic and administrative considerations.

Defining a smaller boundary area for the ground water reservoir in a given voluntary agreement could help address very localized areas of concern. Smaller boundaries can have the dual benefit of limiting the number of parties that would be required to participate in the voluntary agreement and limit the number of restrictions placed on other parties around the broader basin or area. (See the Kansas Sheridan LEMA case study in **Appendix B**.)

To provide legal support for a limited, sub-area geographic scope, there should be a strong basis in hydrogeologic considerations, but other factors could also be used, such as hydrogeologic areas with different responses to groundwater pumping.[25] All factors influencing the definition of the groundwater reservoir for purposes of a voluntary agreement should be thoroughly explained, particularly how they relate to and advance the Groundwater Act policies and any relevant overarching basin- or area-specific management objectives.

The case studies in **Appendix B** describe a variety of approaches to geographic scope taken in other places, noting relevant lessons of the approach in relation to Oregon's regulatory framework and the Harney Collaborative's identified strategies.

Although a variety of different groundwater reservoir boundary options may potentially be legally supportable, there could still be some risk of a legal challenge. Ensuring that the voluntary agreement and the order approving the agreement include a thorough description of how the agreement (and the boundary definition) are consistent with and advance the statutory policy for voluntary agreements, the overarching GHVGAC management objective, and the state's groundwater policies — importantly, how it addresses overdraw and/or groundwater level declines — should help mitigate the risk of a successful challenge on this point.

### *Subject-Matter Scope*

Another common question is about the appropriate and legally supportable subject-matter scope for a potential voluntary agreement. The statute does not define or limit the potential subject matter scope of voluntary agreements, rather the statute provides open-ended guidance that the "Commission may encourage, promote and recognize voluntary agreements

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[24] Winter, T.C., Harvey, J.W., Franke, O.L., and Alley, W.M., 1998, *Ground water and surface water—A single resource*: U.S. Geological Survey Circular 1139, 79 p. 3.

[25] For a description of the groundwater-related physical characteristics of the Harney Basin area, see generally Gingerich, S.B., Johnson, H.M., Boschmann, D.E., Grondin, G.H., and Garcia, C.A., 2022, Groundwater resources of the Harney Basin, southeastern Oregon: U.S. Geological Survey Scientific Investigations Report 2021–5103, 118 p., https://doi.org/10.3133/sir20215103.

among ground water users," the "Commission shall approve the agreement" if it is executed in writing, filed with the Commission, and is "consistent with the intent, purposes and requirements" of Oregon's groundwater laws, and that such approved agreements "shall control in lieu of a formal order or rule of the commission."[26]

These statutory sections allow for a variety of different water management strategies, groundwater recharge elements, community water system planning and management, and agricultural irrigation transition support in a voluntary agreement. These programs and strategies can be bundled in a voluntary agreement with different types of restrictive/corrective control measures that are used in regulations for other basins. Commission approval would be needed for voluntary agreements with these types of bundled water management strategies and regulatory controls because they have implications for how OWRD administers and enforces its Groundwater Act authorities. These "safe bet" options, or time-tested regulatory/restrictive controls already implemented in other parts of Oregon, include:

- Defining specific management objectives, i.e., sustainable annual yield or reasonably stable aquifer levels, and methodology for determining[27]
- Defining certain uses exempt from corrective controls[28]
- Limiting irrigation use to a maximum annual acre-foot per acre duty[29]
- Limiting or restricting existing uses based on a sustainable annual yield allocation[30]
- Establishing mitigation requirements to offset impacts of groundwater pumping[31]
- Requiring water meters, withdrawal records, and reporting by existing users to OWRD[32]

**Appendix B** describes some other approaches implemented outside of Oregon, such as the groundwater trading framework used in the Mojave Basin. A voluntary agreement could also include a variation on restrictive controls already used in Oregon.

A variety of actions to help support the transition to sustainable groundwater use for both rural communities and agricultural irrigators could be implemented by a voluntary agreement do not require Commission approval under O.R.S. § 537.525 because they do not require OWRD's Groundwater Act authorities to administer. However, they may be useful to

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[26] ORS 537.745(1).
[27] i.e., Butter Creek Critical Ground Water Area, OAR 690-507-0650; 690-507-0660
[28] i.e., Stage Gulch Critical Ground Water Area, OAR 690-507-0775
[29] i.e., Amity Hills/Walnut Hill Ground Water Limited Area, OAR 690-502-0210; Chehalem Mountain, Eola Hills and South Salem Hills Ground Water Limited Areas, OAR 690-502-0200; others
[30] i.e., Butter Creek Critical Ground Water Area, OAR 690-507-0670
[31] i.e., Deschutes Basin Groundwater Mitigation Rules, OAR 690-505-0605 (note, however, that this example only contemplates credit generation through surface water conservation; conservation of groundwater in-place is an outstanding question).
[32] i.e., Water Resources Commission Special Order Vol 10 Pg 216, Cow Valley (1959)

include in a voluntary agreement pursuant to O.R.S. § 537.525 as a way to help transition to the groundwater sustainability underpinning the regulatory requirements. Some examples of state and federal programs, action, and transition support could include:

- Conservation Stewardship Program enrollment for payments for practices that reduce reliance on groundwater pumping while increasing soil health, establishing native grasses, enhancing bird habitat or other conservation outcomes.

- Enrollment of some irrigated acres into a Conservation Reserve Enhancement Program that could provide a per-acre payment for transition to a non-agricultural use such as enhanced fish or wildlife habitat or for reduced irrigation (i.e., CREP program eligibility requirement that participant must be a party to the voluntary agreement that also institutes some level of regulatory corrective control)/

- Rural Development programs to support transition to less water-intensive crops such as lentils or barley, or generation of renewable energy compatible with agricultural operations/

- Town or county residential, building and/or industrial water conservation programs (e.g., parties agree to jointly seek funding for and encourage conservation upgrades).

- Stormwater and/or wastewater management and recharge projects (i.e., consolidating seasonal stormflows for recharge in target impact areas, with coordinated funding and implementation between the parties).

As discussed above, there are benefits and challenges to the different subject-matter scope options for a potential voluntary agreement. Determining the appropriate subject-matter scope will involve weighing legal as well as other interrelated factors, i.e.:

- Legal supportability/challenge risk. (Are the actions well-understood, already utilized in other places? Are they controversial?)

- Stakeholder willingness. (Is there enough financial support and technical assistance available to transition to agricultural operations built on groundwater sustainability?)

- Ease of administration. (Are the actions new, complicated, expensive?)

The case studies in **Appendix B** describe a variety of approaches to subject-matter scope taken in other places. The discussion of the case studies in Appendix B note relevant lessons of the approach in relation to Oregon's regulatory framework and call out parallels to the Harney Collaborative's identified strategies.

Although Oregon's groundwater statutes authorize a wide variety of different actions that could potentially be included in a voluntary agreement, there could still be some risk of challenge to a voluntary agreement. To help insulate a voluntary agreement from the risk of a legal challenge, the voluntary agreement and the order approving the agreement should include a thorough description of how the agreement (and the specific actions included) are consistent with and advance the statutory policy for voluntary agreements, the overarching GHVGAC management objective and the state's groundwater policies. This means that the voluntary agreement should be able to demonstrate that its particular combination of water management strategies, agricultural transition support, water data collection and analysis, rural community water system modernization, groundwater recharge actions, restrictive/corrective controls, and monitoring and enforcement protocols together show a likelihood of addressing overdraw and groundwater level declines across the basin.

### *Parties*

The voluntary agreement statute is not explicit regarding the required parties to a voluntary agreement. The statute generally refers to voluntary agreements as being "among ground water users from the same ground water reservoir."[33] Stakeholders have asked whether agreement among *all* ground water users is required or if it may be some other number, e.g., a majority. Given that the statute does not specifically state the required parties, the element is arguably inexact and open to agency interpretation of the legislative policy.

Considering the text and context of the statute and constitutional due process considerations, the most legally supportable interpretation of the required parties is likely *all* ground water users within the defined area. However, it could potentially also be legally supportable to interpret the requirement to be *all interested/affected* ground water users. Depending on the subject-matter scope of the agreement, that interpretation could mean that a subset of ground water users within the area could join as parties to a voluntary agreement if the terms of the agreement do not affect (place new regulatory restrictions on) other ground water users.

Due process requires that a person be given the opportunity to be heard before being deprived of a property or liberty interest.[34] Although there is no set rule for how the opportunity to be heard should be given,[35] there should be some level of notice and opportunity to participate before restrictive/corrective controls are instituted. In the context of a voluntary agreement, voluntarily signing onto the agreement is likely sufficient to assure a court that a groundwater user has had sufficient notice and opportunity to be heard. However, if the terms of the agreement could affect/injure the water rights of an individual that has not signed onto the agreement, there are likely due process issues.

There potentially is some flexibility to develop voluntary agreements that only apply to certain groundwater users. One hypothetical example could be implementing more stringent water use restrictions only on irrigation water users within a certain geographic area that is

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[33] ORS 537.745(1)
[34] *See generally, Matthews v. Eldridge*, 424 US 319 (1976); *Skinner v. Jordan Valley Irr. Dist.*, 137 Ore. 480, 300 P. 499 (1931) (internal citations omitted).
[35] *Matthews v. Eldridge*, 424 US 319 (1976).

experiencing high rates of drawdown due primarily to irrigation. The geographic and subject matter scope would limit the number of impacted groundwater users who would be required parties (e.g., excluding domestic and municipal uses inside the area of high drawdown, as well as irrigation uses outside the area of high drawdown).

Voluntary agreements could potentially take a "management framework" approach as another way to implement limited-applicability tools. Through agreement of as many groundwater users as possible, a voluntary agreement could be developed that incorporates the management objective and a framework for taking subsequent management actions. For example, an agreement could (1) establish the area target for reduced water use (explaining how the target advances the broader GHVGAC management objective) and (2) establish a procedure to review and approve exhibits to the agreement for participation in an agreement-defined conservation program. The agreement could lay out conservation program eligibility and participation requirements; participants must agree to the regulatory requirement (e.g., an annual irrigation limit) but may choose a variety of methods to achieve it (rotational or seasonal fallowing, changes to crops that require less irrigation, offset generated by converting from septic to consolidated wastewater treatment with effluent recharge, etc.) and may access incentives to do so (i.e., CREP, ability to do year-to-year storage/carry over unused water to the next year, supportive funding for septic conversion, etc.).[36]

These types of limited-applicability tools could be a way to pilot voluntary agreements by working within a smaller group of people to reach consensus. The case studies in **Appendix B** describe a variety of approaches to determining the appropriate required parties taken in other places, noting relevant lessons of the approach in relation to Oregon's regulatory framework and the Harney Collaborative's identified strategies.

A voluntary agreement could potentially include a variety of non-regulatory management tools in combination with regulatory requirements, in which case relevant other parties might also need to be involved. As a hypothetical example, an agreement might include both new water conservation requirements and regional recharge infrastructure. The combination of discharge and recharge actions together could address overdraft issues and reduce the demand management burden on groundwater users. In this example, groundwater users are required parties under the statute, and optional parties for implementing recharge infrastructure might include sewer/wastewater providers and county flood control districts. Where a nonprofit or other party is committing to contribute technical and/or financial support for implementing any aspect of the monitoring or management actions, those parties may be required parties in the voluntary agreement (or a supplement thereto).

Many stakeholders can potentially be involved in the *development* of a voluntary agreement; however, the required signatory parties will be those entities that are *subject to the terms and obligations* contained in the voluntary agreement.

[36] One example which relates to a very different regulatory context and source of water is the Lower Colorado River Basin Intentionally Created Surplus Forbearance Agreement. Water rights holders agreed to allow others to leave water unused and each would forbear on their right to take any unused amount. The conserving party must meet certain requirements to participate, and are incentivized to participate because of the management flexibility value in being able to store water from year to year without risk of a junior or other downstream water user taking the unused water.

Even with wide support and participation of groundwater users as parties in a voluntary agreement, there could still be some risk of challenge. The risk of a successful challenge may be mitigated by ensuring that the voluntary agreement and the order approving the agreement each include a thorough description of how the agreement (and determination of appropriate parties thereto) is consistent with and advances the statutory policy for voluntary agreements, the overarching GHVGAC management objective, and the state's groundwater policies. This means that a voluntary agreement should be able to demonstrate that its particular combination of groundwater users and other parties and the actions they are agreeing to undertake together show a likelihood of addressing overdraw and groundwater level declines across the basin.

***Procedure***

The voluntary agreement statute includes limited description of the procedures for submission and review of a voluntary agreement. The statute requires that an agreement be "executed [by ground water users] in writing and filed with the commission."[37] Once filed, the Commission "*shall* approve the agreement" if it meets those form requirements (groundwater users execute the agreement in writing and file with the Commission) and if it "is consistent with the intent, purposes and requirements of [the Groundwater Act], and in particular O.R.S. §§ 537.525, 537.730 to 537.740 and 537.780."[38] These call-out provisions include:

- Oregon's statutory groundwater policy (O.R.S. § 537.525).
- Critical ground water area designation, rules and notice (O.R.S. § 537.730).
- Rules designating critical ground water area (O.R.S. § 537.735).
- Filing rules designating critical ground water area (O.R.S. § 537.740).
- Powers of Water Resources Commission; rules; limitations on authority (O.R.S. § 537.780).

Given that the statute does not specifically describe any other details of review, approval or implementation, the element is arguably inexact and open to agency interpretation of the legislative policy. Text, context, and legislative history give little additional guidance on procedure. Unlike agency rulemaking proceedings, which are legislative in nature, the voluntary agreements statute is structured like an administrative decision with its "check-the-box" requirements. However, each of the elements involve substantive determinations, requiring the Commission to determine consistency of a voluntary agreement with all aspects of Oregon groundwater law and policy. If the Commission finds that the voluntary agreement is not consistent in one or more ways with Oregon groundwater policy, it must explain its reasoning and reject the agreement.

A challenge of the Commission's decision to approve or disapprove an agreement would be likely to be based on an argument that the Commission did not adequately explain its

[37] ORS 537.745(1)
[38] ORS 537.745(1) (emphasis added).

decision.[39] To mitigate the risk of such challenges, the Commission could undertake a rulemaking in advance of considering any particular voluntary agreement in order to clarify and provide additional detail to ensure that a voluntary agreement meets the form and consistency requirements of the statute. However, even with additional regulatory procedures for review, approval and implementation of a voluntary agreement, there could still be some risk of challenge. The risk of a successful challenge may be mitigated by ensuring that the voluntary agreement and the order approving the agreement each include a thorough description of how the agreement (and the process for review, approving, and implementing it) is consistent with and advances the statutory policy for voluntary agreements, the basin-specific management objective (here, the GHVGAC objective), the state's groundwater policies (specifically, addressing overdraft and groundwater level declines), and the Administrative Procedures Act.

### *Effect and Term*

The statute states that an approved voluntary agreement "shall control in lieu of a formal order or rule of the Commission" under the Groundwater Act.[40] The agreement will remain in force until:

- Terminated by the lapse of time as provided in the terms of the agreement; or
- By consent of the parties to the agreement; or
- By order of the Commission if the Commission finds, after investigation and public hearing upon adequate notice, that the agreement is not being substantially complied with by the parties thereto or that changed conditions have made the continuance of the agreement a detriment to the public welfare, safety and health or contrary in any particular to the intent, purposes and requirements of [the Groundwater Act].[41]

In other words, a voluntary agreement can define a specific term of years for which it governs groundwater management or it can be structured to continue indefinitely unless terminated by the parties. The Commission can also terminate the voluntary agreement (after investigation, a hearing and notice) if the voluntary agreement is not fulfilling its stated purpose of leading to sustainable groundwater management. The terms of the agreement will apply to all signatory parties throughout the term of the agreement.[42]

Including clear indicators of progress in relation to the management objectives, with procedures for monitoring, reporting, and assessing when and what additional actions may be needed, with clearly defined roles and responsibilities related to carrying out those procedures,

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[39] ORS 183.482(c) ("The court shall set aside or remand the order if the court finds that the order is not supported by substantial evidence in the record. Substantial evidence exists to support a finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding.")

[40] ORS 537.745(1)
[41] ORS 537.745(1)

[42] If there is a change in land/water rights ownership, the new owner of the water rights would likely need to join the Voluntary Agreement to be subject to its terms and benefits. Additional research and analysis could be undertaken related to other potential options for addressing succession in interests.

can provide a means to demonstrate whether the agreement is being complied with and is continuing to meet the intent of the agreement and the Groundwater Act.[43]


"Fishing in Harney County, Oregon" by Bureau of Land Management (CC BY 2.0)

## Conclusions

The voluntary agreements statute provides minimal, formal requirements for the process and substance of voluntary agreements. In basic terms, a voluntary agreement must (1) be between groundwater users of the same groundwater reservoir, (2) be consistent with Oregon's groundwater laws and policies, and (3) be in writing and filed with the Commission. Upon approval, the agreement controls in lieu of a formal order or rule of the Commission until terminated pursuant to (a) agreement terms, (b) the consent of the agreement parties, or (c) an order of the Commission if the Commission finds that the agreement is not working to achieve its purpose.

Within these basic requirements, there is likely a wide variety of options as to the geographic scope and subject matter scope of a specific voluntary agreement. A voluntary agreement could, for example, establish management objectives for specific areas of concern, informed by relevant statutory management objectives and local hydrologic, environment and community considerations. (Agreements undertaken in specific basins in Arizona, Nevada and California could provide model terms.) A voluntary agreement could also potentially integrate both restrictive/corrective controls and flexible, incentive-based options in a combined package to balance hydrologic, community and economic impacts and encourage groundwater user buy-in. (Agreements undertaken in specific basins in Nevada and California could provide model terms.)

Given the uncertainties around substantive content and procedures for implementing a voluntary agreement, there are a variety of legal risks that an agreement may face. On one hand,

[43] The SPRNCA case study in **Appendix B** provides an example of detailed adaptive management procedures, defined indicators to measure progress, and commitments to continue joint monitoring and modeling activities to ensure effectiveness of the collaborative plan.

voluntary agreements may face challenges from groundwater pumpers that have elected not to join a voluntary agreement. This occurred in basins in Nevada and California, with the agreements and plans ultimately upheld by the reviewing court.[44] On the other hand, the Commission must be able to approve a filed voluntary agreement based on the statutory criteria requiring a voluntary agreement to address overuse and groundwater declines, and the Commission's approval has to have a sufficient basis or it may face a challenge from the Attorney General's office or another branch of government. There is also likely to be counterpressure around the robustness of a voluntary agreement — some stakeholders may challenge an agreement for going too far, while others may challenge it for not going far enough to satisfy statutory requirements and management obligations.

There are several open questions about how far a voluntary agreement in Oregon could potentially go in relation to Oregon's groundwater laws and regulatory structure. However, a voluntary agreement is in the best position possible to be legally supportable and successful if it does the following things:

- Defines a specific management area, thoroughly explaining how it is based primarily on hydrogeologic characteristics and explaining how/why other factors inform the boundaries, as applicable.

- Includes as parties to the agreement all groundwater users within the defined area that will be affected by any restrictive requirements.

- Includes actions and commitments that will make an improvement in the hydrologic trend line over time.

- Includes a thorough explanation of how the terms of the agreement (area boundary and actions and commitments of the parties) are consistent with the state's groundwater laws and policies, how they will advance overarching management objectives of assuring maintenance of reasonably stable groundwater levels and preventing depletion of the groundwater resource.

The details of these components are hydrologically and legally technical and involve consideration of a variety of highly local values. While this report suggests consideration of a broad range of restriction controls bundled with different approaches for supporting agricultural transitions, community water system modernization and groundwater recharge strategies, in the end local water users and community members will determine what path forward works for their basin. Identifying and evaluating priority locations; strategies; and hydrologic, social and environmental values will be important next steps in exploring the use of voluntary agreements to implement management strategies in the Harney Basin.

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[44] In Nevada, based on specific aspects of Nevada law, the court determined that the non-joining groundwater users were subject to the terms of the management plan. In California, the court determined that the non-joining groundwater users must be exempted from the terms of the management agreement; however, because of the incentives offered as part of the agreement, all of the non-joining groundwater users eventually opted into the agreement over the following two decades of implementation. More information about each of these case studies is available in **Appendix B**.

# Appendix A - List of Potential Harney Basin Strategies

The table below contains recommended actions put forward by the Harney Community-Based Water Planning Collaborative in the fifth Draft Groundwater Plan Appendix F: Implementation Framework. The table has been modified to only include Recommended Actions that were noted as "yes," "possibly" or "?" for "Feasible Through a VA" (voluntary agreement) and includes the respective Management Concerns, Strategy to Address Critical Issues and Critical Issues. Comments are from the report authors and are related to the potential implementation of the Recommended Action through a voluntary agreement approach.

| Recommended Action* | Management Concerns | Strategy to Address Critical Issue | Critical Issues** | Feasible Through a VA | Comments*** |
|---|---|---|---|---|---|
| Ask OWRD if there are short-horizon actions that can be taken as a priority to reduce water use in areas of serious groundwater decline | Overallocation / Groundwater Level Declines, Water Security for Groundwater Users | Recommend to OWRD that it take actions in the short term to reduce the amount of groundwater being pumped for irrigation, including permit compliance | 1, 11 | ? | VAs could be used for implementing short-term actions to reduce groundwater pumping for participating groundwater users. |
| Ask OWRD if there are short-horizon actions that can be taken to reduce water use | Overallocation / Groundwater Level Declines, Water Security for Groundwater Users | Recommend to OWRD that it take actions in the short term to reduce the amount of groundwater being pumped for irrigation, including permit compliance | 1, 11 | ? | VAs could be used for implementing short-term actions to reduce water use for participating groundwater users. |
| Ask OWRD to add metering and reporting requirement as rule | Overallocation / Groundwater Level Declines, Water Security for Groundwater Users | Recommend to OWRD that it take actions in the short term to reduce the amount of groundwater being pumped for irrigation, including permit compliance | 1, 11 | yes? | VAs could be used for implementing metering and reporting standards for participating groundwater users. |
| Ask OWRD to enforce existing permit conditions | Overallocation / Groundwater Level Declines, Water Security for Groundwater Users | Recommend to OWRD that it take actions in the short term to reduce the amount of groundwater being pumped for irrigation, including permit compliance | 1, 11 | yes | Enforcement of permit conditions is an existing OWRD authority. VAs could be used for encouraging OWRD to exercise this existing authority. |
| CBWP Collaborative advocate for OWRD to interpret groundwater use data, report to the community and interested stakeholders, and utilize information in management actions | Groundwater Governance and Accountability, Data and Information Gaps | Install accountable water measurement devices on all non-exempt groundwater points of diversion; To develop appropriate reporting procedures for metered non-exempt groundwater points of diversion | 6, 8, 9, 10, 14, 15 | yes | VAs could be used for defining and implementing data collection and reporting and ensuring information is used to inform management actions. |
| CBWP partners, such as The Nature Conservancy, secure funding for a scoping assessment to determine potential implementation pathways of a voluntary | Overallocation / Groundwater Level Declines | Explore and consider a voluntary groundwater market approach; Review feasibility study (Upon review, the | 1, 2, 3 | possibly | VAs could be a groundwater-user-led mechanism for bringing in additional partners and funding for actions that could advance VA and area management goals. |

* The first five columns (Recommended Action, Management Concerns, Strategy to Address Critical Issue, Critical Issues, and Feasible Through a VA) are from the Draft Groundwater Plan Appendix F: Implementation Framework. This table only contains the Recommended Actions identified in the Implementation Framework with the following answers to Feasible Through a VA: yes, possibly/possible, and ?

** Critical Issues are listed by number at the end of Appendix A

*** Comments from the report authors related to potential implementation of the Recommended Action through a Voluntary Agreement.

| Recommended Action* | Management Concerns | Strategy to Address Critical Issue | Critical Issues** | Feasible Through a VA | Comments*** |
|---|---|---|---|---|---|
| groundwater market approach in the Harney Basin | | Collaborative should make a recommendation to implement or not) | | | |
| Collect and summarize information to help understand how the Harney Basin is affected by and responds to the impacts of drought events, as related to water supply and use. | Overallocation / Groundwater Level Declines, Data and Information Gaps, Climate Change Effects on Groundwater | Develop a plan to help mitigate and respond to the impacts of drought on the basin's groundwater. | 2, 25, 30, 31 | possibly | VAs could be a groundwater-user-led approach for defining and implementing data collection and analyses supportive for informing water use context and management actions. |
| Compare OpenET data with OWRD-approved water meter information to assess the effectiveness of OpenET, to potentially monitor water use in fields that are irrigated by temporarily broken meters, and to potentially monitor water use for points of diversion that did not have appropriate plumbing (in consultation with a technical committee described in Section 1, Strategy 11). Assess the ability of OpenET to measure water use of unmetered PODs adjacent to metered PODs; use that information to adaptively manage the implementation of the metering and reporting strategy. | Overallocation / Groundwater Level Declines | Explore how OpenET or other remote-sensing applications could be used as a tool to assess water use | 2 | possibly | VAs could be used for defining and implementing data collection for informing water use context and management actions. |
| Demonstrate successes of irrigators reducing groundwater use for others to learn and to be encouraged (e.g., "demonstration farms"). | Overallocation / Groundwater Level Declines | Implement irrigation conservation measures to help slow the rate of decline and assist in achieving reasonably stable groundwater levels | 1 | yes | VAs could be used for implementing smaller-scale demonstration projects. |
| Develop a basin plan with specific actions and tools to help mitigate and respond to meteorological drought impacts. Develop this plan in conjunction with, or as part of, the Harney County's Natural Hazards Mitigation Plan, based on the Harney Community-Based Water Plan, and in consideration of other drought plans from similar basins (e.g., temporary fallowing programs for groundwater irrigated fields during times of drought). | Overallocation / Groundwater Level Declines, Data and Information Gaps, Climate Change Effects on Groundwater | Develop a plan to help mitigate and respond to the impacts of drought on the basin's groundwater. | 2, 25, 30, 31 | possibly | VAs could be used for implementing a basin plan with specific actions and tools. |
| Develop a strategy and pursue funding with community support for alternative water delivery mechanisms where feasible | Water Security for Groundwater Users | Identify feasible alternative water delivery mechanisms to meet exempt water supply needs of rural residents | 11 | possibly | VAs could be a groundwater-user-led mechanism for bringing in additional partners and funding for actions that could advance VA and area management goals. |
| Enforce well construction standards | Overallocation / Groundwater Level Declines, Groundwater | Work with OWRD to enact improvements in its enforcements of water rights and well | 1, 2, 8, 9, 10, 22, 26, 27 | yes | Enforcement of well construction standards is an existing OWRD authority. VAs could include |

| Recommended Action* | Management Concerns | Strategy to Address Critical Issue | Critical Issues** | Feasible Through a VA | Comments*** |
|---|---|---|---|---|---|
| | Governance and Accountability, Data and Information Gaps | construction standards in a publicly transparent manner | | | provisions for encouraging OWRD to exercise this authority. |
| Ensure all permits conditions and water use limits are met | Overallocation / Groundwater Level Declines, Groundwater Governance and Accountability, Data and Information Gaps | Work with OWRD to enact improvements in its enforcements of water rights and well construction standards in a publicly transparent manner | 1, 2, 8, 9, 10, 22, 26, 27 | possibly | Enforcement of permit conditions and water use limits is an existing OWRD authority. VAs could include provisions for encouraging OWRD to exercise this authority. |
| Ensure all water right data, including water use data as required, is up to date and publicly available | Overallocation / Groundwater Level Declines, Groundwater Governance and Accountability, Data and Information Gaps | Work with OWRD to enact improvements in its enforcements of water rights and well construction standards in a publicly transparent manner | 1, 2, 8, 9, 10, 22, 26, 27 | yes | VAs could be used for establishing data collection and reporting protocols. |
| Ensure the water use information reported to OWRD is available to the certificate/permit-holder | Groundwater Governance and Accountability, Data and Information Gaps | Install accountable water measurement devices on all non-exempt groundwater points of diversion; To develop appropriate reporting procedures for metered non-exempt groundwater points of diversion | 6, 8, 9, 10, 14, 15 | yes | VAs could be used for establishing data reporting protocols. |
| Explore ways to generate funding for domestic well owners such as how an insurance fund, where users pay a fee, that could be administered locally | Overallocation / Groundwater Level Declines | Provide financial and technical solutions to domestic well users experiencing declines in groundwater quantity/quality due to declining groundwater levels | 2 | yes | VAs could be a mechanism for funding and implementing solutions that support domestic well owners. |
| Identify and prioritize incentives (like CREP) to reduce groundwater use in areas where it would otherwise impact GDEs | Overallocation / Groundwater Level Declines, Ecosystem Health and Protection | Implement actions that protect and conserve GDEs | 2, 4, 5 | possibly | A VA is likely not required to implement this action. However, VAs could be a mechanism for implementing incentives to reduce groundwater use. Packaging incentives and/or compensation options to mitigate economic hardship for groundwater users can help balance restrictive measures that may also be included in a VA. |
| Identify and prioritize strategies and approaches to managing groundwater and present them to the RAC | Groundwater Governance and Accountability | Work with OWRD to ensure that Collaborative members are represented and Collaborative developed strategies are presented to the RAC when considering groundwater management rulemaking | 7 | yes | VAs could be used to implement strategies in addition to or in lieu of groundwater management rulemaking. |
| Identify funding sources to conduct an inventory of unused wells | Groundwater Governance and Accountability, Data and Information Gaps | Develop a well clean up and safe harbor program | 8, 9, 10, 22 | yes | VAs could be a mechanism for collaboratively working to identify funding for and implement an unused well inventory. |

| Recommended Action* | Management Concerns | Strategy to Address Critical Issue | Critical Issues** | Feasible Through a VA | Comments*** |
|---|---|---|---|---|---|
| Identify incentives for adopting more efficient technology (e.g., finding equipment grants to help convert to more efficient technology, such as Natural Resources Conservation Service's Environmental Quality Incentives Program, Bonneville Power Administration/Harney Electric Cooperative, Oregon Trail Electric Co-Op). | Overallocation / Groundwater Level Declines | Increase use of efficient irrigation technology | 1 | yes | A VA is likely not required to implement this action. However, VAs could be a mechanism for implementing incentives for adopting efficient technology. Packaging incentives and/or compensation options to mitigate economic hardship for groundwater users can help balance restrictive measures that may also be included in a VA. |
| If it is confirmed by the appropriate technical agency experts that metering data is unreliable for determining water use from a specific well, convene a technical committee of technical agency experts and stakeholders (i.e., OpenET founders, OWRD, USGS, others). The technical committee will determine a process to achieve water use measurement either through requiring changes in plumbing or through other water use measurement (such as OpenET) that meets the purpose of the data; for any PODs determined by the committee to use a significant amount of water, require changes in plumbing and installation of a meter. Sources of cost-share and incentive funding will be sought for cases requiring changes in plumbing. | Groundwater Governance and Accountability, Data and Information Gaps | Install accountable water measurement devices on all non-exempt groundwater points of diversion; To develop appropriate reporting procedures for metered non-exempt groundwater points of diversion | 6, 8, 9, 10, 14, 15 | yes | VAs could be used for establishing a technical committee and process to review and update (as needed) data collection protocols. |
| Implement the conservation implementation strategy by NRCS to reduce groundwater use by 3000 acre-feet/year. | Overallocation / Groundwater Level Declines | Implement irrigation conservation measures to help slow the rate of decline and assist in achieving reasonably stable groundwater levels | 1 | yes | VAs could be a mechanism for funding and implementing solutions to conserve groundwater. |
| Improve water resource data collection, interpretation, and information sharing in the Harney Basin | Water Security for Groundwater Users, Data and Information Gaps | Build community understanding of water resource conditions in the Harney Basin | 11, 12, 16 | yes | VAs could be used can be a groundwater-user-led approach for defining and implementing data collection and reporting protocols and a process for utilizing information to inform water use context and management actions. |
| In the GHVGAC, require near-real-time, accurate, OWRD-approved groundwater meters be installed on all groundwater points of diversion, except for exempt uses, and report water use from each meter annually to OWRD. Meters should utilize digital data loggers (e.g., USB-compatible) to reduce reporting burden on water users and ensure consistency. | Groundwater Governance and Accountability, Data and Information Gaps | Install accountable water measurement devices on all non-exempt groundwater points of diversion; To develop appropriate reporting procedures for metered non-exempt groundwater points of diversion | 6, 8, 9, 10, 14, 15 | yes | Establishment of metering/measuring and reporting standards is an existing OWRD authority. VAs could include provisions for encouraging OWRD to exercise this existing authority. |

| Recommended Action* | Management Concerns | Strategy to Address Critical Issue | Critical Issues** | Feasible Through a VA | Comments*** |
|---|---|---|---|---|---|
| a) For all those areas where near-real-time meters will not be practical due to technological limitations, the department will be requested to provide a list of approved alternative meters/approaches that could be implemented. | | | | | |
| Include a recommendation for enforcement in the integrated plan | Overallocation / Groundwater Level Declines, Groundwater Governance and Accountability, Data and Information Gaps | Work with OWRD to enact improvements in its enforcements of water rights and well construction standards in a publicly transparent manner | 1, 2, 8, 9, 10, 22, 26, 27 | yes | Enforcement of well construction standards and permit conditions is an existing OWRD authority. VAs could include provisions for encouraging OWRD to exercise this existing authority. |
| Local-scale planning protections for conserved water, such as voluntary agreements and/or contractual obligations, are established for water users in the Harney Basin. These agreements or contracts could be entered into between or among private parties, OWRD, and/or a local governance body. | Overallocation / Groundwater Level Declines, Water Security for Groundwater Users | Research policy or planning mechanisms to ensure that conserved water remains in the ground | 1, 2, 13? | possible | VAs could potentially be a mechanism for protecting conserved water; however, because conserved water has implications related to statutory provisions and consequences of 'nonuse' of a water right, additional research and analysis is likely needed to develop a legally appropriate approach to doing so. |
| Provide incentives for irrigators who can prove reduction in their groundwater use. | Overallocation / Groundwater Level Declines | Implement irrigation conservation measures to help slow the rate of decline and assist in achieving reasonably stable groundwater levels | 1 | yes | VAs could be a mechanism for providing incentives to reduce groundwater use. A voluntary agreement could bundle regulatory curtailment of groundwater pumping with strategies to help off-set either the need for--or the economic impact of--reduced groundwater pumping. |
| Request OWRD collect data on illegal water use and produce an annual report regarding progress/implementation of RA above | Overallocation / Groundwater Level Declines, Groundwater Governance and Accountability, Data and Information Gaps | Work with OWRD to enact improvements in its enforcements of water rights and well construction standards in a publicly transparent manner | 1, 2, 8, 9, 10, 22, 26, 27 | yes | Prohibiting illegal water use is an existing OWRD authority. VAs could include provisions for encouraging OWRD to exercise this existing authority. |
| Request that OWRD collect information on groundwater use, initiate a continuous cancellation process for expired permits and water rights that haven't been used in 5 years, and share information on their findings with the public | Groundwater Governance and Accountability, Data and Information Gaps | OWRD initiate cancellation of all known expired permits and water rights that haven't been beneficially used in 5 years in the Harney Basin and develop a plan to systematically identify those permits that may be subject to forfeit | 6, 8, 9, 10, 22 | yes | Conducting various water resources investigations, surveys, and studies and enforcing water permits and rights are existing OWRD authorities. VAs could include provisions for encouraging OWRD to exercise these existing authorities. |
| Set benchmarks and timelines for reducing groundwater use. | Overallocation / Groundwater Level Declines | Implement irrigation conservation measures to help slow the rate of decline and assist in achieving reasonably stable groundwater levels | 1 | yes | VAs could be used for defining benchmarks and timelines for reducing groundwater use. A VA should explain how the benchmarks and timelines address overdraw and groundwater level declines |

| Recommended Action* | Management Concerns | Strategy to Address Critical Issue | Critical Issues** | Feasible Through a VA | Comments*** |
|---|---|---|---|---|---|
| | | | | | across the basin consistent with the state and basin policies. |
| Support OWRD in ensuring that all illegal water use ceases | Overallocation / Groundwater Level Declines | Work with OWRD to enact improvements in its enforcements of water rights and well construction standards in a publicly transparent manner | 1 | yes | Prohibiting illegal water use is an existing OWRD authority. VAs could include provisions for encouraging OWRD to exercise this existing authority. |
| The CBWP Collaborative reviews the results of the assessment and evaluates different approaches | Overallocation / Groundwater Level Declines | Explore and consider a voluntary groundwater market approach; Review feasibility study (Upon review, the Collaborative should make a recommendation to implement or not) | 1, 2, 3 | possibly | A VA could potentially be a mechanism for implementing a voluntary groundwater market. A market approach would likely require an OWRD role related to allocating the available resource (i.e., annual allocations or shares) and processing marketing (i.e., procedures and criteria for evaluating temporary and permanent transfers and/or changes in use, tailored to meet area/sub-area management objectives). Because a market approach has implications related to statutory provisions around transfers, additional research and analysis is likely needed to develop a legally appropriate approach for a market framework. |
| The interagency team convened by the Oregon Watershed Enhancement Board (OWEB) develops a draft groundwater CREP proposal to be reviewed by Harney Basin stakeholders. The draft proposal should: a) meet federal requirements, including stewardship of enrolled lands (e.g., crop-cover and weed-management requirements), and b) have state willingness to participate. If the proposal lacks buy-in from stakeholders, the interagency team should create an avenue for further stakeholder input for improvement. | Overallocation / Groundwater Level Declines | Support, as a Collaborative, the CREP program described in the application to FSA and encourage voluntary enrollment by water users | 1, 2, 3 | yes | VAs could be a mechanism for providing incentives to reduce groundwater use, including the CREP program. A voluntary agreement could bundle regulatory curtailment of groundwater pumping with strategies to help off-set either the need for--or the economic impact of--reduced groundwater pumping. |

## Critical Issues List:

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|---|---|
| ***Critical Issue 1*** | There are declining groundwater levels in the Greater Harney Valley Groundwater Area of Concern (GHVGAC) due to cumulative groundwater discharge, including both human uses (predominantly irrigation) and natural discharge, exceeding recharge. |
| ***Critical Issue 2*** | Many groundwater users are being affected by seasonal and long-term declines in available water, which has unknown impacts on groundwater dependent ecosystems. |
| ***Critical Issue 3*** | Groundwater declines are not uniform across the basin or between shallow and deep groundwater, which can lead to management challenges. |
| ***Critical Issue 4*** | There are limited legal protections for springs. |
| ***Critical Issue 5*** | Declining groundwater levels negatively affect springs, wetlands, cold water inputs to streams, riparian areas, other groundwater dependent ecosystems, and lakes as well as the native flora and fauna associated with these groundwater dependent ecosystems. |
| ***Critical Issue 6*** | There is lack of accountability regarding the use of groundwater for irrigation. Groundwater used by irrigators is reported by only some of the permit holders but is not uniformly measured and reported. |
| ***Critical Issue 7*** | There are limited public participation opportunities and barriers to participation in the water permitting and permit transfer process, which can lead to decisions that do not fully consider potential impacts to the local environment, community, and economy and potentially produce outcomes that lead to disproportionate impacts on people who have not been engaged or represented. |
| ***Critical Issue 8*** | Failure to remove water rights for abandonment or non-use results in inaccurate accounting of valid water rights volume and inaccurate accounting of water availability if based on permitted volume. |
| ***Critical Issue 9*** | Failure to remove water rights for abandonment or non-use allows those water rights to continue to be subject to transfer applications and/or to be reactivated instead of removing those acre feet from permitted volumes and reflecting that removal in stats of water availability. |
| ***Critical Issue 10*** | Failure to remove water rights for abandonment or non-use allows those water rights to be reactivated which creates further draws on already depleted groundwater reservoirs. |
| ***Critical Issue 11*** | The current and potential negative effects of declining groundwater levels on domestic and stock water wells - including lack of water and declining water quality - is having a negative impact on the quality of life and economic security of rural inhabitants of the Harney Basin. |
| ***Critical Issue 12*** | The impact of declining groundwater levels on the water supply for the cities of Burns and Hines is unknown and are not currently monitored. |
| ***Critical Issue 13*** | The community of Burns and Hines have the need to invest in infrastructure to provide water service to their citizens. Ongoing infrastructure updates and funding will likely be needed in the future. |
| ***Critical Issue 13*** | There is limited legal protection for exempt groundwater uses. |
| ***Critical Issue 14*** | There is limited or no baseline information about the condition and location of groundwater-dependent ecosystems and limited or no monitoring to determine the impacts of groundwater declines now and in the future. |
| ***Critical Issue 15*** | The total amount of groundwater pumped in the basin is unknown, which can lead to issues with accurate allocation regimes. |
| ***Critical Issue 16*** | There is limited information about water use from domestic and stock water wells and historic well conditions. |

| | |
|---|---|
| ***Critical Issue 17*** | Incomplete information on potential economic impacts of lowering groundwater levels in agricultural and domestic wells. |
| ***Critical Issue 18*** | Incomplete information on potential economic impacts of voluntary curtailment and CREP payments. |
| ***Critical Issue 19*** | Incomplete information on potential economic impacts of curtailment from the State. |
| ***Critical Issue 20*** | Incomplete information on potential economic impacts from ecological impacts of groundwater declines. |
| ***Critical Issue 21*** | Incomplete information on the impacts from continued development in the GHVGAC. |
| ***Critical Issue 22*** | Lack of information about occurrence, distribution, and potential impacts of both unpermitted and poorly constructed wells and impacts on groundwater quality/quantity. |
| ***Critical Issue 23*** | There is a need for better understanding of the effects and amount of supplemental groundwater used. |
| ***Critical Issue 24*** | Previous groundwater data for the basin has been inconclusive. Site-specific groundwater data, such as designation of certain areas for targeted CREP outreach, groundwater markets, etc., might be useful for effective groundwater management as well as ongoing data gathering and collection by the Department. |
| ***Critical Issue 25*** | Incomplete information on the effects of climate change on groundwater resources in the Harney Basin. |
| ***Critical Issue 26*** | There is uncertainty about whether co-mingling between shallow and deep groundwater systems is occurring due to well construction issues in some parts of the basin. |
| ***Critical Issue 27*** | There is an unknown number of undocumented wells in the basin that may not have been properly constructed and have not been inspected or maintained over time. For instance, there are many uncapped wells in the basin that could negatively impact groundwater quality. |
| ***Critical Issue 28*** | Groundwater quality monitoring in the basin is not done on a regular basis, which causes difficulty in understanding changes overtime. |
| ***Critical Issue 29*** | Arsenic is a documented water quality issue in the basin. Arsenic exceeds human health standards in some wells across the basin that provide drinking water. Water quality is an issue in the basin. (Do not have consensus on this language change yet) |
| ***Critical Issue 30*** | Future climate conditions in the Harney Basin are likely to be warmer and drier than current ones, which will likely impact groundwater resources. |
| ***Critical Issue 31*** | Lack of a drought contingency plan |

# Appendix B - Case Studies

## San Pedro Riparian National Conservation Area MOU and Cooperative Monitoring and Adaptive Management Plan (Arizona)


The MOU is designed to achieve a series of shared goals to ensure a healthy San Pedro River and ecologically viable San Pedro Riparian National Conservation Area; adequate long-term water supplies to meet the reasonable needs of the area's current and future residents and property owners as well as the SPRNCA; opportunities for continued economic growth and development in Cochise County and Sierra Vista; and an operationally secure Fort Huachuca that can accomplish its national defense missions, have a safe and adequate water supply, and comply with all obligations under the Endangered Species Act.

The *geographic scope* of the agreement is based on the U.S. boundaries of the hydrologic subbasin, which aids administration of the actions in the agreement by including the hydrologic areas of concern and the specific entities within the region with jurisdiction to undertake relevant actions. Monitoring and adaptive management indicators are based on 14 defined zones within the subbasin area with distinct hydrogeologic characteristics, resource concerns, and/or jurisdictional considerations.

The *subject matter scope* of the agreement is confined to monitoring actions and establishment of an adaptive management process for cooperative management of water resources in the region. The MOU and plan coordinate monitoring activities, create adaptive management framework to track indicators (riparian health trends) and triggers for additional management, and create a process for the parties to determine when/what additional management actions should be taken.

The *parties* to the MOU are the government entities and federal agencies with authority to implement the monitoring and adaptive management actions included in the MOU.

There are important *distinguishing elements* from the Harney context to consider related to this example. The MOU does not identify nor implement specific management strategies. It also does not provide an explicit way to manage/reduce current uses or limit new uses.

The potentially *informative elements* of this agreement for the Harney context include:

- Monitoring framework with defined, trend-based indicators and triggers for when additional management actions are needed.
- Commitments by the parties to collaboratively plan, evaluate, fund and implement ongoing monitoring and management actions.
- Planned management actions to reduce use and bolster aquifer levels that do not place new requirements on existing water users.

**Resources**

- SPRNCA MOU and Cooperative Plan
- *Agreement gives county a seat at San Pedro conservation discussions* (Herald Review, Sept. 16, 2021)
- *Agencies affirm their commitment to address water and ecological conservation near the San Pedro River in Southeast Arizona* (Sierra Vista, Sept. 21, 2021)

## Mojave Basin Settlement (California)


As an alternative to continued litigation initiated by ongoing overdraft issues, a committee representing a variety of water users and interests in the Mojave Basin worked together to develop a groundwater allocation system, management zones and tools, and supply augmentation options.

The *geographic scope* of the agreement is based on the hydrologic basin and defines four subbasins with unique management objectives, which aids administration of the actions in the agreement by including the hydrologic areas of concern and defining areas based on specific hydrogeologic characteristics, resource concerns, and jurisdictional/ implementation considerations. The *subject matter scope* of the agreement is based on the underlying litigated matter, which was to adjudicate all of the water rights within the hydrologic basin. The agreement established a system for monitoring and management within and among subbasins to meet downstream water rights obligations, address changes in use, address conjunctive management issues, and protect special-status species.

The *parties* to the settlement agreement were most of the water users within the hydrologic basin. The agreement defined a "de minimis" category to exempt certain smaller water users. Nine water rights users did not join the settlement agreement. The stipulated judgment filed with the court included over 75% of the parties.

There are important *distinguishing elements* from the Harney context to consider related to this example. Water users in the Mojave Basin had a 'backstop' to help mitigate overuse (imported surface water). This arguably created a softer landing for reducing overuse: Water users can use more than their annual allocation, but they must pay a fee based on the cost

of imported surface water in the overage amount. Additionally, judicial settlement provides an arguably greater degree of legal cover for the implementing agencies because the management plan is approved by the court and has the force of law.

The potentially *informative elements* of this agreement for the Harney context include:

- Subbasin-based management objectives to address localized hydrologic issues.
- Ramp down schedule reduces overuse over time.
- Incorporates a 'water market' management element, which creates a balancing mechanism to allow new uses or changes in use while maintaining the water budget defined as part of the settlement.
- Incorporates environmental values into management goals and subbasin objectives.

There are also potentially *informative process lessons* for the Harney context:

- Defining 'de minimis' uses helped simplify the agreement negotiation process and minimize the required parties.
- If potentially impacted parties do not voluntarily participate, there is risk of a successful legal challenge. However, a successful challenge does not necessarily mean that the agreement is not otherwise supportable and valuable. Nine senior water rights holders did not join the stipulated agreement. They successfully challenged and were exempted from the terms of the agreement, which was otherwise upheld as to the stipulating parties. This meant that those non-stipulating parties were not subject to the water use restrictions agreed to within the agreement but were subject to the general state laws applicable (in California in that region, right to pump water under their lands for current and prospective reasonable and beneficial need for use on their respective properties). Most of the non-joining parties eventually opted into the agreement due to the benefits of participating, notably, the settlement agreement's marketing framework for temporary or permanent transfers of annual allocations, which provides management/operational flexibility and financial support that otherwise is unavailable or burdensome.

**Resources**

- Mojave River Decree, (Superior Court, State of California, County of Riverside, January 10, 1996)
- *History of the Adjudication*, *Judgement after Trial*, (Mojave Water Agency)

## Groundwater Management District 4 / Sheridan 6 Locally Enhanced Management Area (Kansas)


Kansas law enables the creation of local groundwater management districts to help manage and conserve groundwater and prevent economic deterioration. Districts, which are initiated and approved by local petition and vote, are governed by locally elected boards and charged with creating management programs for conservation and management of groundwater within the district that are reviewed and approved by the Division of Water Resources. To implement the approved management program, the Division of Water Resources may establish rules and regulations applicable to the specific district.

Certain designations allow for additional management measures to address groundwater declines and other conditions of concern in certain areas. Intensive groundwater use control areas (IGUCAs) and local enhanced management areas (LEMAs) may be designated on the request of a groundwater management district or a majority of local water users, following reviews, hearings and a determination by the chief engineer. LEMA plans must include goals and corrective control provisions adequate to meet the management problems/goals identified as part of the area designation. The plan may include corrective control provisions that are defined in statute:

- Closing the local enhanced management area to any further appropriation of groundwater;
- Determining the permissible total withdrawal of groundwater in the local enhanced management area each day, month or year, and apportioning the total quantity among groundwater right holders according to priority;
- Reducing the permissible withdrawal of groundwater by any one or more appropriators or by wells in the LEMA;

- Requiring and specifying a system of rotation of groundwater use in the LEMA; or
- Any other additional requirements as are necessary to protect the public interest.

The Sheridan 6 LEMA was designated within Kansas' Groundwater Management District 4 in 2013 on petition of the district and following review and approval by the chief engineer. GMD 4's Management Program defines seven overarching management problems, including groundwater depletion issues. To address localized areas of impact for depletion within the broader district, the Sheridan 6 LEMA program established a limit on total permissible water use from within the area over the five-year LEMA period.

There are important *distinguishing elements* from the Harney context to consider related to this example. This plan is not explicitly a "voluntary agreement," but it does require a majority of groundwater users to support the petition for designation of the area. The authorizing statute sets the standard for required parties and the types of corrective actions that may be incorporated into a plan.

The potentially *informative elements* of this management plan for the Harney context include:

- Subbasin-based management objectives and corrective actions within a broader regulated basin to address localized hydrologic issues.
- Ramp down schedule to bring down overuse over time.
- Incorporates economic, environmental, and community values into management goals and subbasin objectives.

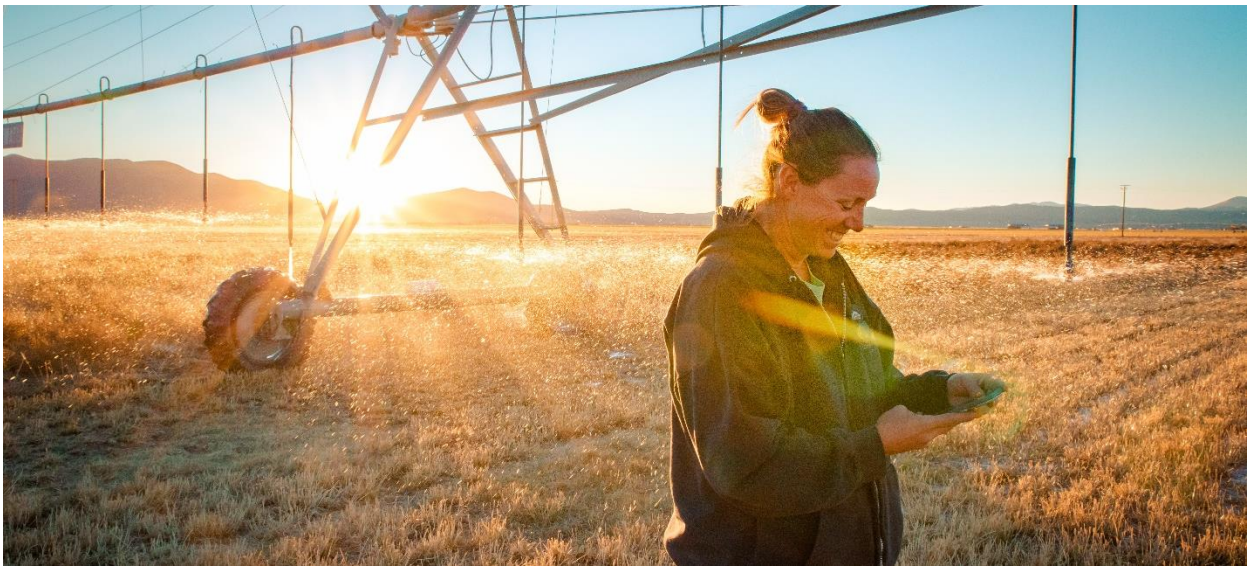
There are also potentially *informative process lessons* for the Harney context:

- The localized approach taken with the Sheridan 6 LEMA appears to have generated less conflict/more buy-in than a district-level LEMA approach, allowing implementation to proceed without/with less legal challenge.

**Resources**

- Groundwater Management District Act, K.S.A. §§ 82a-1020 – 82a-1042 (Nov. 2018)
- K.S.A. § 82a-1041 Local enhanced management areas
- Order of Designation Approving the Sheridan 6 Local Enhanced Management Area within Groundwater Management District No. 4 (Division of Water Resources, 4/17/2013)
- Northwest Kansas Groundwater Management District No. 4: Revised Management Plan (Adopted by GMD 4 Board and approved by the Chief Engineer 2016)
- Lessons from Kansas: A More Sustainable Groundwater Approach (Stanford Water in the West)
- Fact Sheet: Intensive Groundwater Use Control Areas (Kansas Department of Agriculture)

## Diamond Valley Groundwater Management Plan (Nevada)



Recognizing the need to stabilize groundwater declines and in anticipation of a critical management area designation, the local community and stakeholders in Diamond Valley came together to develop a local groundwater management plan. The locally developed plan was approved by a majority of groundwater users in the Valley and approved by the state engineer in 2019. The plan was recently upheld by the Nevada Supreme Court following several years of judicial review.[45]

The *geographic scope* of the agreement is based on the hydrologic basin. The *subject matter scope* of the agreement is limited to managing irrigation water uses within the basin. It establishes a shares-based system based on existing water rights, defines a 'ramp down' schedule to reduce use over time, allows for 'storage' of unused shares for use in later years, and allows trading of shares to manage new and changes in uses.

The *parties* were a majority of groundwater users in the Basin who joined the petition submitted to the state engineer in support of the plan (a standard for approval set by Nevada statute).

There are important *distinguishing elements* from the Harney context to consider related to this example. This plan is not explicitly a "voluntary agreement," but as noted above, it does require a majority of groundwater users to support the petition for approval of the plan. The authorizing statute sets the standard for required parties.

The potentially *informative elements* of this agreement for the Harney context include:

- Ramp down schedule brings down overuse over time.

[45] Diamond Natural Resources Protection and Conservation Assoc. v. Diamond Valley Ranch, LLC, 138 Nev. Adv. Op. 43 (2022).

- Incorporates a 'water market' management element, which creates a balancing mechanism to allow new uses or changes in use while maintaining the water budget.

- Incorporates environmental, social, and economic community values into management objectives.

The potentially *informative legal considerations* of this plan for the Harney context include:

- Whether the relevant state agency can approve a voluntary agreement/plan that includes management tools that the state itself doesn't have the legal authority to implement? [46]

- Whether instituting a voluntary shares-based system is a legally supportable approach to recognize water rights yet manage water use outside of the prior appropriation system? [47]

- What is a reasonable timeline for a ramp down schedule? What if conflicts with senior water rights are already occurring? [48]

- What data and information are necessary to satisfy a 'substantial evidence' standard to legally support an agency determination? [49]

**Resources**

- Diamond Valley Groundwater Management Plan
- Order #1302 Granting Petition to Adopt a Groundwater Management Plan for the Diamond Valley Hydrographic Basin (Nevada State Engineer, 2019)
- Diamond Valley GMP FAQ (Nevada Division of Water Resources)
- Case Information for Case No. 81224, DIAMOND NAT. RES. PROT. AND CONSERVATION ASS'N VS. DIAMOND VALLEY RANCH, LLC (Nevada Supreme Court, for the Court's Final Opinion, see Document 22-19127)
- *In Diamond Valley farmers are looking to protect their future and testing the limits of Nevada's water laws* (The Nevada Independent, Oct. 28, 2020)
- *Justices uphold groundwater plan in ruling that could 'significantly affect water management'* (The Nevada Independent, Jun. 22, 2022)

[46] The Nevada Supreme Court determined that, based on the specific Nevada laws that applied, the State Engineer had discretion to approve a groundwater management plan that does not strictly comply with Nevada's statutory water laws or strictly adhere to the doctrine of prior appropriation.

[47] As noted above, based on the specific Nevada laws that applied, the Nevada Supreme Court determined that the State Engineer had discretion to approve a plan that does not strictly adhere to the doctrine of prior appropriation.

[48] In Nevada, the Supreme Court deferred to the State Engineer in determining a reasonable timeline, so long as the State Engineer concluded that the plan set forth the necessary steps to remove the basin's critical management area designation and was warranted under statutory factors.)

[49] In Nevada, the Supreme Court looked to the State Engineer's methodical consideration of statutory factors and extensive scientific findings in concluding whether the plan would balance the Basin back to its perennial yield.

# Appendix C - Questions and Initial Responses/Considerations

| Stakeholder Questions | Comments / Page Reference |
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| What is the appropriate scope of a voluntary agreement? Is there an umbrella agreement or should there be separate agreements to address specific strategies? | The scope of any given voluntary agreement will vary based on the specific management objective it is targeted to address, the geographic scope, and the management tools/actions included. For example, one voluntary agreement might include general, basinwide use limitations (i.e., basinwide limitations on certain type of use), while another agreement might include targeted use limitations (i.e., more restrictive irrigation water duties in an area seeing high rates of groundwater decline). An umbrella agreement could provide a useful regional framework but would include more parties and may be more difficult to develop. Separate agreements for specific strategies and/or targeted issue areas could ease development by limiting parties and scope. Separate agreements could reference and incorporate the Groundwater Plan and/or other planning resources to explain and link the individual voluntary agreement to the comprehensive regional framework and goals.<br><br>For the Harney Basin context, this question could be explored further in next steps. See pages 15-19 for a general discussion of voluntary agreement geographic scope and subject matter scope. |
| How can voluntary agreements make things more equitable and improve conditions for all water users, particularly considering the water needs of exempt well users and groundwater-dependent ecosystems, which have been detrimentally impacted? | It will be important in any management approach to consider equitable solutions that improve conditions for all water users and avoid detrimental outcomes. A voluntary agreement approach could potentially provide a collaborative forum and integrate a broader array of management objectives and tools than would otherwise be considered or available through Commission rulemaking. This question will also depend on the specific management objectives (hydrologic, community, and environment), geographic scope, and management tools/actions included in a specific voluntary agreement.<br><br>For the Harney Basin context, this question could be explored further in next steps. |
| Are other places dealing with groundwater depletion using voluntary agreements? And if so, how? | Yes. See Case Studies in Appendix B. |
| Which strategies might require a voluntary agreement vs. which might be amenable to such an agreement? | New requirements and restrictions (i.e., measuring and annual reporting, pumping limitations) for existing uses would require a voluntary agreement (or Commission rulemaking). Many other types of tools could potentially be amenable for inclusion in a voluntary agreement. |

| Stakeholder Questions | Comments / Page Reference |
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| | For the Harney Basin context, this question could be explored further in next steps. See pages 16-19 for a general discussion of voluntary agreement subject-matter scope and **Appendix A** for notes on Harney strategies and recommended actions. |
| Could a voluntary agreement be used to execute a transfer between two people, as part of a pilot demonstration for building up to a water market? | Water rights transfers are governed by Oregon law. Voluntary agreements cannot conflict with state statutes. However, it might be possible to include supplemental transfer considerations/procedures in an agreement that are consistent with Oregon's transfer laws. In some places outside of Oregon, for management purposes, groundwater rights have been converted into groundwater "shares" or "allowances" with annual allocations and transfer rules that apply to the annual allocation as opposed to the underlying water right. However, such share transfers would likely implicate POD or POU elements of the underlying water right.<br><br>For the Harney Basin and broader Oregon contexts, additional legal analysis and outreach with OWRD could be undertaken in next steps. See Case Studies in Appendix B for Diamond Valley (Nevada) and Mojave Basin (California) for examples from other states. |
| Should and how would supplemental water use be factored into a voluntary agreement? | How and whether to factor in supplemental water use will depend on the specific management objectives (hydrologic, community, and environment), geographic scope, and management tools/actions included in a specific voluntary agreement.<br><br>For the Harney Basin context, this question could be explored further in next steps. |
| How can voluntary agreements be used in conjunction with any rulemakings on designations from OWRD to address groundwater issues? Can we have a regulatory structure in the areas with the most acute issues and voluntary agreement(s) in other parts of the basin to address overdraft? | Voluntary agreements are an *approach* to implementing management actions as an alternative or supplement to Commission rulemakings. Voluntary agreements can supplement existing rules and/or change/override existing rules upon review by the Commission and promulgation of new rules. Voluntary agreements could potentially provide an approach to addressing overdraft in certain areas within the broader basin, so long as they are consistent with the broader basin policies and Oregon's groundwater laws. How a voluntary agreement can/should be used in conjunction with rulemakings will depend on specific management objectives (hydrologic, community, and environment), geographic scope of acute issues, preferred management tools/actions, and community buy-in.<br><br>For the Harney Basin context, this question could be explored further in next steps. See pages 16-19 for a general discussion of voluntary agreement subject-matter scope. |
| What happens to the agreement if there is a change in landownership? Does the county have a role in ensuring | Voluntary agreements are entered into "among ground water users from the same ground water reservoir." In general terms, any individual groundwater user that is affected by a new requirement or restriction in a voluntary agreement is a required party for an |

| Stakeholder Questions | Comments / Page Reference |
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| the agreement remains if land ownership changes? | agreement. If there is a change in landownership, the new groundwater user will need to become a party to the agreement. Once a voluntary agreement is approved by the Commission, there could be an important county role in notifying the Commission of relevant changes in landownership and the new landowner of the existence of and terms of the agreement, and potentially providing outreach and education to the new landowner to encourage participation.<br><br>For the Harney Basin and broader Oregon contexts, additional research and outreach with OWRD could be undertaken in next steps. See pages 19-21 for a general discussion of voluntary agreement parties. |
| Who are the parties involved in a voluntary agreement? | Voluntary agreements are entered into "among ground water users from the same ground water reservoir." In general terms, any individual groundwater user that is affected by a restrictive requirement in a voluntary agreement is a required party for a voluntary agreement. A voluntary agreement could potentially include a variety of management tools in combination with regulatory requirements, in which case relevant other parties might also be involved. As a hypothetical example, an agreement might include new water conservation requirements (demand management) and regional recharge infrastructure (supply augmentation). The balance between discharge and recharge actions make it so that groundwater users do not have to bear as much of a demand management burden. Groundwater users are required parties, and optional parties for implementing conservation incentives and recharge infrastructure might include sewer/wastewater providers, county flood control districts, and/or NGOs. This question will depend on the specific management objectives (hydrologic, community, and environment), geographic scope, and management tools/actions included in a specific voluntary agreement.<br><br>For the Harney Basin, this question could be explored further in next steps. See pages 19-21 for a general discussion of voluntary agreement parties. |
| Who needs to approve of the agreement and who is responsible for ensuring it is carried out? What are the roles of the landowners, the county, and the state in an agreement? | Voluntary agreements are reviewed and approved by the Commission. New requirements and restrictions would likely be implemented and enforced by the Department. Any non-regulatory requirements included in the agreement are implemented according to the terms of the agreement. The agreement could define indicators for measuring progress towards the management objectives, with procedures for monitoring, reporting, and assessing when and/or what additional actions may be needed, with clearly defined roles and responsibilities related to carrying out those procedures. This question will depend on the specific management objectives (hydrologic, community, and environment), geographic scope, and management tools/actions included in a specific agreement. In general: |

| Stakeholder Questions | Comments / Page Reference |
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| | *Landowners* can be involved in the development of the voluntary agreement. They will be considered necessary parties to sign onto the agreement if they are also interested and affected groundwater users or otherwise subject to the terms and obligations of the voluntary agreement.<br><br>*Counties* may participate in the development of a VA, but they are not necessary parties to the agreement unless they are also an interested and affected groundwater user within the scope of the agreement or are otherwise subject to the terms and obligations of the voluntary agreements. Counties could potentially participate in agreements related to non-regulatory terms of the voluntary agreement (i.e., related to actions supportive of the agreement management objective like related land use / development policies, regional recharge infrastructure, etc.). They could potentially provide additional roles in providing notices, education, and outreach to landowners about the voluntary agreement terms.<br><br>*State* roles include: The Commission will review voluntary agreements for consistency with the statute and Oregon's groundwater laws. The Commission may also promulgate rules to implement terms of an approved voluntary agreement as necessary. The Department will implement and enforce restrictive requirements included in an approved agreement.<br><br>For the Harney Basin and broader Oregon contexts, additional research and outreach with the Commission and OWRD could be undertaken in next steps. |
| What level of participation is needed in order to successfully implement a voluntary agreement be successful? Is it 100%? | Voluntary agreements are entered into "among ground water users from the same ground water reservoir." In general terms, any individual groundwater user that is affected by a regulatory requirement in a voluntary agreement is a required party for an agreement. The state likely cannot approve nor enforce a voluntary agreement with a regulatory requirement where 100% of affected groundwater users are not parties. A voluntary agreement could potentially include non-regulatory management actions as well, in which case any individual or entity with authority to undertake that action should be included. This question will depend on the specific management objectives (hydrologic, community, and environment), geographic scope, and management tools/actions included in a specific voluntary agreement.<br><br>For the Harney Basin and broader Oregon contexts, additional research and outreach with the Commission and OWRD could be undertaken in next steps. See pages 19-21 for a general discussion of voluntary agreement parties. |

| Stakeholder Questions | Comments / Page Reference |
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| What metrics do you use to evaluate the agreement and how do you ensure that the goals are being met? | This question will depend on the specific management objectives (hydrologic, community, and environment), geographic scope, and management tools/actions included in a specific voluntary agreement.<br><br>For the Harney Basin context, next steps could involve: evaluating desired outcomes specific to the voluntary agreement objective/scope and overarching basin plan; assessing ongoing monitoring relevant to those outcomes and identifying monitoring/ information gaps; and defining indicators and a process to evaluate progress. See Case Studies for San Pedro Riparian National Conservation Area (Arizona). |


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**Partial Comments*** **related to the *Proposed Guidance for Voluntary Agreements Among Groundwater Users from the Same Groundwater Reservoir***

and

**ORS 537.745 *Voluntary agreements among groundwater users from same reservoir***

By Christopher Hall, Water League

[*Note: These comments have been edited to remove the first 11 pages of the original document from which they have been extracted to remove the discussion and context around the Division 512 rulemaking process, which is NOT UP FOR COMMENT. Water League submitted the original document to OWRD in January/ February 2025, when OWRD solicited comments on the *Proposed Guidance for Voluntary Agreements Among Groundwater Users from the Same Groundwater Reservoir*. Despite extending the deadline two times, Water League recalls being only one of three total submittors.]

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***tl;dr – The Voluntary Agreement statute under ORS 537.745 carves out a special place for irrigators to comply with the law freely, and in return for this concession, beneficiaries seek exclusive privileges and immunities that shield them from the law.***

. . . Voluntary Agreement (VA) proponents argue on behalf of VAs by saying that they can begin slowing or stopping groundwater declines immediately. How does this eagerness square with their desire to work within the 30-year phase-in once regulatory orders kick in for other irrigators who slogged through appeals court challenges to push back against regulatory action? It doesn't; rather, it resembles the promises by proponents in California basins. For some perspective on this issue, we refer to the 2024 policy paper, *Five Guiding Principles for Effective Voluntary Agreements*, which addresses the problems associated with irrigators using VAs for the express purpose of stalling the effects of regulatory action:

> One of the oft-cited benefits of VAs is that they can achieve desired outcomes more quickly than regulatory requirements alone. However, the actual pace of VA development in the Bay-Delta watershed—where, as for many other watersheds, pace matters acutely—has not lived up to this promise. When ecosystems are buckling under severe hydrograph modification, climate change, and a barrage of other stressors, delays in establishing and implementing adequate flow requirements risk permanent ecosystem harm, including extinction. In effect, however well-intended, the protracted VA negotiations and related State Water Board processes have functioned as long-term waivers of the increased regulatory protections the Board and others have long agreed are necessary.[1]

The authors discuss at length how VAs function as diversions away from regulatory action. The extent of the subterfuge in California, as it relates to stalling action in the Bay-Delta watershed, is near universal. Notably, VA proponents wish to incorporate adaptive management processes that require elaborate beta-testing scenarios, which are sequential and time-consuming. Indeed, prolonged measures of some adaptive management schemes are labyrinthian.

## Privileges and Immunities Called "Flexibility" and "Carrots"

The more a VA departs from the regulatory arm of the law, the more likely irrigators will enjoy and comply with the VA provisions. With this axiom in mind, and the contradictory requirement that VAs must be "consistent with the intent, purposes and requirements of" the groundwater sections of Chapter 537, we now review the terms *flexibility* and *carrots*. VA proponents and OWRD staff use these two terms to refer to the benefits and incentives, respectively, that VAs can offer irrigators.

The more benefits parties to VAs enjoy, which separate their experience from irrigators who are left out of VAs, the more unconstitutional the implementation of ORS 537.745 becomes. But it is expressly the provision in ORS 537.745 that VAs must be "consistent with the intent, purposes and requirements of" the groundwater sections of Chapter 537 that both prevents the statute from running afoul of the equal protection clause in the Oregon Constitution and makes the proposed benefits of VAs difficult to

[1] Felicia Marcus, Nell Green Nylen, Dave Owen, Michael Kiparsky, *Five Guiding Principles for Effective Voluntary Agreements: A Case Study on VAs for Water and Habitat in California's Bay-Delta Watershed*, The Center for Law, Energy & the Environment, UC Berkeley Law, January 2024. [25]

comprehend within a legal framework. We discuss this dissonance below.

Similar to California, Oregon incentivizes VAs through the threat of regulatory action.[2] This sentiment is the basis for all diplomacy. Agreements must be backed by the use of force, whether by the law, regulation, order, or legal precedent. Every VA is, by definition, an alternative to regulatory action to avoid, by degrees, the concrete implementation and enforcement of the law and administrative rules of the state. Ostensibly, every VA is an effort by those, whose actions would be regulated, to find an easier and softer way to mimic the effects of the law.

The authors of *Five Guiding Principles* state that:

> Public discourse often misleadingly describes a false choice between regulations or VAs. It is more accurate to say that, to enable VAs, there must be regulatory requirements that allow for the possibility of alternative implementation pathways.[3]

Presumably, for VAs to work, the voluntary actions must parallel regulatory actions in effect; while the means may vary, the ends must be the same. There is a problem, however, when the means (in fine grain detail) are unequally applied among the population of irrigators, such as those who are not party to VAs. The aggregate *outcomes* achieved through a VA may track with the same outcomes achieved by irrigators exposed to regulatory action, but at what cost in terms of equity under the law? Are there financial benefits resulting from "flexibilities" and "carrots" that some irrigators enjoy that others cannot access because they are either excluded from VAs (as if left out of cliques), or excluded for other reasons despite their wish to join?

VA proponents want the OWRD to allow "flexibility" that others cannot enjoy outside VAs, and to provide them with "carrots" that are sweet enough to incentivize the formation of VAs.[4] These means

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[2] Marcus et al., *Five Guiding Principles*. [28] (The authors note that "VAs cannot substitute for regulatory requirements. On the contrary, negotiation of successful, durable VAs depends directly on the existence of a strong regulatory foundation to drive agreement and assure implementation.")
[3] Marcus et al., *Five Guiding Principles*. [35]
[4] Oregon Consensus and OWRD, Harney Groundwater: Voluntary Agreement SubGroup, October 1, 2024. (See the entire set of negotiations in this informal 2-hour discussion to set the standards for Voluntary Agreements. This meeting was publicly announced after it was held. The incentive to join a VA must be inherent to the benefits of acting voluntarily (whatever they are that do not create a constitutional crisis). Attempting to incentivize VAs in lieu of the threat of regulatory action is nonsensical, unless the state allows irrigators to turn the concept of "incentive" on its head, and concludes that submitting to the threats of lawsuits by irrigators who would draw out the regulatory process interminably is an incentive to approve VAs. In that case, the state has ceded power to the persons they would regulate, setting up an entirely higher level

are likely to give them a competitive edge. If all irrigators could enjoy the same benefits (means/ ends) whether or not they were parties to VAs, then the justification for VAs would be moot. Therefore, the presence of VAs are *prima facie* evidence of a double standard or two-tier class system. The idea that any irrigator can form a VA or join one to enjoy the benefits is baseless; otherwise, the WRC would institute the "flexibilities" and "carrots" for all irrigators as a matter of administrative rulemaking policy.

**On the matter of "flexibility," there are three VA desires:**

1) A desire for adaptive management in VAs, which in the case of excessively declining groundwater levels, generally means starting from a ramp-up in the reduction of pumping, to annually checking results against the trajectory when the USGS/ OWRD modeling scenarios project reaching OWRD's target water-level trend of zero decline, and modifying pumping up or down in the VA as needed to stay on track. Factors related to pumping reductions include: 1) monitoring meters on wells and monitoring groundwater levels, 2) evaluating effectiveness, 3) adjusting the timeline for reaching the Total Voluntary Reductions (TVR), which requires "reducing the Agreed Water Use Limit each year until the PTW or TVR is met,"[5] and 4) modifying the TVR as needed to target OWRD's goal of a water-level trend of zero decline.

   Without strict OWRD oversight and guardrails to confine adaptive management activities, these objectives could go from a straight-line trajectory intended to achieve the desired VA outcomes to a meandering journey. VA proponents desire full control over adaptive management to the greatest extent possible to test various alternatives over long periods to simulate regulatory orders without experiencing the same level of pain as those directly exposed to such orders.

   There are two species of adaptive management: one is guided by administrative rules and OWRD staff; the other is guided by the terms of VA contracts. As of this writing (Jan. 2025), there is a debate as to which activities that comprise adaptive management go into which bucket: the OWRD rule bucket and the VA bucket.[6]

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of preferential treatment (the "coercion carrot") for parties to VAs.)

[5] OWRD, *Proposed Guidance for Voluntary Agreements Among Groundwater Users from the Same Groundwater Reservoir*, October 25, 2024. [3]

[6] Oregon Consensus & The High Desert Partnership, Examples of Adaptive Management in Oregon and Beyond, December 12, 2024. [3] (This document is ostensibly an advisory draft; it appears, in part, to also be a countervailing force to the OWRD document "*Proposed Guidance for Voluntary Agreements Among Groundwater Users from the Same Groundwater*

With the proposal to phase in water use reductions over 30 years to achieve OWRD's target water-level trend of zero decline, in the hands of VAs, adaptive management could draw out compliance much longer. The premise of adaptive management, related to VA "flexibility," is that reaching OWRD's target water-level trend of zero decline is *highly complex* and will require much "*learning while doing*" (a euphemism proponents embrace to replace the distasteful but more accurate term "trial and error").[7]

For irrigators not party to VAs, the means will look a lot like the ends: OWRD will simply regulate off juniors until PTWs result in a target water-level trend of zero decline, and then they'll probably hold that pattern indefinitely.

2) A desire to transfer the seniority of water right certificates from one Point of Appropriation (POA) to other junior POAs, and to move irrigation water from one Place of Use (POU) to other POUs – all within the geographic boundaries set by the terms and conditions of VAs within the same reservoir. ORS 537.745 can control in lieu of WRC orders related to the groundwater sections of Chapter 537, but not over the rest of the chapter or other chapters; therefore, ORS 540.520 and 540.523, which govern water use transfers, block the presumption by VA proponents that they can move their water right certificates around among various POAs and POUs under ORS 537.745. Notably, HB 3801 in 2025, which never got a hearing, stated: "(12)(b) (b) Notwithstanding ORS 540.520 and 540.523, may make changes described in ORS 540.520 and 540.523 without applying for approval for the changes."[8] The presumption by the bill's sponsor is that the legislature would have to revise the water code to empower VAs function as privatized water right transfer authorities.

   No one else in Oregon, including irrigators left out of VAs, can evade the water right transfer laws. The proposal for flexibility to avoid ORS 540.520 and 540.523 is factually and legally impossible. Arguments by VA proponents that water needs to be used on more productive soils is a widespread problem across all of eastern Oregon and is resolved through the water rights transfer process. The idea that irrigators who have caused some of the worst damage to

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*Reservoir*.)

[7] Oregon Consensus, Examples of Adaptive Management. [1-2]

[8] Oregon Legislative Information System (OLIS), HB 3801, 2025.

groundwater reservoirs and soil salinization would be rewarded with not having to comply with the water right transfer laws would be highly unequal and potentially create widespread resentment across the state.

The simple remedy is for every party to a VA to apply for water right transfers as needed. The idea of hot-swapping seniority, POAs, and POUs on very short time scales runs counter to the most essential principle that propelled the establishment of Oregon's water code in 1909 and the subsequent expansion of it by the 1955 Groundwater Act: taming the water use chaos through staid and controlled regulation to create more certainty and predictability, both spatially and temporally. An important consideration is that water right transfers shall not cause injury to others. The OWRD maintains security by conducting hydrologic studies that demonstrate over long periods of time, and at specific locations, proposed water uses will not harm others. Proponents' use of VAs to move around seniority, POAs, and POUs annually is anathema to the rule of law and order necessary to reasonably protect the present and future public health, safety, and welfare, and the groundwater dependent ecosystems. As such, the proposal is unreasonably inconsistent with regulatory principles, which we argue is the precise intent of VAs: to avoid the WRC's regulatory actions to the greatest extent possible.

In a CGWA, the logic of moving senior water diversions around to various POUs is not unlike trying to develop land around the rims of steep eroding canyons. If proponents of VAs define subareas of VAs under OAR 690-010-0130(3) to benefit some irrigators party to a VA (which is an unlawful use of the rule), and it has the effect of harming others,[9] there is a high chance that any water right transfer in the geographic area of the VA will cause an injury. Moving water diversions among POAs and POUs without going through the water right transfer process compounds the potential for injury. Ignoring the potential for injuries by not conducting due diligence in the basin that experiences excessive declines in groundwater is unthinkable.

We reserve our most searing critique for the proposal to compare VAs to rotating ditch agreements, rotations in water use, and irrigation districts[10] so that VA proponents can work around the water right transfer statutes.

[9] Darrick E. Boschmann, Response to RAC request: "sub-basin" PTW for the Harney Basin CGWA, 02/26/2024. [6-8]
[10] Oregon Consensus, Voluntary Agreement SubGroup. (Discussions in this meeting, about how VAs are like rotating ditch agreements and irrigation districts, have the unintended effect of highlighting how VAs are not like rotating ditch agreements and irrigation districts.)

**VAs are not at all like rotating ditch agreements.** VAs would comprise two or more water rights, each associated with distinct POAs and appurtenant POUs; whereas, ditch rotation agreements usually distribute water to various landowners whose properties are overlaid by one POU associated with a water right certificate. The parts of a VA cannot become subsumed into or become a whole; legally, they must remain as parts distinguished by their distinct water rights and associated POAs and POUs. We acknowledge that OWRD proposes Total Voluntary Reductions (TVR) that represent the collective sum of water use conservation required by each VA, subtracted from the full duty of all the water rights that parties bring to VAs. However, this summation does not subsume the various parts into a whole, single water right. The analogy to a rotating ditch agreement attempts to conflate numerous discrete components of a VA that cannot legally merge those components.

**Nor will ORS 540.150 *Rotation in water use; notice* suffice to move water around various POUs in conjunction with ORS 537.745.** In circumstances where two or more water right certificates share use of the same water source, rotation agreements can provide an alternative to prior appropriation where one of the water right holders is senior, but nonetheless, they agree to share the water source with other junior water right holders.[11]

Ditch and other types of rotation agreements do not transfer seniority to different POAs or POUs, nor do they mix water from various water sources for distribution to various POUs as VA proponents propose. Instead, rotation agreements manage timing and sharing of water within the constraints of existing rights.

[11] United States, Brief on the Merits as Amicus Curiae in Support of Appellants Oregon Water Resources Department and Klamath Tribes, Case No. CA A167380, Oregon Court of Appeals, filed December 7, 2018, by Billy J. Williams, Kelly Zusman, Jeffrey Bossert Clark, and Eric Grant. [28-29] (The US Attorneys' argument about why the Hyde Agreement is not a rotation agreement under ORS 540.150 is elegant and concise. Citing two sources: "***In a rotation agreement, different water users, each of whom draws their supply from the same source, agree to 'take a turn at using the full quantity of water available in the source to irrigate his or her lands,' … 'Under rotation one user may take all the available water, regardless of senior priorities for a limited period of time, and the next user may do the same.' Oregon law confirms the obvious proposition that a rotation agreement is an agreement to "rotate" the use of water … Even under the Hydes' erroneous interpretation of the Hyde Agreement, the parties did not agree to each take a turn using their full shares of the river's water. Instead, the Hydes argue that the parties agreed to split the water of the Upper Williamson River between the Hydes' appropriative use and the Tribes' non-consumptive, in-stream water rights in the Klamath Marsh. But that is not "rotation" because the parties are not taking turns or "rotating" their use of the water***."

**To be clear: in the case of rotating two or more water rights, ORS 540.150 is a voluntary version of ORS 537.742(2)(f), which is the regulatory action OWRD uses in CGWAs: "A provision requiring and specifying a system of rotation of use of groundwater in the critical area."** Quite to the contrary, VA proponents envision mixing and matching various water rights and POAs to irrigate various unauthorized POUs. Additionally, some rights would be in use, some not, and some might attempt to pump their wells at rates higher than the water rights permit.[12]

**As for irrigation districts, they hold water rights on behalf of their members, who put water authorized by those water rights to beneficial use.** Irrigation districts hold a set number of water rights associated with specific PODs, POAs, and POUs, and any movement of these real assets requires a water right transfer for which only the water right holder can apply.[13] VAs cannot operate as irrigation districts unless the irrigators who would be parties to VAs set up an irrigation district. Even then, the law prohibits moving around seniority, POAs, and POUs within an irrigation district without a water right transfer.

3) A desire for a "flexible" contract that can increase or decrease the number of parties to a VA, change the geographic boundaries of the VA, move the goalposts for compliance with VA provisions under the pretense of adaptive management, and change other terms of the VA in a ministerial way without having to go back before the WRC and seek approval for the revised contract. As Chad Karges noted during the Harney Basin VA Subgroup Meeting, they would like: "Resolution at the lowest level possible," and Rep. Mark Owens suggested, tongue-in-cheek: "Complete discretion by the groundwater users."[14] Such flexibility, when not accessible to all, becomes a state-sponsored program to benefit some over others.

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[12] Representative Mark Owens, Draft Voluntary Agreement Guidance Document, email to OWRD, August 6, 2024. [3] (See admission that irrigators have been exceeding the rate limits set by their water rights and how they want to keep doing so under the pretense that pairing ORS 537.735(3)(d) with ORS 537.745 allows them to exceed water right rates despite the fact that VAs must be "consistent with the intent, purposes and requirements of ORS 537.505 to 537.795 and 537.992.")
[13] *Fort Vannoy Irrigation v. Water Resources Comm.*, Sup. Ct. of Ore., filed July 10, 2008. (This case settles the question of who controls water rights and water use in irrigation districts, and discusses the roles and responsibilities of the water right users and water right holders, particularly with regard to water right transfers.)
[14] Oregon Consensus, Voluntary Agreement SubGroup. [at 2:04:50]

**On the matter of "carrots," there are:**

1) A desire to receive a waiver on the Contested Case process, which would protect parties to VAs from being legally held to the same standards as irrigators who are left out of VAs. Contested Case proceedings are long and drawn out; they are quasi-judicial hearings that fulfill the constitutional requirement of due diligence when enacting water use curtailments on a water right. They include evidence, discovery, witness statements, and a legal process that concludes in a ruling by an Administrative Law Judge (ALJ). Then the WRC reviews the ALJ ruling and issues an order. Following the orders, which could include substantial reductions in pumping along the doctrine of prior appropriation, there could be cases brought before the Oregon Court of Appeals. That appeals process could take two to five years. If VA parties were exempt from the Contested Case process, they could not be regulated off in the event their VA fails or parties leave the VA. The WRC would have to start up a new Contested Case every time a VA fails or a party resigns from a VA. Given the rigmarole of the legal process, untold years could pass while a VA stalls through "adaptive management," fails to substantially comply with its obligations, and the WRC orders the termination of the VA before parties undergo a Corrective Control Order curtailing their water use similar to their neighbors who never entered VAs. Getting a free pass to avoid the Contested Case process is an extraordinary "carrot."

   Any VAs approved by the WRC should require all VA parties participate in a Contested Case hearing under ORS 537.742 and ORS 183 to ensure regulatory action buttresses substantial compliance with all VA provisions. The "learning while doing" (trial and error) activities under the pretense of adaptive management should have strict timeline limits set forth from the outset to ensure that the effects promised by the VAs will strictly align with the effects of regulatory actions imposed upon irrigators who are not parties to VAs. If parties to VAs are to be believed – that they will meet the same standards as the statutes to ensure the effects of their actions track with the effects of regulatory action – then they should have nothing to fear by being parties to the forthcoming Contested Cases. To the point: there could be irrigators who go through the Contested Case hearings as parties and then later on join a VA.

2) A desire to operate relatively risk-free means, in part, avoiding groundwater statutes in Chapter 537 with which irrigators would otherwise have to comply. ORS 537.745 states that VAs "shall control in lieu of a formal order or rule of the commission." A very liberal misconstruction of

that clause could attempt to protect VA parties from other groundwater sections of Chapter 537 under the pretense that the VA has primacy. The extent of the misconstruction would be the degree to which it departs from the other requirement that VAs are "consistent with the intent, purposes and requirements of" the groundwater sections of Chapter 537. **The law cannot equally apply to all irrigators if a portion of it applies only to one class and has the effect of reducing business risk on their behalf.**

Irrigators have also expressed a desire to be free from several types of risk associated with more rigid regulatory frameworks that others left out of VAs could be exposed to. For example, VA proponents are concerned about the potential for future regulatory changes that could impose stricter water use limitations in their subareas, and they want their VAs to shield them from such adaptive management by the state. VA proponents also want to be shielded from lawsuits by disgruntled neighbors who are left out of VAs and believe they have been harmed by the irrigators who are party to VAs. They also want to avoid the risk of being locked into annual/ seasonal water use limits that would have been set by the WRC as the annual Agreed Water Use Limit that increases until it equals the Total Voluntary Reduction (TVR). And proponents of VAs want to be shielded from lawsuits by those who have standing related to domestic well failures and harm to groundwater dependent ecosystems. It appears that VA proponents want the WRC to grant them fiefdoms, which is an extraordinary "carrot.".

3) A desire to be bought out by the state on the pretense that the state is responsible for the over-pumping because the agency staff over-appropriated the Harney Basin by permitting too many groundwater right applications. This desire, which came up during the Harney Groundwater Voluntary Agreement SubGroup,[15] is unrelated to VAs and is common to all irrigators who 1) fear having their junior water rights on productive wells being regulated off in

[15] Oregon Consensus, Voluntary Agreement SubGroup. [at 1:59:14 to 2:01:37] (The claim that Oregon is responsible for over-appropriating the Harney Basin and is therefore legally responsible for the welfare of the groundwater right certificates it issued is spurious because of extraordinary and prolonged political pressure by the irrigation lobby and their patrons who forced through water right applications that never should have been permitted. (See Emily Cureton Cook, "Race to the Bottom: How Big Business Took Over Oregon's First Protected Aquifer," OPB, March 16, 2022. This three-part series reports on the political and private sector negligence that has led to the impairment of the public's groundwater sources.) Far from the OWRD acting as if it were a socialist state government agency running the irrigation industry as a public sector concern, OWRD staff were under intense pressure for decades to approve water right applications when there was not sufficient water available or the water availability was unknown. We reference the tenure of Maragret Pagel, Phil Ward, and other state officials cum lobbyists/ lawyers who passed through the revolving door between the public and private sectors as examples of the culture that led to over-pumping the water sources that belong to the public. Notably, Representative Owens has managed to straddle the revolving door and work in the public and private sector simultaneously to benefit his and his constituents' interests, the awkwardness of which is constantly apparent.)

the CGWA, or 2) want recompense for their water rights associated with non-productive wells that aren't capable of generating income. One of the attorneys, Dominic Carollo, raised the "carrot" of buying back defunct water rights during the discussion on VAs precisely because he is skeptical that VAs are feasible and that the only viable alternative is paying irrigators to cancel or pause their water rights.

Advocating for buyback proposals (e.g., eminent domain lite) is unrelated to VAs, but we refer to the proposals because they were raised during VA discussions.

## Review of the Proposed Guidance for Voluntary Agreements Among Groundwater Users from the Same Groundwater Reservoir

[The following is a sequential review of the *Proposed Guidance for Voluntary Agreements Among Groundwater Users from the Same Groundwater Reservoir*, which is before the September WRC meeting.]

Generally speaking, OWRD's *Proposed Guidance for Voluntary Agreements Among Groundwater Users from the Same Groundwater Reservoir*, which we review and comment on below, is a good starting point for rulemaking related to ORS 537.745.[16] We also incorporate the entire set of comments in this paper as information to consider when contemplating rulemaking for ORS 537.745.

Notwithstanding our serious concerns about the statutory construction and the interpretations of ORS 537.745, including the ways proponents of VAs have envisioned applying the statute, we provide the following comments on OWRD's *Proposed Guidance for Voluntary Agreements Among Groundwater Users from the Same Groundwater Reservoir*.

We strongly agree with and support the *Proposed Guidance for Voluntary Agreements Among Groundwater Users from the Same Groundwater Reservoir* as a rough draft for writing administrative rules for ORS 537.745. ***Any sections of that document we are silent on means that we have no questions or comments and support the draft language.***

[16] OWRD, *Proposed Guidance for Voluntary Agreements*.

Our comments follow the title of each topic in the OWRD document:

**Background:**

We refer to our critique herein – of ORS 537.745 and the numerous proposals articulated by proponents of VAs – as the scope of information the WRC and OWRD should consider as background when contemplating the approval, management, and termination of VAs.

**General Applicability:**

ORS 537.745 explicitly states that VAs must be "consistent with the intent, purposes and requirements of ORS 537.505 to 537.795 and 537.992, and in particular ORS 537.525, 537.730 to 537.740 and 537.780…" These statutes are the groundwater sections of Chapter 537. However, OWRD has interpreted the consistency to be with the Groundwater Act of 1955, the provisions of which were articulated in HB 26 in 1955. Since then, there have been many amendments to the groundwater section of Chapter 537, and we recommend reframing the General Applicability to ensure ongoing consistency with the evolving statutory framework governing groundwater within Chapter 537.

We also suggest acknowledging that VAs must be consistent with the entire water code, including all chapters from 536 to 558, and that ORS 537.745 cannot conflict with other statutes and the Oregon Constitution, as would some of the proposed provisions of VAs.

**Authority**

The WRC can delegate its authority to issue an order terminating VAs, as acknowledged at the end of the *Proposed Guidance* document; however, no mention of such authority is stated in this section.

While we strongly believe the WRC should hold informational hearings on VA approvals and termination orders, and make the first generation of approvals and any termination orders, we acknowledge the authority of the OWRD staff to process such acts on behalf of the WRC.

The politics, liabilities, and gravity of approving VAs for the first time – under an elusive and troubled statute that has never been implemented since 1955 – requires the WRC leadership. We also recognize

that administrative rules should be written to accompany ORS 537.745.

**Groundwater Users:**

Under the Minimum Participation Level, the requirement is that a VA must account for at least 30% of the PTW of the subarea the VA is located in. But what happens if irrigators drop out and the VA lacks a minimum participation level? Is there a grace period for the remaining irrigators to seek new members before the OWRD finds the VA is not in substantial compliance with the WRC approval? Is there a subarea census that can be updated annually that contains the information that is required under the heading "Reporting and Monitoring" and reasonable projections be made about the "bench depth" that all VAs have regarding the potential to lose and gain new parties? OWRD could estimate the viability of VAs and the length of any grace period by understanding the scope of potential irrigators capable of joining VAs when VAs fall below the Minimum Participation Level.

The Agreed Water Use Limit should be referred to in the second paragraph of the Minimum Participation Level to clear up the ambiguity about what is "subject to the agreement;" otherwise, state what is meant by that conditional statement.

**Groundwater Rights:**

The statement referring to "valid water rights that can prove beneficial use within 5 years prior to the time the agreement is approved" needs to address the ways irrigators will prove use that is evidentiary based. Perhaps this could include metering where available, OpenET imagery, sworn statements of fact under the threat of perjury, and photographic and video evidence.

All unauthorized and non-conforming wells drilled without start cards and/ or lacking well log numbers, and all wells used in violation of the terms of a water right must be prohibited from participating in VAs and be subject to well abandonment unless OWRD receives water right transfer applications within 60 days of discovery by OWRD or disclosure by the irrigator. Well abandonment should begin after 60 days in the event of no action to remedy the unlawful appropriation.

That unauthorized water uses could be overlooked in a CGWA would be an extraordinary breach of the public trust, undermining the integrity of Oregon's water laws and the equitable distribution of this

critical resource. Such permissiveness would erode confidence in the state's ability to manage water resources sustainably and equitably. The admission of the scope of the problem requires immediate remediation regardless of whether unauthorized or non-compliant wells are associated with VAs.[17]

The next statement that "The maximum volume of water available to the parties within a voluntary agreement is the sum of the total duty allocated to all valid rights participating in the agreement" should continue with "notwithstanding the limits imposed by the subarea PTW and/ or the VA TVR."

**Groundwater Reservoir:**

This section states that:

> An approved agreement must define the groundwater reservoir, or portion thereof, the agreement is intended to cover. For a designated CGWA, the groundwater reservoir may be defined as the entire CGWA, one or more subareas within the CGWA, or a portion thereof.

Given the extraordinary work by the OWRD and USGS to study and map the GHVGAC (and to paraphrase ORS 537.665), the WRC, 'by its own motion, has already identified and defined the location, extent, depth, and other characteristics of the groundwater reservoir' and 15 subareas that are hydrologically distinct.

But the gerrymandered 6 subarea map made up by irrigators with an interest in increasing the geographic areas to facilitate VAs are not groundwater reservoir boundaries; rather, they are administrative boundaries established under OAR 690-010-0130(3)(b) and (c). Because the irrigators drew up the 6 subarea map for their private contractual purposes, there is no set of groundwater reservoirs yet defined they can use for VAs. To be clear, the CGWA map lines are not the lines of groundwater reservoirs, though they could be if the WRC made a final determination of the boundaries and depth of the GHVGAC groundwater reservoir(s). Any proper map suitable for VAs may need to

[17] Oregon Consensus, Voluntary Agreement SubGroup. [at 0:43:32 to 0:45:53] (OWRD staff hydrologist, Tim Seymour, reading from a document compiled by Harney Basin VA group: "We anticipate that there will be a number of wells that are not specifically in their authorized locations, and we need a process to allow water users to fix this without penalty and without delays." Representative Mark Owens, irrigator from Crane also noted: "So you're going to see you're going to see a fair subset of wells that may or may not be in a specific location, maybe not authorized under permit…I mean, a lot of it's gone on for the last multiple decades. Well goes dry, a well goes out. You get a well driller, maybe the welder didn't do a start card. He drills a well close to the same location...We start pumping from it. I don't think, honestly, the farmers understand to what extent that that might be scrutinized, to what extent it might show up.")

coordinate with ORS 537.665 if VAs are to withstand critiques about whether parties to VAs are indeed from the same groundwater reservoir. Such tensions could flare up between juniors in VAs adjacent to seniors not in VAs. Knowing that the WRC formally stood behind the data regarding hydraulic connections through a *Final Determination* under ORS 537.665(3) would streamline the resolution of these concerns.

While the entire GHVGAC is hydraulically connected by degrees, OWRD designates some areas as high-priority and others as low-priority because there are distinct hydrogeologic units that demonstrate unique features, including the propensity for some to be easily overdrawn much more than others. For this reason, we acknowledge the need for VAs to be sufficiently proximate so that they pump "each other's water" in a seasonal/ annual timescale (the groundwater flows along a hydraulic gradient among VA parties within the length of a season). If VA parties were spread out beyond the one-year reach of the groundwater flows, then the logic of how *a TVR is to a VA as a water use curtailment is to a single irrigator* falls apart. The logic of a VA is that all the irrigators sort out how they will collaborate on reducing annual groundwater pumping to reach the TVR, and somehow that is attractive enough for them to form a VA that does not run afoul of state laws and the state constitution.

The purpose of proximity is to ensure that irrigators are horsetrading water (under ORS 540.520/ .523) of the same relative level of *scarcity* because CGWA statutes (that the VAs must be consistent with) seek to establish a target water-level trend of zero decline, and that is not possible if irrigators were to cap and trade water credits from relatively distant, distinct, or compartmentalized groundwater reservoirs. We acknowledge that the entire GHVGAC could be regulated as one hydrologic unit as shown in the "Model E scenario,"[18] but that requires a 59% reduction across the board and any proposed VA would have to consist of at least 30% of all irrigators in the GHVGAC, which is inconceivable.

This section also states: "(1) An approved agreement must be accompanied by a map depicting all places of use and points of appropriation for the water rights included in the agreement." We take this moment to concur with OWRD that no version of state-run water use management could allow unauthorized or non-conforming large-scale wells to be associated with water rights in a CGWA region that is under immense stress resulting from excessively declining groundwater levels and the scrutiny

[18] OWRD, Summary of Model Results Presented at RAC 11, November 13, 2024. (See the entire document for how "Model Scenario E" functions.)

of hydrologists, political pressure, rulemaking, and the public eye. While the OWRD may have overlooked the misappropriation of water in the past as described in the Oregon Consensus Voluntary Agreement SubGroup discussion, the tolerance for such lax oversight is over. The POAs must be lawfully associated with the water right certificates and POUs must be preexisting locations defined and authorized by non-canceled water right certificates used at least once in the prior 5 years dated to the submission of the VA to the WRC for approval. (Incidentally, we support extending the period of permissible non-use to 15 years.)

**Groundwater Use:**

This section states that: “If a voluntary agreement is within a critical groundwater area or subarea where a permissible total withdrawal has been set by rule, the Department must use the PTW as the primary criterion for evaluation when considering whether to approve the voluntary agreement.” This may be fine to determine whether the VA meets the Minimum Participation Level; otherwise, there should be an acknowledgment to the effect “...except where the department has set a TVR.”

This section states: “Target for Voluntary Reduction” or “TVR” means the total amount of groundwater that the Department determines should be withdrawn from an area on an annual basis.” The phrase “from an area” is ambiguous and should say “from within the geographic boundaries of a voluntary agreement approved by the WRC under ORS 535.745.”

The concept of a TVR should be elaborated on to remove any question about what it is and how it works: the TVR is the total (collective?) amount of water irrigators party to a VA must not pump in order to comply with the PTW of any given CGWA or subarea therein.

In the case the WRC was to consider approval of a VA before a PTW or TVR has been set, then all WRC approvals of VAs must have a contingency clause that requires all VAs approved before the OWRD sets PTWs to immediately conform to the limits of PTWs once they are set.

Under the section on Agreed Water Use Limit is this statement: “The schedule for water use reductions must be specified in the voluntary agreement and should demonstrate a commitment to achieving stable water levels within a reasonable timeframe.” This is weak language – "should demonstrate a commitment to achieving..." This allows irrigators party to a VA the flexibility to not conform to TVRs

that must comply with PTWs; meanwhile, all the irrigators left out of VAs are forced to comply with state Corrective Control Orders and do not experience the so-called "flexibility" parties to VAs enjoy. This double standard is inequitable, where in one section of chapter 537, some irrigators can enjoy flexibility (ORS 537.745), and in others, they cannot (ORS 537.742).

The section on Rate and Duty states: “Notwithstanding this provision, the Director may determine, pursuant to ORS 537.735(3)(d), that a higher rate would result in more efficient water use.” ORS 537.735(3)(d) states:

> Any one or more provisions making such additional requirements as are necessary to protect the public welfare, health and safety in accordance with the intent, purposes and requirements of ORS 537.505 to 537.795 and 537.992.

Despite the broad scope of this paragraph, we question whether ORS 537.735(3)(d) can authorize water use rates beyond the terms of certificated water rights, especially considering the limits on water right transfers not to expand the rate. OWRD believes it is theoretically possible.[19] Rate limits are longstanding controls to protect the water resources of the state; to relax them in areas where substantial harm looms resulting from excessively declining groundwater levels is not only an unjustified privilege and immunity from the law, but a profound inconsistency with CGWA principles reining in harmful water uses.

This statement for increasing the rate on a water right comes from a request emailed by Representative Mark Owens, wherein he states:

> Many of the water rights in the Div 512 rulemaking area fall below the rate required to irrigate crops in the Harney Basin. Limiting all water use to 1/80th cfs (may not exceed the rate and duty of “any water right”) will be highly detrimental to water right holders and voluntary agreement participants. If individuals are part of a voluntary agreement, it does not make sense that they would generally be subject to WRD regulation based on water right calls. ORS 537.735(3)(d) can apply whether there is a senior water right call, or not. The flexibility in rate is critical to formulate voluntary agreements that are reducing water withdrawals so as to

[19] OWRD, Response to email from Mark Owens to Kelly Meinz (August 6, 2024) regarding OWRD’s Draft Voluntary Agreement Guidance Document, September 27, 2024. [6]

> achieve a stable groundwater level within an acceptable timeframe and at an acceptable level, while making economic sense to the participants and signatories to the agreement.[20]

We understand from this statement that 1) irrigators are currently using water at rates higher than their water right certificates authorize; 2) that irrigators have not been sufficiently regulated by OWRD on this matter; and 3) since parties to VAs will necessarily come under the close management of OWRD, parties to VAs request a pass on the enforcement of the law that requires water right holders to comply within the rate limits of their water right certificates. This is what VA proponents mean when they request flexibility: they want ORS 537.745 to extend privileges and immunities others cannot access. Given, however, that the Harney Basin is suffering from excessively declining groundwater levels, the fact that OWRD has not and would not enforce the rates on water right certificates is extraordinary. With the imposition of a CGWA impending, there is reason to believe OWRD will require all irrigators to stop misappropriating water by exceeding the authorized rates of their water right certificates. That VA proponents would anticipate this enforcement and seek "flexibility" on the matter demonstrates yet another example of how those left out of VAs will not enjoy the same perks, including perks that are unlawful, such as exceeding rate limits set by water right certificates.

The section on Rate and Duty states: "'Overuse' means use above the volume or rate of the approved voluntary agreement." The section should state: "'Overuse' means use above the collective duty or rate of the approved voluntary agreement, or the use above the duty or rate of any one water right."

There is also this statement: "Overuse is a basis for a finding that the parties are not substantially complying with the agreement." We suggest that OWRD clearly define the term "substantial

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[20] Representative Mark Owens, Draft Voluntary Agreement Guidance Document, August 6, 2024. [3] (This email is a response to a July 8, 2024, meeting that was withheld from public view so VA proponents could work among themselves to settle the prospective guidelines for how VAs would function to their specifications. These guidelines will likely be the basis for administrative rules, and to that extent, they were at the time, a form of private rulemaking that is now open to the public. Rep. Owens began his email stating: "*We would kindly ask that WRD refrain from disseminating the draft proposed guidance to the RAC in its current form, pending further discussion with the small work group that met on July 8, 2024, and pending revisions reflecting further discussions and input. As explained in more detail below, there are a number of areas where we think further work is likely needed to find alignment and agreement on an approach to voluntary agreements in the area of the Div 512 rules/Harney Basin.*" We view this request for privacy as an example of how business as usual has worked in the past decades whereby the largest water users call the shots and influence statutes, administrative rules, guidelines, and the day-to-day management of the public's water resources. Such policymaking has had the effect of privileging special interests who have a usufructuary right to the water that belongs to the public over others, and in this case, not just over the greater public interest, but more specifically over those who may be left out of VAs. We include this detail to show in fine grain resolution the mechanics by which special interests (VA proponents) seek to influence laws to privilege themselves above and/ or immunize themselves from the public interest, which may hold different views. We also recognize that not all the VA proponents' ideas necessarily conflict with the public interest; some are worthy and ought to be considered.)

compliance" in rule as it relates to compliance with VAs. While the term is generally understood in a regulatory context, VAs must be held to a percentage, such as 95% of the Agreed Water Use Limit, TVR, and PTW. Otherwise, there will be endless stalling over what is meant by substantial compliance by lawsuits that have already been threatened.

The statement "At no time will under use result in an increase to the agreed water use limit," should include a direct statement that "no parties to VAs may carryover under use from a previous year to any year thereafter."

**Duration:**

The statement "The agreement will include the period of time over which groundwater use will be reduced" should replace the word "over" with "during."

Regarding the duration of water use, OWRD could track the annual water use for a VA on a graph that shows the actual duty of water used on the Y-axis and each year on the X-axis, with the Y-axis ranging from zero to the maximum duty the TVR permits, and the X-axis ranging from the year the WRC approves the VA to the year when OWRD has set compliance with the target water-level trend of zero decline. This simple graphing would enable OWRD to reasonably project whether VAs are on a timeline to reach their targets and will give OWRD and VA parties sufficient notice of whether course correction is required to stay on target. The OWRD should project (plot) the graph in advance as to what the trajectory would look like so that it can compare every year just how close VAs are "Substantially Complying" with their TVRs. The USGS/ OWRD modeling software would set the end point where the TVR rate results in OWRD's target water-level trend of zero decline.

Under section (1) of Duration, the statement "...voluntary water use reductions to match the PTW should be implemented within a reasonable timeframe" must be consistent with what is expected of irrigators who are not party to VAs and are subject to regulatory action. Otherwise, preferring or privileging water users because they entered VAs creates a double standard, two-tier class system under the law. This double standard is the quintessential definition of unequal protection under the laws. Whatever time frame OWRD imposes upon irrigators not party to VAs (in any given CGWA or subarea) must be the same time frame imposed upon parties to VAs, or vice-versa.

Section (2) of Duration states: “If a voluntary agreement is within a critical groundwater area or subarea where a target for voluntary reduction has been set, voluntary water use reductions to match the TVR should be implemented within a reasonable timeframe.” The term “reasonable timeframe” is a poor and ambiguous euphemism for “Substantial Compliance,” which should be used and the graph mentioned above should replace the ambiguity. Also, the statement is awkward and redundant.

Section (3) states: “If a voluntary agreement is within an area or subarea the Department has set a target for voluntary reduction, the period of time for voluntary reduction to match the TVR cannot exceed the duration of the agreement.” The statement should be: “If a voluntary agreement is within an area or subarea the Department has set a target for voluntary reduction, the period of time for *the Agreed Water Use Limit* to match the TVR cannot exceed the duration of the agreement.”

**Reporting and Monitoring:**

Under the Annual Statement of Use, section (1) “a map depicting lands subject to irrigation” should show the precise POUs surveyed by a CWRE. A CWRE could initially map out all the existing POUs and grid the map for easy modifications in the future, where each grid square is one square acre.

Section (3) requires: “contact information, including telephone and email address, for owners of every well to be pumped during the irrigation season.” This section should also require the same for owners of the POUs to be wetted by irrigation use; they may not be using their wells but they may be contributing their lands. (We take this opportunity to reiterate that all VAs must incorporate water right transfers under ORS 540.520 and 540.523.)

Under Monitoring, Section (2) states: “...that Department staff may, with reasonable notice, enter the property of a party for the purposes of water level measurement, collecting flow meter readings, and ensuring that the flow meters are properly functioning.” We suggest that ascertaining the location of irrigation use on POUs and the duty of water on POUs not to exceed the certificated CFS/ AF is also a reason to enter the property.

Section (3) states: “...the watermaster must visit each participating landowner’s property to verify wells authorized for use under the voluntary agreement and the existence and functioning of totalizing flow meters.” We suggest detailing what the term *verify* means by adding “to verify that wells authorized for

use under the VA have well logs, are associated with start cards, and are authorized for use by water right permits or non-canceled water right certificates."

**Agreement Modification Prior to Commission Approval:**

No additional comments at this time – refer to the entirety of this paper for details related to the approval of VAs.

**Agreement Amendment After Commission Approval:**

(Note: we reiterate that there must be strict limitations to the "flexibilities" and "carrots" that parties to VAs enjoy that privilege or grant immunity to them over irrigators unable or uninvited to join VAs. Proponents have been vocal about wanting near free rein to act as if VAs were sovereign entities. Their ambition is directly proportional to their resistance to the Division 512 rulemaking effort leading to a CGWA designation and regulatory action to curtail water use. We suggest the WRC be present and active in the VA approval process and that OWRD manage VAs carefully because VAs are statutory instruments with their legitimacy and fairness dependent on equitable access and administration.)

The statement: "The Commission also may delegate this authority to the Department" is acknowledged. However, while OWRD can manage ministerial amendments to VAs, the WRC should oversee more substantial amendments, especially when attempting to implement ORS 537.745 for the first time since 1955. What are the minor amendments that can be managed ministerially, and what are those that should go before the WRC for approval?

We suggest that the following amendments must go before the WRC and should not be processed by OWRD staff in a ministerial fashion:

1) Changes in parties to the VA, both incoming and outgoing;
2) Changes in POAs and POUs (which will require coordination with ORS 540.520/ .523);
3) Water Right Transfers into or outside of the VA geographic boundaries (intra-VA Water Right Transfers between VA parties can be an OWRD ministerial action);
4) Changes in the Agreed Water Use Limit and the TVR;
5) Changes in the timeline to reach the TVR or water volumes that relate to phasing in or out of water

use reductions and the timeline to reach the zero rate of decline in groundwater levels;
6) Any changes in adaptive management that could cause injury or harm to domestic wells, groundwater dependent ecosystems, and other irrigators subject to regulation in the Harney Basin CGWA.

OWRD staff will be put under immense pressure by parties to VAs to process changes ministerially, and we believe the WRC must oversee all the amendment types listed above to prevent the abuse on behalf of the public interest. Pressure on OWRD staff by those they regulate must come to an end, especially when such pressure goes unseen out of the public eye.

Under Additional Parties, two statements need to be better understood:

> (1) A prospective party must notify the Department and the existing parties to the agreement of their intent to join the agreement by December 31 prior to the year in which they wish to join.
>
> (3) All existing parties to the agreement and the Commission (or Department if authority has been delegated) must consent to the addition of any new party.

Who decides who is in VAs and who is left out of VAs? What if three irrigators get together and want to form a VA and a fourth wants to join – can the three irrigators refuse to admit the fourth? And can they gang up on each other and sue each other and push each other out? How is the formation of VAs (who is privileged to enter, who is left out, and the criteria for being selected or rejected) to be determined? Since VAs are instruments of the law, which is a specific legal framework that has been envisioned by proponents to grant parties to VAs certain privileges ("flexibilities" and "carrots"), the decision about who gets to benefit and who does not quickly reaches a constitutional question of fairness and equal application and protection of the law to all.

Given that VA proponents seek significant advantages, how VAs derive their authority to form, change membership, and dissolve raises legal and ethical questions regarding equality and fairness. We wonder if VAs are like public or mutual benefit corporations or political subdivisions of the state that require bylaws or charters, and trustees. Would parties to VAs be the trustees of the VAs?

We believe that if the opportunity to participate in a VA, in any given CGWA or subarea, is not equally

available to all eligible water users without prejudice, or if the criteria for participation are not transparently applied, VA governance (or the lack thereof) could potentially lead to claims of discriminatory practices. These are significant factors to consider regarding the statutory construction of ORS 537.745 and proposed administrative rules. We also wonder if and who can challenge the membership of VAs – who has standing to challenge the vagaries of membership.

Under Party Termination, will the WRC and OWRD be held liable for how VAs manage terminations and resignations of its members since the WRC and OWRD approved the VAs? We believe the process of membership management must be very carefully considered since VAs are an instrument of the law that has been envisioned to dole out privileges and immunities only some can enjoy.

The statement "Any party terminating their involvement in the agreement will become subject to any existing groundwater control measures pertaining to the geographic location of their water right" underscores the seriousness of terminations and disgruntled resignations from VAs because the consequences are the loss of privileges and exposure to the cold hard hand of the regulatory state. Who will take responsibility for those kicked out of the Garden of Eden?

We also note that all parties to VAs will have to also be parties to Contested Case hearings from the start if they are to be subjected to the regulatory actions of the state after removal from VAs.

Two side notes: 1) any prospective VA parties who went through a Contested Case hearing but do not wish to go through appeals court challenges to implement their VAs, will be casting doubt on the legitimacy of the complaints other irrigators have who wish to proceed with their appeals court challenges; and 2) the discrepancy between the experience irrigators have in their VAs and irrigators subject to regulatory action will come into stark relief on the basis that VA parties may not wish to go through the appeals court challenges, demonstrating the extent to which the VA class of irrigators enjoys benefits under the law that regulated irrigators do not.

The section titled Water Right Transactions is a poor euphemism for Water Right Transfers under ORS 540.520 and 540.523, and is unjustified. The following language from this paragraph is unambiguously the language of water right transfers:

> …if any water right subject to the agreement is modified by a water right transaction in a way

that changes the amount of water available to the agreement or changes the places of use subject to the agreement. Such transactions include, but are not limited to, changes to the place of use, changes to the points of appropriation, or splitting of a right.

We are incredulous at the term "water right subject to the agreement" because the legal term is water right subject to transfer. ORS 537.745 has no authority over statutes other than ORS 537.505 to 537.795 and 537.992. While VAs must be "consistent with the intent, purposes and requirements of ORS 537.505 to 537.795 and 537.992," there is no law that says VAs may run afoul of all the other laws of the state of Oregon, including other chapters in the water code. Our position here aligns with our repeated statements that ORS 537.745 does not permit the WRC to approve VAs that run afoul of the Oregon Constitution. All VAs must apply for water right transfers.

**Agreement Approval:**

See our earlier comments on the WRC delegation of its authority to the OWRD.

**Agreement Termination:**

Section (b) states: "Changed conditions have made the continuance of the agreement a detriment to the public welfare, safety and health or contrary to the intent, purposes and requirements of the Ground Water Act of 1955." The Ground Water Act of 1955 has been amended many times over 70 years, so it may be best to say the "Water Code" to encapsulate all the laws of the state that pertain to water governance and management regardless of the time period. If VAs were a detriment to the public health, safety, and welfare for any reason, they could be terminated for breaching any law, including the Oregon Constitution.

There may also be a reason for the WRC to terminate a VA if the parties are suing each other in tort actions that are prolonged and are not resolved in a timely manner. The governance of VAs must be held at a high level in the way public and mutual benefit corporations function with bylaws and trustees to ensure that VAs, instruments of the law authorized by ORS 537.745, are maintained in an orderly, lawful, and constitutional fashion. Administrative rules for ORS 537.745 must include how VA governance shall function.

## Conclusion

Privatizing public sector duties has been fraught with many failures over the past 70 years because some public sector activities are not well-suited to the private sector. VAs are an attempt to privatize the regulatory functions of the state, and we believe such privatization will unreasonably perpetuate the harms resulting from over-pumping the groundwater reservoirs. The VAs under ORS 537.745 are not feasible as proposed because they conflict with the water right transfer statutes and create a constitutional crisis resulting from numerous factors related to privileges and immunities. The VA's most effective result may be stalling water use reductions while the WRC imposes water use curtailments on other irrigators. Such an effect runs counter to the legislative intent of HB 2192, which sought to remove stalling tactics by affected water users and their lobbyists by bringing the CGWA statutes in line with the Administrative Procedures Act (APA).

The OWRD must manage the water in the basin (every basin) to ensure that we do not return to the *Wild West*. It's problematic enough that too many of Oregon's water use policies still contain vestiges of the dysfunctional past, not for the private sector to potentially game the public sector and worsen those effects in the 21st century.

If there are any credible scenarios, at a minimum:

- VAs must be state-enforced binding legal contracts so all parties have shared expectations and legal responsibilities to each other and the state.
- The WRC must impose strict penalties for breaking the contracts or stalling their provisions, which would parallel VA parties suing each other for breach of contract (tort).
- Access to VAs would have to be open to all irrigators in the Harney Basin (no one could be denied entry), and protections would have to be in place to ensure those who experience regulatory action do so because they believe they are as well off as if they were to join VAs.
- VAs can never be used as schemes to avoid unequivocal and timely compliance with OWRD's target water-level trend of zero decline, which is already 30 years past due.

VA proponents will argue that VAs are inherently fair because they are voluntary; because participation is not compulsory, any resulting disparities in access or benefits do not raise concerns of fairness or

constitutional rights. That argument is facile because it leaves out important details related to privileges and immunities in both the formation of VAs and the disparity of experiences and outcomes VA parties seek.

If the benefits of VAs were genuinely equitable and universally beneficial, there is a compelling reason for the WRC to extend these benefits across the board, rather than restrict them to self-selected groups. If, however, doing so stalled or preempted the goal of stabilizing groundwater levels in the CGWA, then it follows that extending the perks of VAs is an exclusive benefit only a few can enjoy. The idea that the Harney Basin hydrology might only be able to tolerate a certain limited amount of VAs would demonstrate that there necessarily must be an excluded class of irrigator citizens if VAs were ever implemented. Perhaps this is one reason why ORS 537.745 has never been implemented since legislators passed the law as part of the 1955 Groundwater Act.

We also note that conflating the voluntary nature of the agreements with freedom, which is both the public relations message and the main benefit VA proponents seek (e.g., freedom from the imposition of Corrective Control Orders, freedom to hot-swap water sources and locations, freedom to exceed the rates of water rights, etc.), has the effect of misrepresenting the potentially egregious negative impacts. We sense the inadvertent and inescapable possibility that proponents cannot avoid voluntary-washing their ambitions to obscure how the envisioned privileges and immunities may benefit them at the expense of others: “It’s voluntary; what’s not to like?”

We explained how gerrymandering the CGWA subareas only serves proponents of VAs; worse, the process forces irrigators in low-priority areas to give up their water to irrigators in high-priority areas, which when reverse-engineered by OAR 690-010-0130(3)(b) and (c), simulates a state-mandated water right transfer that redefines the term *water right subject to transfer* in ways no one could have ever envisioned.

Voluntary Agreements under ORS 537.745 incentivize lawful behavior by offering exclusive benefits to participants, effectively rewarding them for voluntarily complying with laws that are intended to apply equally to all. This arrangement contradicts the principle of equal application of the law, creating a privileged class that operates under different rules.