



Oregon


John A. Kitzhaber, MD, Governor

Water Resources Department

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MEMORANDUM

TO: Water Resources Commission

FROM: Thomas J. Paul, Acting Director 

SUBJECT: Agenda Item A, September 25, 2014
Water Resources Commission Meeting

Klamath Drought Rulemaking

I. Introduction

Governor Kitzhaber declared a drought in Klamath County under Executive Order No. 14-01 on February 13, 2014. The Oregon Water Resources Commission adopted temporary rules OAR 690, Division 22, at the March 6, 2014 Commission meeting. These rules granted a preference of water use for human consumption and stock watering over other uses of water in Klamath County effective April 1, 2014 and will expire September 27, 2014. Temporary rules can only be in effect for 180 days and cannot be extended; therefore, for the preference to continue, rules must be adopted through the “permanent” rulemaking process.

During this agenda item, the Commission will consider rules that would allow this preference to continue for the duration of the Governor’s declared drought pursuant to Executive Order No. 14-01. The rules would expire on December 31, 2014.

II. Background

Many of the water rights in the Klamath Basin include domestic and stock water along with irrigation. Under Oregon Law, the Commission may grant a preference for stock water and human consumption, whenever the Governor declares a state of drought emergency in an area. In 2013 and 2014, the Commission adopted temporary rules granting a preference for water use for human consumption and livestock in Klamath County. Since the 2014 temporary rules will expire on September 27, 2014, Department staff began the permanent rulemaking process.

The Department consulted a Rules Advisory Committee (RAC) and received feedback on the proposed draft rules and statement of fiscal impact and cost of compliance. Members of the RAC included Katie Fast, Oregon Farm Bureau; April Snell, Oregon Water Resources Congress; Gil Riddell, Oregon Association of Counties; Kay Teisl, Oregon Cattleman’s Association; and Dani Watson, Ranch and Range Consulting. The only change to the draft rules proposed by a RAC member was to allow the preference to be extended to groundwater. Since this rule allows water right holders that would otherwise be regulated off to continue to exercise their rights for human consumption and stock purposes, the Department agreed and the draft of the proposed rules was modified to strike the word “surface,” allowing both groundwater and surface water

users to benefit from the preference. (Note: The Department recognizes that the City of Klamath Falls is the only groundwater user likely to exercise the preference; see Department's response in Attachment 1, Theme 4).

Notice of rulemaking appeared in the *Oregon Bulletin* on July 1, 2014. The public comment period was open through July 29th, and a public hearing was held on July 24th. Due to public comments received, the Department broadened outreach efforts and extended the public comment period to 5:00 PM on September 19th. Notice of a second public hearing was published in the *Oregon Bulletin* on September 1. A second public hearing was held in Klamath Falls on September 18. Department staff reviewed and considered all public comments that were received by the close of the public comment period. Summaries of the comments received and Department responses are included in Attachment 1. Complete copies of the public comments received are included in Attachments 4-6.

III. Discussion

ORS 536.750(1)(c) authorizes the Commission to grant a preference for stock water and human consumption during a governor-declared drought. Pursuant to advice from the Department of Justice, the Commission must adopt a rule in order to grant the preference.

The intent of these rules is to allow holders of water rights for stock water and human consumption uses – that would otherwise be shut off during a call by a senior water user – to continue use of that water for those purposes. This preference would allow the water right holders that are being regulated due to a call by a senior water right holder to continue to divert and use water for stock water and human consumption purposes during the period of a governor-declared drought. At this time, for some water users, there are no readily available alternative sources of water for either stock or human consumption.

The Department received a number of comments on this rulemaking, which have been broken into themes in Attachment 1. As discussed below, based on the public comments received, the Department is recommending that this rule sunset on December 31, 2014.

The Department believes that there are misconceptions that these rules authorize groundwater regulation, or set standards for how the Department determines whether a well is connected to a surface water source and whether regulation of a well would benefit a senior water right holder. See Attachment 1, Theme 2. These rules do not do any of the above; rather, if the holder of a water right for stock water and human consumption uses receives a regulation notice, these rules would allow those uses to continue during the period of governor-declared drought. In terms of groundwater, small quantities for human consumption and stock are unlikely to be determined to provide an effective and timely relief to senior users and, therefore, unlikely to receive a regulation notice. Since this rule benefits users that receive a regulation notice, the extension to groundwater has a limited effect – mostly to allow the one well of the City of Klamath Falls to continue pumping for human consumption. Generally, most other groundwater users would not need to exercise the preference, and would, therefore, be unaffected by the rule. See Department's response in Attachment 1, Theme 4.

There were also questions and concerns about why this rule would only apply in Klamath County. Certain areas of Klamath County had not been regulated prior to 2013; therefore, these areas are not accustomed to regulation and do not have the stock watering infrastructure in place to ensure access to water for stock during a drought. Although work began last fall to secure stock water supplies, the basin needs additional time to transition and get these supplies in place. This is a real need, demonstrated by the many comments received supporting the rule (see Attachment 1, Theme 1). These rules allow for that transition during the governor-declared drought, but are not a permanent solution. The Department has provided an extensive explanation for this in the Department's responses to public comments in Attachment 1, Theme 7.

Finally, there were concerns expressed about the quantity of water allowed to be utilized by those exercising the preference. See Attachment 1, Theme 9. The Department understands these concerns and believes that further conversations would be necessary, should the preference be granted in the future. This also points towards the need for the rules to sunset.

Due to the misconceptions about the rule, the fact that the rule is meant to help water users transition and not be a permanent solution, the concerns expressed about the quantity of water allowed under the preference, and the other public comments received, the Department recommends that these rules should not become permanent, but rather should sunset at the end of the year.

IV. Action Item

The Commission is asked to consider adoption of the OAR 690, Division 22 rules, which allow holders of water rights for stock water and human consumption uses – that would otherwise be shut off during a call by a senior water user – to continue use of that water for those purposes. This preference would allow water right holders to continue to divert and use water for stock water and human consumption purposes only during the period of a governor-declared drought. The rules would expire on December 31, 2014. The rules being proposed for adoption are included in Attachment 2.

V. Alternatives

The Commission may consider the following alternatives:

1. Adopt administrative rules, OAR 690, Division 22, as proposed, which would sunset on December 31, 2014.
2. Modify and adopt administrative rules, OAR 690, Division 22.
3. Find that rules are not needed.

VI. Recommendation

The Director recommends Alternative 1, to adopt administrative rules OAR 690, Division 22.

Racquel Rancier
Senior Policy Coordinator
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Attachments

Attachment 1: Summary of Public Comments and Department Responses

Attachment 2: Proposed final OAR 690, Division 22 rules

Attachment 3: Oregon Revised Statute (ORS) 536.750

Attachment 4: Transcript of Public Hearing on July 24, 2014

Attachment 5: Transcript of Public Hearing on September 19, 2014

Attachment 6: Copies of Written Comments Received

Attachment 7: Press Release and FAQs

Attachment 8: OAR, Division 22 Hearing Draft

Summary of Public Comments Received and Department Responses

Between July 1 and September 19, 2014, the Department received comments supporting and opposing the proposed rules. All comments received by the deadline were reviewed and considered. Summaries of the comments received and the Department's responses are included below. The complete written and oral comments received are included in Attachments 4-6.

Theme 1. Support for Rule

Andrea Rabe – Rabe Consulting

- In support of rule change. Important for the community to have the rule change. It is important to have these rules in place so that we can continue with the necessities of livestock and drinking water without having to wade through the time-consuming bureaucracy.

Garrett Roseberry – Rancher

- In support of rule change. Without the rule change there would be a negative impact on business owners, homeowners, municipalities, and landowners. It is very apparent that Klamath County is not equipped to handle a long-term drought. This rule change allows the time needed to move forward in a positive direction and develop the tools needed to deal with drought.

Larry Nicholson – Upper Basin Landowner

- In support of rule change. Pulling this temporary rule change right now would be devastating to many folks. Many ranchers applied for subsistence through the NRCS to get wells subsidized and nothing has been approved yet. In the long run we will be self-sustaining, but we need time to get these things done.

Henry Hummel

- Please extend the stock water rule. If we can maintain stock water, we will be able to water the stock that we are keeping.

Linda Long – Chairman of Modoc Irrigation District

- In support of rule change. Our district is very much in need of water after September because the cattle stay around up until December. There is no other way to get water in the Upper Basin. It is critical for our communities as a whole to support this rule change.

Individual, but similar comments from: Becky Hyde, Chet Vogt, Garrett Roseberry, Kevin Newman, Allen Foreman, Randall Kizer, and Jim and Caren Goold.

- Failure to extend the drought relief rule for livestock owners would have significant negative consequences for livestock producers. The ability to access water for livestock in drought conditions regardless of priority date is critical for the sustainability of a livestock operation. The proposed drought rule for Klamath County is the first step in allowing the communities of the Klamath basin to begin to build the capacities and infrastructures to deal with drought conditions. Without the modification, Klamath County will suffer even more economic damage and hardship.

Department's Response: The Department understands that this preference has been important to stock water users in the basin. The Department encourages stock water users to take steps to secure water supplies so that they will no longer need this preference, particularly given the concerns expressed during this rulemaking. Department staff are happy to assist water right holders in understanding how this can be accomplished under the law. Contact your local watermaster.

Theme 2: Groundwater Regulation

Tom Mallams – Klamath County Commissioner

- Striking the word “surface” in the proposed rule seems to be a very strong and very deliberate attempt to regulate groundwater under the surface water statute. It looks like the Department is trying to regulate groundwater the same way it regulates surface water, which has never been done before.

Senator Doug Whitsett

- By using the models that they have, OWRD has changed the burden of proof from the state to the well owner. The well owner must prove they are not causing change instead of the state having to prove that the well owner is causing change.

Representative Whitsett

- We believe that OWRD's computer groundwater modeling fails to rise to the level of the preponderance of evidence proof statutorily required to authorize groundwater regulation in favor of a senior surface water right.

City of Klamath Falls

- The merger of groundwater and surface water could impact the geothermal wells within Klamath County, causing an unintended but related health and safety problem.

Oregon Cattleman's Association – Jim Welsh

- Wouldn't the same outcome be established within rule if there was no reference to groundwater? The inclusion of groundwater assumptions of connectivity to surface water are not scientifically determined within all the river miles of the Klamath area, and it doesn't seem necessary for this inclusion in the rulemaking.

Klamath County Commissioners

- OWRD continues to turn off groundwater and surface water at the same time with no verifiable proof of interference. Their only “proof” is a computer model that agrees with OWRD's assumptions on the connectivity of ground water and surface water.

Klamath-Lake County Farm Bureau

- The Farm Bureau supports the new rule as long as it does not address, impact, or modify how the Department determines whether ground water and surface water are connected for the purposes of regulation and if it does not define how the Department proves that a well substantially interferes with surface water.

Paul Lewis

- I object to the proposed rule due to the following statement from Senator Doug Whitsett: OWRD has not expended the resources necessary to determine by a preponderance of evidence that individual Klamath County wells are connected to surface water and that the regulation of their use would result in timely and effective relief of interference with priority surface water rights. That preponderance of evidence can only be established by individual empirical field well tests that produce data sufficient to prove that the well is connected and is causing timely and effective interference. Because of your failure to determine if a well effects surface flow, you should not be able to shut off any wells until this is proved on a scientific basis. Without this proof, there is no need for a rule to allow stock and human water, since wells cannot be legally shut off.

Department's Response

The proposed rules do not address, impact or modify how the department determines whether groundwater and surface water are connected for the purposes of regulation. It does not define how the Department determines that a well substantially interferes with surface water. These topics are to be the subject of a future rulemaking as required by the Upper Klamath Comprehensive Agreement. The Department will ensure that the rulemaking on groundwater is an open and transparent process to the public. Further information about this process will be forthcoming. This rule allows a groundwater user to continue pumping, despite a shutoff notice, for the purpose of human consumption and stock water use. The Department recognizes that there is less of a need to extend the preference to groundwater users; see Department's response in Theme 4 below.

Theme 3. Authority to Extend the Preference to Groundwater

City of Klamath Falls (July 28, 2014)

- The Department has no statutory authority to interpret ORS 536.750(1)(c) to include groundwater in the temporary preference.

Water for Life

- As contained in subsection (1) of OAR 690-022-0033, the identifying term of "surface water" is apparently modified to "water." Thus, with this modification, it appears the Water Resources Department is attempting to extend the scope of the rules to all waters within Klamath County, as opposed to surface water resources. Water for Life, Inc., opposes this effort to substantially broaden the scope of the administrative rules as they relate to the regulation of water resources during a declared drought. Additionally, we believe the statutory authorities maintained by the Department (ORS 536.700 to 536.780) as they relate to "Emergency Water Shortage Powers" extend to surface water resources. Similarly, we do not believe such authorities grant the Department authority to extend such administrative rules to ground water resources. To illustrate this distinction, one should review existing statutory provisions contained in ORS 536.750(1)(f) (Powers of commission after declaration of drought rules). Such provisions provide for the distinction between the regulation of surface and ground water resources during a declared drought. During a declared drought, in accordance with ORS 536.750 (1)(f), the

Commission may: Utilize an expedited notice and waiting requirement established by rule for the substitution of a supplemental ground water right for a primary water right under drought conditions in place of the notice and waiting requirement provided in ORS 540.524. Thus, such provisions identify the distinction between authorities to regulate surface water resources and ground water resources during a declared drought.

Department's Response: The Department does not agree and believes that both groundwater and surface water are included under Emergency Water Shortage Powers. ORS 536.750(1)(f) does not specify regulation, rather, it provides a tool for water users to obtain water in a drought under an expedited process.

Water for Life

- Finally, Water for Life, Inc. believes the attempt to extend the scope of the proposed administrative rules to ground water resources conflicts with existing statutory provisions regarding the designation of a critical ground water area (ORS 537.730, et seq.). Such provisions provide a process to be followed when ground water resources are limited or insufficient.

Department's Response: Critical groundwater areas allow restrictions on groundwater without regard to priority date. This regulation is occurring not because of the need for a critical groundwater area at this time, but rather to fulfill the call for water by a senior water user.

Theme 4. Need for Rules to Apply to Groundwater

Representative Whitsett

- OWRD should leave the word “surface” in the proposed permanent rule as it appears in its current emergency rule. The exemption is needed because current law does not appear to have a surface water exemption in place to allow diversion for stock water. Even if OWRD had the authority to regulate groundwater pursuant to its Finding of Fact and Final Order of Determination in the Klamath River Adjudication, a call on wells to discontinue the use of groundwater in quantities sufficient to water livestock would be a futile call because it would not measurably benefit the senior priority water right holder.

Similar, but individual comments from: Larry Sees, Joan Sees, Brandan Topham, Virginia Topham, Susan Topham, Bruce Topham

- Please limit the proposed rules to surface water only, withdraw the proposed rules and seek specific legislative approval before issuing rules that merge the legal authority over surface and ground water rights during periods of severe, continuing drought. OWRD continues to turn off ground water and surface water at the same time with no verifiable proof of interference.

Keno Irrigation District

- We can only support the proposed rules if they are limited to surface water only. This should be specifically stated in the final rules as it was in the original proposal.

Frank Hammerich – Rancher

- Opposed to rule change. I believe there are plenty of statutory regulations in place to allow for human and livestock use. Groundwater is already exempt for livestock use. I believe this is an unnecessary rule. They get exempt use for the first 180 days, and there's no reason to make it any longer.

Department Response: The Department recognizes that there is less of a need to extend the preference to groundwater users. Under Oregon law, stock water use is exempt from water right permit requirements, as is domestic water use up to 15,000 gallons per day. While these types of exempt uses can still be subject to regulation, in all likelihood, small quantities are unlikely to be determined to provide an effective and timely relief to senior users and, therefore, unlikely to receive a shutoff notice. Since this rule only benefits users that receive a shutoff notice, the extension to groundwater has a limited effect – mostly to allow the one well of the City of Klamath Falls to continue pumping for human consumption. Generally, most other groundwater users would not need to exercise the preference. In addition, there is no rule that automatically allows for these uses to occur for 180 days. Temporary rules require action by the Commission.

Theme 5. Need for Rules

Water for Life

- Another significant policy question is whether there is actually a need for the administrative rule being proposed. As contained in ORS 536.310, preferences for human and livestock consumption during periods of insufficiency are clearly identified. Provisions contained in ORS 536.750 additionally provide the Commission clear authority during a drought period.

Department Response: ORS 536.310(12) is a policy statement that applies to planning and permitting. It does not provide a blanket preference for these uses across the state without regard to prior appropriation for the purposes of regulation. The fact that ORS 536.750(1)(c) allows the Commission to grant a preference during drought demonstrates that this has not been the case. The rulemaking action is the way for the Department to grant the preference as authorized under ORS 536.750(1)(c). Pursuant to advice from Department of Justice, the preference must be granted via rule.

Theme 6: Public Awareness of Rulemaking

City of Klamath Falls (July 28, 2014)

- Notice of the rulemaking proceeding was inadequate.

Oregon Cattleman's Association – Jim Welsh

- There seems to be an apparent lack of public notice, which was brought up by many of the landowners in the Klamath area.

Klamath County Commissioners on August 7, 2014

- The July 24, 2014 public hearing did not give citizens and public official's adequate time to prepare oral and/or written comments.

Department's Response: The Department values public input in the rulemaking process. As a result of the comments received at the first public hearing, the Department undertook efforts to further engage the community in the rulemaking process to understand the full spectrum of opinions about the rules. The Department extended the public comment period until September 19, 2014 and scheduled another public hearing on September 18, 2014. The Department issued a press release on the rulemaking and an article appeared in the *Herald and News*. In addition to contacting individuals in the Basin and meeting with the individuals to go over the rules, the Department ran a public notice advertisement in the *Herald and News*. The Department encourages individuals to sign up for our rulemaking mailing list, which can be found on our website.

Theme 7: Need for Rules only in Klamath County

Tom Mallams – Klamath County Commissioner and Irrigator - 2nd Public Hearing

- Also, it is problematic that this rule only applies to Klamath County. Why is Klamath County being singled out when Jackson County right next door hasn't had a study done yet? Jackson County has been adjudicated for years whereas we just had the adjudication for Klamath County.

Frank Hammerich – Irrigation District Manager

- Main concern is the singling out of Klamath County and there is no reason to give the cities and cattle preferential treatment.

Representative Whitsett

- We find no viable reason or justification for this permanent rule to apply only to the Klamath River watershed in Klamath County. Nine other counties are under gubernatorial drought conditions, and none of those counties have a rule similar to this.

City of Klamath Falls (July 28, 2014)

- There is no need for a permanent rule affecting only Klamath County.

Oregon Cattleman's Association

- Why is it necessary in the Klamath area when it isn't necessary statewide, and if the need for a permanent rule isn't necessary elsewhere wouldn't the same developments in other similar situations also develop in the Klamath over a couple of years or more without the need for a permanent rule?

Klamath County Commissioners on August 7, 2014

- The rule changes are dealing with statewide rules that are now being changed specifically for Klamath County. It is not clear whether these changes could be extended to other Counties or the entire State of Oregon.

The Klamath Tribes

- We are troubled by the Klamath-only aspects of the proposed rules and need reassurance that the unique demands made of senior water rights holders in the Klamath Basin are legitimate. If it is true that the Klamath Basin needs time to achieve the sophistication described as being present in other basins, then the proposed rules should sunset soon.

Water for Life

- Third, with respect to the proposed administrative rules, Water for Life, Inc., would like to raise a number of pertinent policy questions. During the 2014 calendar year, the Governor has issued five Executive Orders declaring drought conditions in 10 individual Oregon Counties. In the event the proposed administrative rules are intended to address the regulation of surface water resources during a declared drought, it would seem appropriate such rules would be extended to the other county jurisdictions on a uniform and consistent basis.

Brandan Topham

- Opposed to rule change. It is an unneeded rule. No other county has it, why do we need it? If you're going to do this rule change, do it to the whole state. You are picking on us because we have limited financial means. You're setting the precedent here to eventually apply it to the whole state and shut everyone down. This rule only helps the Modoc Irrigation District and the city of Klamath Falls.

Virginia Topham

- I don't think you should be targeting Klamath County.

Department's Response: Other areas of the state have a long history of regulation under the doctrine of prior appropriation. Therefore, other basins across the state already have infrastructure and systems in place to address human consumption and stock water needs during a call by senior users. The Klamath Basin is unique in that regulation began for the first time in 2013 in most of the basin, as a result of the completion of the first phase of the Klamath Adjudication. This meant that senior pre-1909 water users could begin to request enforcement of their water rights. In the Klamath Basin, stock owners and cities have not been faced with regulation in the past and drought has exacerbated the potential for impacts. Therefore, systems are not fully in place to ensure that both people and stock have access to water outside of systems used under their existing water rights. Although work began last fall to secure stock water supplies, the basin needs additional time to transition and get these supplies in place.

The statute (ORS 536.750) that authorizes certain actions during a governor-declared drought, including allowing for a preference for human consumption and livestock, was enacted in 1989. Prior to 2013, staff were unable to find evidence that the preference had ever been enacted. Aside from a small adjudication on Phelps Creek, no other adjudication has been completed since the 1989 statute passed, except the administrative phase of the Klamath Adjudication (Phelps Creek Final Order of Determination 11/1988; Final Decree Issued 12/1989). This supports the Department's assertion that this is needed only in Klamath because the area has not yet adapted to regulation.

As regulation began in Klamath in 2013, the Oregon Cattleman's Association requested that the Department enact the preference for stock water and human consumption in Klamath. The Department and Commission agreed. While other counties were also under a governor-declared drought in 2013, the Department did not receive a request for the preference in these other counties.

In other basins, individual water users identify measures necessary to meet their water needs. These measures generally include those described below, as well as other tools made available under ORS 536.750.

When livestock would otherwise have legal access to both the use and source of the surface water source, under Oregon law, a water right for stock water use is not required when the water is diverted to a trough or tank through an enclosed water delivery system that is equipped with an automatic shutoff or flow control mechanism, or can return water to the stream through an enclosed delivery system. Therefore, in many parts of the state, cattle owners have installed devices that allow them to access water.

In many areas where surface water is not available, stock owners have wells. A water right is not required for stock watering, or use of water for domestic purposes up to 15,000 gallons per day from a well; however, new wells must be recorded with the Department. Wells exempt from water right permit requirements could be subject to regulation [ORS 537.545(4)], but due to the relatively small amount of water generally necessary for stock water, their potential for substantial interference is less likely. In other words, they are unlikely to provide a timely and effective benefit to the senior user. In addition, in many areas of eastern Oregon, there are small reservoirs that provide water for stock. Finally, in dry areas of the state, stock owners may make management decisions such as moving stock to areas where water and food are available. Since many dry areas of the state have been subject to regulation, they generally have taken steps to ensure that they have access to water.

Theme 8: Sunset on Rules

Klamath-Lake County Farm Bureau

- ... and we hope that it sunset in December to make sure there are no other problems.

The Klamath Tribes

- Making the rules permanent is unnecessary. The rules are emergency rules, and not intended to provide stockmen with permanent relief from drought.
- There was no rulemaking to provide water to tribal fisheries at the expense of other water users...now that the Tribes are asked to provide relief to others, it should be assured that exemptions to the prior appropriation doctrine are absolutely necessary, are not prolonged inappropriately, and are as narrow as possible.

- The likely impact of expiration of the emergency rule is not great. The BOR's Klamath Project, whose call on the Klamath system is a large part of the basis for invoking the emergency rule, is near the end of its irrigation season and its call will soon end. Also, the Basin is at or near the time of year when much of its livestock is shipped to other locations for the winter. It is not the responsibility of the Department or the Tribes to provide continued relief.
- An extension of the rule through next year, 2015, with the rule automatically expiring at the end of that year, would begin to address the necessary limitations. It will send a clear message that emergency relief of this type will end soon because it is intended only to provide a short transition as people adjust to the new situation in the Klamath Basin.
- We are troubled by the Klamath-only aspects of the proposed rules and need reassurance that the unique demands made of senior water rights holders in the Klamath Basin are legitimate. If it is true that the Klamath Basin needs time to achieve the sophistication described as being present in other basins, then the proposed rules should sunset soon.

Joanna Lyons-Antley – City Attorney for City of Klamath Falls - 2nd Public Hearing

- The City appreciates that this rule change will benefit us. One of the concerns I have is the merging of surface and ground water. Clarification in the rules about this is our main concern. I think it would be appropriate to have a sunset at the beginning of the year due to the negative sentiment.

Tom Mallams – Klamath County Commissioner and Irrigator - 2nd Public Hearing

- I would like these rules to sunset at the first of the year.

Oregon Cattleman's Association

- Why is it necessary in the Klamath area when it isn't necessary statewide and if the need for a permanent rule isn't necessary elsewhere wouldn't the same developments in other similar situations also develop in the Klamath over a couple of years or more without the need for a permanent rule?

Department's Response: The Department agrees that this is not a permanent solution to drought in the basin, but rather a temporary means to assist water users as the basin transitions. Water users in the basin will need to take steps necessary to secure supplies, as water users in other basins across the state have. Last year, efforts began to develop stock water supplies. Stock water users and domestic water users that benefitted from the preference in 2013 and 2014 should continue to work towards more secure supplies. (Also see response to Theme 7 above).

Theme 9: Quantity of Water Allowed Under the Preference and Protection of Instream Flows

WaterWatch

- Limits should be inserted on the amount that can be diverted and/or appropriated to serve human and livestock consumption needs to limit the impact that these rules would have on other water right holders and scenic waterway flows. Clarify that conveyance water is not included in this exception. Require the water right holder to certify the amount to be used and a commitment to stay within required limits

Rocky Liskey

- We are only allowed 15 gallons per head of cattle. That is certainly not enough in 85/90 degree heat. Please include guidance in your rules that are more in line with the needs of a 1200/1500 pound cow and her calf.

Luther Horsely – Farmer/Rancher

- No opinion for or against this rule change. When OWRD allocates an amount for stock use they should take into account the soil composition and topography rather than a set amount per cow. When you have cattle drinking out of a ditch and that ditch gets shut off, the cattle will go down there and get mired in the mud. This causes many problems.

The Klamath Tribes

- The rules should require the most efficient possible use of emergency water. As written, the proposed rules can be read to allow sufficient diversion of water to fill a long, leaky canal in order to deliver water to stock at considerable distance from the water source.
- The rules should not allow for indefinite expansion of human and stock demand. As written, the proposed rules allow the demand for emergency water to expand as the human and livestock populations grow in the Basin. Such growth can cause the emergency rules to eventually overwhelm the seniority system.
- The rules must minimize flow reductions in Basin streams. As written, the proposed rules do not prevent the complete dewatering of a stream and consequent destruction of fisheries.
- Any extension or modification of the rules should provide that the emergency drought rules apply only when the Specified Instream Flows (Section 3.20 of the Upper Basin Comprehensive Agreement) are being met.

Department Response: The Department believes that these comments support placing a sunset on the rule, given that some comments requested that more water be allowed to be provided for stock watering, while other comments suggested limits be placed on the amount. (See also comments on Theme 7 and 8 above).

Theme 10. Applicability and Right of Preference to Make a Call

City of Klamath Falls on August 21, 2014

- The City recommends adding language to the proposed rule that clearly states that the preference for human consumption and stock water use only applies to water rights that are regulated.

Klamath-Lake County Farm Bureau

- We believe that Section 1 of the rule could be interpreted to give the right of a neighbor or town to call on irrigation water of a senior water right if their well was going dry. We believe that the intention of the rule is to only protect the neighbor or town from having their water right called on, not to let them make a call on other users. We hope this statement would be clarified before the rule is adopted, and we hope that it sunset in December to make sure there are no other problems.

Scott Fenters – Board Member of Klamath/Lake County Farm Bureau

- I am a Potato grower. I am not saying I am for or against the rule, but my concern is that the rule doesn't say you can't shut other people on the aquifer off in order to allow for human consumption and stockwater.

Department's Response: The Department agrees. The purpose of these rules is to allow water right holders that are being shutoff due to a call by a senior water user, to continue to use water for human consumption and stock water purposes. Therefore, the preference can only be exercised by those water rights that are regulated. The rules have been modified to make that clearer. In addition, while the statute and rule could be interpreted to allow for a call to satisfy the preference, the Department does not seek to implement it in that manner. The rules have been modified to clarify that the preference does not allow the water right holder exercising the preference to make a call for water to satisfy the preference. Rather, the preference only allows them to continue to take water for human consumption and stock, provided that it is available at their point of diversion.

Miscellaneous Topics

Types of Uses Authorized - Frank Hammerich – Irrigation District Manager

- There is no reason to give the cities and cattle preferential treatment.

Department's Response: The Oregon Legislature, recognizing the potential impacts to human and animal welfare during a drought, authorized the Commission, pursuant to a declaration by the Governor that a severe, continuing drought exists, to grant a temporary preference to water rights for human consumption or stock watering use over other water uses regardless of priority date (see ORS 536.750(1)(c)). The Department has no authority to grant a preference to other uses or rights. Its authority is limited to human consumption and stock water.

Curtailment of Other Uses Under the Right

Joanna Lyons-Antley – City Attorney, Klamath Falls

- The City of Klamath Falls will become the water police and be in charge of making sure everyone is using their water for domestic use.

William Adams – Klamath Falls City Counselor

- Opposed to rule change. I'm concerned that this rule change will make it more difficult for our water department to operate. You're going to turn us into the water police. We supply water to a number of different things that aren't considered domestic use. It will be incredibly difficult for us to go out and monitor this.

Department's Response: The Oregon Legislature, recognizing the potential impacts to human and animal welfare during a drought, authorized the Commission, pursuant to a declaration by the Governor that a severe, continuing drought exists, to grant a temporary preference to water rights for human consumption or stock watering use over other water uses regardless of priority date (see ORS 536.750(1)(c)). The Department has no authority to grant a preference to other

uses or rights. Its authority is limited to human consumption and stock water. The intent of these rules is to allow holders of water rights for stock water and human consumption uses – that would otherwise be shut off during a call by a senior water user – to continue use of that water for those purposes during a governor-declared drought. In other words, if a water right holder is being regulated, the water right holder can choose to exercise the preference, and, therefore, continue to divert and use water for these uses. Thus, the rule would benefit both surface water users and groundwater users that receive a shutoff notice during a drought-declaration.

In addition, the Department notes that according to the City of Klamath Falls Water Conservation and Management Plan, the City has agreed to undertake a number of actions to reduce or curtail water use during droughts. Cities do have responsibility for encouraging residents to conserve water, and can require water curtailments for certain uses and purposes in times of short supply.

Justification - City of Klamath Falls (July 28, 2014)

- The Department lacks necessary justification for the rules.

Department's Response: The City of Klamath Falls sent in additional comments after this comment noting that they now understood that extending the rule to groundwater would benefit the City; it is unclear if this comment is still a concern. Drought exacerbates water supply challenges and can pose a serious risk to both humans and animals. The intent of these rules is to allow holders of water rights for stock water and human consumption uses – that would otherwise be shut off during a call by a senior water user – to continue use of that water for those purposes during a governor-declared drought. In other words, if a water right holder is being regulated, the water right holder can choose to exercise the preference, and, therefore, continue to divert and use water for these uses. Thus, the rule would benefit both surface water users and groundwater users that receive a shutoff notice during a drought-declaration.

Fiscal Impact - City of Klamath Falls (July 28, 2014)

- The fiscal impact analysis is inadequate.

Department's Response: The Department believes that the fiscal impact analysis is adequate. The fiscal impacts in the City's comments would result from regulation, not from the preference. Furthermore, there is no requirement for a water right holder to exercise the preference. Since this rule allows the water right holder, that would otherwise be regulated off, to continue limited uses, the water right holder can choose whether or not to exercise the preference. If the costs exceed the benefits of continuing the limited use, the water right holder will not exercise the preference and will utilize other means. The Commission only has authority to grant a preference for human consumption and stock during a governor-declared drought. It does not have authority to do this for other uses such as industrial or fish.

Temporary vs. Permanent - Trish Syler – Klamath Falls City Counselor

- I ask the Commission to limit the number of continued temporary rules and expedite the process by which permanent rules are put in place. Temporary rules do not give anyone any certainty.

Department Response: These rules, as originally proposed by the Department, would have eliminated the need for temporary rules. However, given the concerns expressed during this rulemaking process, the Department is inclined to recommend that these rules sunset.

Tribal Federal Reserved Rights - The Klamath Tribes

- It is unlikely that the proposed rules in any form could be enforced at the expense of the Tribal Federal Reserved Water Rights. The Tribes' water rights cannot be involuntarily reduced or compromised by state action. Both federal and state courts have made this clear.

Department's Response: Comment has been noted.

Proof of Need - The Klamath Tribes

- The proposed rules, once invoked by the Governor's declaration of a drought, potentially apply indefinitely. This seems backwards because it essentially makes the emergency rules permanent until further action demobilizes them. It puts the momentum behind continuing application of the rules by making the burden one of showing the drought has eased, rather than showing the drought, and the need for application of the extraordinary rules, continues.

Department's Response: The emergency rules only go into effect for the duration of the governor's drought declaration and during the effective period of the rule. The Executive Order generally includes an expiration, at which time the preference would automatically no longer be in effect. Before the governor will declare drought in an area, the local government (generally the county) must first request the drought declaration. Thereafter, the Water Availability Subcommittee and the Drought Council review the hydrologic conditions in the region including weather, water supplies, streamflows, precipitation, and snowpack. The Drought Committee then makes a recommendation on whether the drought declaration is warranted. At that point, the Governor then makes the final determination on whether to issue the drought declaration. Therefore, there is a process in place for evaluating requests for drought declarations and ensuring they are warranted. That said, the Department understands that this does not necessarily address the concerns expressed in these comments. These comments have been noted should a preference be considered in the future.

Penalties – The Klamath Tribes

- The rules should be written in a way that more effectively empowers the Department to prohibit users from using water meant for stock water to irrigate lands along the above-mentioned long, leaky canal.
- Either the proposed rules should include explicit penalties for abuse, or they should refer directly to other enforcement and penalty mechanisms available to the Department. Otherwise, experience teaches that junior water users can be expected to take more water than is strictly needed under a tight emergency watering regime.

Department's Response: Junior water right holders that receive a shutoff notice and continue using water for uses not authorized under the preference are using water illegally and subject to enforcement actions as part of the laws governing regulation of water. In addition, this does not allow the use of water without a water right, which would also be an illegal use.

Unauthorized/illegal uses are addressed through other statutes and rules, not these rules. Also see response to Theme 9 above.

Reference to Statutory - Water for Life

- First, absent of express statutory authority, administrative agencies lack the ability to promulgate, or in this case, modify administrative rules. In this respect, we suggest the specific reference to the “Purpose” of the rules retain the term “Statutory” for current, as well as future review.

Department Response: Comment has been noted.

**OREGON ADMINISTRATIVE RULES
WATER RESOURCES DEPARTMENT
CHAPTER 690
DIVISION 22
EMERGENCY WATER PROVISIONS – KLAMATH COUNTY**

690-022-0020**Purpose and ~~Statutory~~ Authority**

- (1) The purpose of these rules is to implement ORS 536.750(1)(c), which- authorizes the Commission, pursuant to a gubernatorial declaration that a severe, continuing drought exists, to grant a temporary preference to water rights for human consumption or stock watering use over other water uses regardless of priority date. ~~These rules address an immediate threat to the health and welfare of the people of Oregon that would otherwise occur if regulation of senior water rights in Klamath County curtailed or prohibited use of surface water for human consumption and stock watering as defined in these rules.~~
- (2) ~~Executive Order No. 14—01: Determination of a State of Drought Emergency in Harney, Klamath, Lake and Malheur Counties Due to Drought and Low Water Conditions, was signed by Governor John A. Kitzhaber, M.D., on February 13, 2014.~~
These rules, pursuant to the Governor’s Executive Order no.14-01, dated February 13, 2014, are effective upon filing, and shall remain effective until December 31, 2014. During the effective period of these rules and a drought declaration under ORS 536.740 in Klamath County, the Commission grants a preference in Klamath County of use for water rights for human consumption or stock watering as provided in this rule. The temporary preference of use shall only apply to Klamath County and shall remain in effect only during the effective time period of the Governor’s drought declaration in Klamath County while these rules are in effect.
- (3) ~~These rules become effective on April 1, 2014 and will remain in effect for 180 days from the effective date or for the term of Oregon Governor Kitzhaber’s Executive Order No. 14—01, whichever is shorter.~~
These rules are repealed on December 31, 2014.

Stat. Auth.: ORS 536.025; 536.027; 536.750

Stats. Implemented: ORS 536.750

690-022-0025**Definitions**

~~The~~Unless the context requires otherwise, the words and phrases used in Division 22 have the following meaning:

- (1) “Commission” means the Oregon Water Resources Commission.
- (2) “Department” means the Oregon Water Resources Department.
- (3) “Human Consumption” means the use of water for the purposes of drinking, cooking, and sanitation.
- (4) “Stock Watering-~~Use~~” means the use of water for consumption by domesticated animals and wild animals held in captivity as pets or for profit.

Stat. Auth.: ORS 536.025; 536.027; 536.750

Stats. Implemented: ORS 536.750

690-022-0030

Applicability and Preference

Notwithstanding any provision of Oregon Administrative Rules Division 690 to the contrary: During the effective period of a drought declaration under ORS 536.740 in Klamath County, and notwithstanding any provision of law to the contrary, the Commission grants a temporary preference for human consumption and/or stock watering as follows:

- (1) ~~These~~ The preference described in these rules ~~apply~~ applies only to the diversion or use of ~~surface~~ water within Klamath County.
- (2) Uses of ~~surface~~ water for human consumption and stock watering, to the extent authorized under a water right certificate, permit, decree, or findings of fact and order of determination issued in an adjudication subject to ORS Chapter 539, are granted a preference over all other water uses regardless of the priority date of the ~~underlying~~ water right for stock watering or human consumption.
- (3) The Department will regulate water rights in Klamath County in accordance with the preference for water rights for human consumption and stock watering use granted in as provided in subsection (2) of this section. 690-022-0030 (2) of these rules.
- (4) ~~Political subdivisions~~ Water right holders exercising the human consumption or stock water preferences established in this rule shall assure curtailment of water uses unrelated to the preference ~~consistent with this rule.~~
- (5) This preference does not authorize a water right holder exercising the preference to make a call for water.
- (6) The option for a water right holder to exercise the preference only applies to a water right holder being regulated by the watermaster in order to satisfy a senior water right.

Stat. Auth.: ORS 536.025; 536.027; 536.750

Stats. Implemented: ORS 536.750

536.750 Powers of commission after declaration of drought; rules. (1) Notwithstanding any provision of ORS chapters 536 to 543A, after a declaration that a severe, continuing drought exists, the Water Resources Commission may:

(a) Issue without first conducting a hearing under ORS 537.170, a temporary permit for an emergency use of water;

(b) Allow a temporary change in use, place of use or point of diversion of water without complying with the notice and waiting requirements under ORS 540.520;

(c) Notwithstanding the priority of water rights, grant preference of use to rights for human consumption or stock watering use;

(d) Waive the notice requirements under ORS 537.753 and the report required under ORS 537.762;

(e) Allow a temporary exchange of water without giving notice as required under ORS 540.535; and

(f) Utilize an expedited notice and waiting requirement established by rule for the substitution of a supplemental ground water right for a primary water right under drought conditions in place of the notice and waiting requirement provided in ORS 540.524.

(2) The commission by rule may establish procedures for carrying out the provisions of this section and a schedule of fees that must accompany a request under subsection (1) of this section. [1989 c.87 §3; 1999 c.873 §20; 2001 c.788 §1]

**Klamath Rulemaking Hearing
July 24, 2014
Public Comment**

General Introduction

John Roberts: My name is John Roberts, I will be serving as the Water Resources Department's Hearings Officer today. The purpose of this hearing is to take public comment on proposed rules in OAR Chapter 690, Division 22 regarding preference for human consumption and stock water use in Klamath County during a Governor-declared drought. Any final rules will be adopted by the Water Resources Commission. Staff are available in the back of the room to answer any questions. You all know Scott and Racquel, I believe, so feel free. I will not be responding to questions as my role here is to take public comment on the proposed rules.

The Department will review the public comments made during the public comment period, and a subsequent staff report will address issues raised by your comments. In addition to the opportunity to present oral arguments or comments at this hearing, anyone may submit written comments until 5:00 pm on July 29, 2014, which is the close of the public comment period. Comments received after that time will not be reviewed or considered by the agency unless the agency decides to extend the public comment period for everyone.

Each person wishing to comment orally at this hearing should complete one of the registration cards located on the information table in back and bring it to me. I will use those cards to call each person when it is his or her turn to testify. When I call your name, please come forward, state your name, and where you are from. If you represent an organization, please identify the organization and remember to state your name. You may then present your comments. If you have written material to enter into the record, please say so and try to summarize it. Give me a copy of that material if you have not already submitted it to the agency.

Please note the following:

- Please turn off cell phones during this hearing.
- Copies of the draft rules and the opportunity for public comment are provided on the table at the back of the room. If you have any questions about the rules, Racquel and Scott are in the back of the room to speak with you, outside. Are there any questions on how the hearing will be conducted?
- I will begin the hearing in about 2 or 3 minutes, everyone seems about ready.

Formal Hearing

This hearing is now in session and is being tape recorded to maintain a permanent record. My name is John Roberts, and I am the hearings officer. Today is July 24, 2014, and the time is 6:08 pm.

The purpose of this hearing is to provide an opportunity for public comment on proposed rules in OAR Chapter 690, Division 22 regarding preference for human consumption and stock water use in Klamath County during a Governor-declared drought.

ORS 536.750 authorizes the Oregon Water Resources Commission, upon a gubernatorial declaration of drought, to grant preference for water use for human consumption and stock watering over other uses of water regardless of priority date.

The purpose of this rule is to prioritize stock and human consumption uses of water, whenever there is a Governor-declared drought in Klamath County. Human consumption purposes include drinking, cooking and sanitation, which are essential to maintaining basic human health. Stock watering purposes includes the use of water for consumption by animals held in captivity as pets or for profit, a necessity for animal welfare. The rules would allow the continued use of water for stock watering and human consumption purposes by junior water right holders in Klamath County, who would otherwise be regulated off in order to meet the call of senior surface water rights in the Klamath Basin during a Governor-declared drought.

In addition to presenting oral arguments at this hearing, anyone may submit written comments until 5:00 pm on July 29, 2014, which is the close of the public comment period. If you want to submit written comments, please see the contact information on the back table that Racquel has.

Comments received after 5:00 pm, July 29, 2014, will not be reviewed or considered by the agency unless the agency decides to extend the public comment period for everyone. If you have questions about the rules, staff will be available as I stated previously.

The Water Resources Department will not respond to questions during this hearing. After the close of public comment period, Department personnel will prepare a staff report, which will be available from the Department.

The first request for comment is from Joanna Lyons-Antley. Did I get that right? Welcome.

Joanna Lyons-Antley: My name is Joanna Lyons-Antley. I am a city attorney for the City of Klamath Falls. I apologize my comments are not well organized as I found out about this about two hours ago. To the extent that I understand it, it merges the surface and ground-water rights, the proposed rules do. This differs from the previous regulation which only created a situation where only regulated surface water rights. The City is concerned about that, because Conger Wellfield supplies the City of Klamath Falls the majority of its water. And it is used not only for domestic purposes, which of course would be protected by this, but also for industrial uses, for irrigation, and for other uses. So to the extent that the proposed rule does that the City of Klamath Falls objects to it. I think this also creates unintended consequences. I don't know if that type of profits with stock watering is necessarily the, if there becomes a shortage of water, what we would be concerned about the uses, the prior uses we have been using for our wells. Truthfully, it would become a regulation nightmare for the City of Klamath Falls. We would be regulating it and we would become the water police in a lot of ways to ensure that folks that using our well water are using it for domestic purposes. That is the extent of my comments, and I may have more. Thank you.

John Roberts: Thank you. Others? Commissioner Tom Mallams.

Tom Mallams: Good evening. My name is Tom Mallams, I am a Klamath County Commissioner, but I am also a small time irrigator in the Upper Basin, so I need to openly state that there is a potential perceived conflict of interest. The State Ethics Board said "no there isn't" on one occasion already, so I feel very comfortable speaking here today as a Commissioner and as an irrigator at the same time. I do have

some thoughts as an irrigator because I do have extensive knowledge and history here irrigating since the mid 70's in the Upper Klamath Basin, so I do have a lot of knowledge there. But the first thing I want to do as a County Commissioner is to formally request for an extension of this public comment period, and request another public hearing here, 60 days out. I know there is a time limit on the temporary rule, but at this time of year that all the irrigators in the Upper Basin and all over the Klamath Basin are very, very busy. I talked to a number of them today and yesterday. They wanted to be here but there was no way they could physically be here because of crops, they have to get their crops in. They have thousands of acres of hay on the ground, the weather has been very uncertain. We have had some rain showers that are devastating to the hay producers. So they could not be here. They have a strong desire to be here and provide public comment, but the timing doesn't allow that to happen.

My comments on the proposed language of this, I find it very disturbing when you strike the word "surface" out of the proposed rule here, it is what to me seems to be a very strong and very deliberate attempt to change the use of surface water for human consumption and stock water to include groundwater, usage as being regulated under surface water statute. I don't believe that's appropriate. I don't think there are statutes to back that up. It looks to me like they are trying to a backdoor methodology to regulate groundwater the same time they regulate surface water, which has never happened before. The only time I believe that's ever happened was in a critical groundwater area designation. That is not present in Klamath County. I again find it very disheartening that our Oregon Water Resources Department has signed the settlement agreements that are in place, or trying to be put into place, all three of them, the KBRA, KHSA and the new Upper Basin Agreement. In those agreements, it says all signatories have to do everything they can and possible, and I paraphrase, to make sure these agreements go forward, including legislation and so forth. I think that puts the Oregon Water Resources Department at a very tenuous spot at best, where they are agreeing to support a direction before it is even legislated or passed by anybody. And that is what seems to be happening now, they are passing and pushing forward directions that support those agreements without what you might call due process, and again in this case, the irrigators haven't had the chance to really be here to voice their concerns. The statutes I believe clearly draw distinctions between surface water and groundwater. These rules here and other ones that are in the wings, so to speak, that I have knowledge of, support the language in those agreements which ties groundwater and surface water together, changing Oregon statute. Or modifying it, however you want to term that. I find that extremely disheartening since I've been involved in these water issues since the adjudications first started. For decades and decades we've been told that groundwater and surface water is completely different, there is no correlation there. Many people drill wells with that assurance from Oregon Water Resources Department, they find out, gosh, it's not true now. It was true back when they drilled their wells, but now it's not. Obviously, groundwater will be regulated first, in most cases because it is going to have a very junior water right. That is going to devastate the entire economy of the Klamath Basin. It has a strong, strong potential, very definitely. I would say it's more than a potential, but I would say a real threat to our economy here. As a Commissioner, I represent all the citizens of Klamath County and the citizens of Klamath County have time and time said again and again that they don't want this kind of regulation, they don't agree specifically with the documents that are being pushed by Oregon Water Resources Department. I am a product of that, to some extent, so every election has shown that by a gigantic margin. They don't agree with this direction, the citizens don't agree with that. Where that doesn't mean their interpretation of the statute is correct, but I believe they are correct. I believe the direction that the Oregon Water Resources Department is going is not the right direction. I don't think they have the statutory authority to do what they are doing. I think they need to be backed up, and have more public comments on the direction they are trying to go. The Klamath Basin is a very troubling area for water demands, there is no doubt about it. They talk about the water wars for a hundred years.

That's true. I've been part of a lot of those disagreements and things over the years. But the Klamath Basin can solve those problems here, not with all the help of all the federal agencies and environmental groups. That was proven back in 2005 when they had a tentative agreement signed in Greg Walden's office. I think that's where those agreements should be crafted, here locally, without all those numerous stakeholders that I had the unfortunate pleasure of meeting for a number of years with in Sacramento and Portland and Redding through the KBRA process. I wasn't a party of the KHSA agreement process because I was excluded from those meetings a number of times because I refused to sign an addition confidentiality agreement. But more to the point here tonight is; I know we aren't here to discuss all those agreements, but they are tied to this proposed rule-making modification, and that's where I find, again this is very disheartening. I think we need to step back and think about what the Oregon Water Resources Department is actually trying to do here. It is going to devastate communities, complete communities. These are communities I represent. Yes, there are some in the communities that want to go this direction, but as a commissioner, by and large, by gigantic proportions, the citizens say "no". And I talked to a number of the other Commissioners around the State of Oregon, and they are watching this very closely. Because they know that what happens here, could happen to them also. So I think there needs to be some time for other elected officials around the State of Oregon to be more involved in this and can have their input as well. So I guess that would be my comments.

John Roberts: The question I have for you is, knowing the Ag schedule, you want the comment period open or another hearing in October, or something like that?

Tom Mallams: That would be ideal, yes. I know this rule expires in 180 days. At the end of 180 day I think there could be an extension, I am assuming some of this. And the irrigation season would be winding down, not necessarily in September, but October is a much better time frame for the irrigator to participate in the Hearing. And I think it would be very appropriate to have that opportunity, for the irrigators to do that, and for the rest of the community as well. I mean this didn't creep up on us overnight. But it was fairly short notice and I think there are a lot of citizens who would like to participate in this.

John Roberts: OK. Thank you very much.

Tom Mallams: Thank you.

John Roberts: Senator Doug Whitsett.

Douglas Whitsett: My name is Doug Whitsett, I am a State Senator, representing this area. I reside at 23131 North Poe Valley Road, Klamath Falls. I have several comments. ORS 536-750 is a statute related to drought declarations, recent water drought declarations statewide. And I really do need to have some clarification as to why we would be establishing a rule only for Klamath County no matter what auspice that rule would be promulgated. Why if it's good for Klamath would it not be good for the rest of the State.

I also share the other speakers' concern regarding the incorporation of groundwater in this surface water regulation. As you know, the current law and regulations says that if the well is constructed between a quarter of a mile and mile from a surface water source, the proof of substantial and timely interference is borne by the State, before they can regulate. The state has created some groundwater models, and I am certainly not a model expert, but it would seem to me that those models have some suspicious holes in them. I would be very concerned, and I would be very interested to hear what the

statistical confidence in those models are and how they achieved those, that statistical confidence. But by using those models, Mr. Commissioner, Mr. Chair, the Water Resources Department has uniquely changed the burden of proof from the State to the well owner. In testimony in the Capitol, the Water Resources Department Director and others, has stated that the Department is really unable to measure the effect of a single well, but they are confident that the effect, the accumulative effect that is demonstrated by the models, actually is measurable. So if you change the burden of proof to the well owner, and there is no way that the well owner can measure whether his well is causing the change or not, which is the testimony of the Water Resources Department, then you have really put a box around the well owner. There is no way he can defend his water right.

So, those are some of my concerns, the final thing in the rule it says, that the water user shall ensure curtailment of water uses unrelated to the preference. That also bothers me where you pushed, the Department is attempting to incorporate the regulation of groundwater in the surface water adjudication. This could be construed as an open ended threat if you used your well for anything besides watering your stock and your family, we will shut it down. Thank you. That is all I have to say.

John Roberts: OK. Thank you. Are there others that wish to share?

Frank Hammerich: I might as well throw my two cents worth in.

John Roberts: OK.

Frank Hammerich: I'm Frank Hammerich from Langell Valley, and I am actually a manager of an irrigation district in Langell Valley. My main concern as Senator Whitsett said, is singling out Klamath County. I mean, there is absolutely no reason to extend this, make it a permanent rule for Klamath County. Everybody worried about domestic and livestock, yet somebody's alfalfa field irrigation, they pull the plug all the time. I think we are looking at it at a wrong avenue. I think the Oregon Water Resources Department should say "OK, I think we can make a transfer between an irrigation deal to a municipal deal". And of course, that's a dollar and cents deal. Go with the value based deal and make it work, because just making it a junior right, pretty soon it will be Owens Alley again in L.A. There is no reason to give the cities a preference right to a priority date and the same as the cattle. And that's just my thoughts on the whole thing. That there is no reason to give them preferential treatment. There are other ways around it. Thank you.

John Roberts: Thank you so much. Other comments? OK. Thank you. At this point...

Racquel Rancier: We will take a recess. We won't close it until 7 o'clock.

John Roberts: So if you want to hang around if someone else shows up, we will be open until 7. Otherwise I think I have heard everyone who is here. So this will be on the record, and we will get it put together and copies will be distributed within a week or two.

Racquel Rancier: Comments will be available by the Commission meeting.

John Roberts: Commission meeting will be August 21 and 22.

**2nd Division 22 Klamath Rulemaking Hearing
September 18, 2014
Public Comment**

General Introduction

John Roberts: Any final rules will be adopted by the Water Resources Commission. I will not be responding to questions as my role here is to take public comment on the proposed rules. In addition to the opportunity to present oral comments at this hearing, anyone may submit written comments by 5 PM on September 19, 2014, which is the close of the public comment period. Comments received after that time will not be reviewed or considered by the agency, unless the agency decides to extend the public comment period for everyone.

The Department will review the public comments made during the public comment period, and a subsequent staff report will address issues raised by your comments. The WRC will review the staff report and consider whether or not to adopt these rules during a teleconference next week on September 25th at 10 AM. Additional information about the Commission meeting is available at the back of the room.

Each person wishing to comment orally at this hearing should complete one of the registration cards located on the information table in back and bring it up to me. I will use those cards to call each person when it is his or her turn to testify. When I call your name, please come forward, state your name, and where you are from. If you represent an organization, please identify the organization and remember to state your name. You may then present your comments. In order to ensure that everyone has an opportunity to comment on the rules, please provide comments that are germane to the rulemaking. If you have written material to enter into the record, please say so and try to summarize it. Give me a copy of that material if you have not already submitted it to the agency.

Please note the following:

- Please turn off cell phones during this hearing.
- Copies of the draft rules and the opportunity for public comment are provided on the table at the back of the room. If you have any questions about the rules, Racquel and Scott are in the back of the room to speak with you, outside. Are there any questions on how the hearing will be conducted?
- I will begin the hearing in about 5 minutes.

Formal Hearing

The time is now 6:35. This hearing is now in session and is being tape recorded to maintain a permanent record. My name is John Roberts, and I am the hearings officer. Today is September 18, 2014 and the time is 6:37.

The purpose of this hearing is to provide an opportunity for public comment on proposed rules in OAR Chapter 690, Division 22 regarding preference for human consumption and stock water use in Klamath County during a Governor-declared drought.

ORS 536.750 authorizes the Oregon Water Resources Commission, upon a gubernatorial declaration of drought, to grant preference for water use for human consumption and stock watering over other uses of water regardless of priority date.

The purpose of this rule is to prioritize stock and human consumption uses of water, whenever there is a Governor-declared drought in Klamath County. Human consumption purposes include drinking, cooking and sanitation, which are essential to maintaining basic human health. Stock watering purposes includes the use of water for consumption by animals held in captivity as pets or for profit, a necessity for animal welfare. The rules would allow the continued use of water for stock watering and human consumption purposes by junior water right holders in Klamath County, who would otherwise be regulated off in order to meet the call of senior surface water rights in the Klamath Basin during a Governor-declared drought.

In addition to presenting oral arguments at this hearing, anyone may submit written comments until 5:00 pm on September 19, 2014, which is the close of the public comment period. If you want to submit written comments, send comments to Joshua Spansail at Oregon Water Resources Department, 725 Summer St. NE, Suite A, Salem, OR 97301, or fax comments to 503-986-0903 attention rule coordinator, or email comments to rule.coordinator@wrdd.state.or.us. We can have that information available in the back of the room.

Comments received after 5:00 pm, September 19, 2014, will not be reviewed or considered by the agency unless the agency decides to extend the public comment period for everyone. We have a fair amount of people wishing to testify, so I hope that you would keep your comments as succinct as possible. Again, you can submit comments until the end of the comment period.

I will begin taking comments now. First is Andrea Rabe.

Andrea Rabe: My name is Andrea Rabe, and I'm with Rabe Consulting. I appreciate you taking the time to hear our comments. I am in support of the proposed rule change. It is important for the community to have the rule change to allow for human consumption and livestock watering without having to continually go back through the administrative process with the Governor's Office. We all understand that bureaucracy takes time to move, but unfortunately people and cows need to drink every day. It is important to have these rules in place so that we can continue with the necessities of livestock and drinking water without having to wade through the time-consuming bureaucracy.

John Roberts: Thank you. Garrett Roseberry.

Garret Roseberry: Thank you, my name is Garrett Roseberry, I'm a rancher in Bly, Oregon. I'm in favor of the drought rule modification. Without the rule change there would be a negative impact on business owners, homeowners, municipalities, and landowners. It is very apparent that Klamath County is not equipped to handle a short-term or long-term drought. Our communities are very diversified, and if we have the time we will find ways to mitigate drought, and mitigate the other issues that have come to light in the last two years. This rule change allows the time needed to move forward in a positive direction and develop the tools needed to deal with drought. I appreciate the time to talk.

John Roberts: Thank you. Frank Hammerich.

Frank Hammerich: I'm Frank Hammerich. I am opposed to the rule change. I believe there are plenty of statutory regulations in place to make it go. Exempting groundwater for livestock use? It's already exempt. As far as the city goes, it's a big problem, but I think it can be addressed in other ways. Alternate sources, I mean right now the groundwater rules are within a quarter mile. The administrative rules we've moved it to a mile for interference with surface water. I believe this is an unnecessary rule. Like you said, other basins have been adjudicated for 80-100 years and they addressed this problem in way better ways than this. We run livestock, it's an interesting deal. You get 180 days. If there's no surface water available for 180 days, they're not eating anything anyways. They get exempt use for the first 180 days, and there's no reason to make it any longer.

John Roberts: Thank you. Larry Nicholson.

Larry Nicholson: Hello, my name is Larry Nicholson, and I'm an Upper Basin landowner. I was also a part of the negotiating team for the Upper Basin water settlement. I am in support of the rule change. I think ranchers are trying to get a handle on all of this slowly. Pulling this temporary rule change right now would be devastating to many folks. Many ranchers applied for subsistence through the NRCS to get wells subsidized and nothing has been approved yet. In the long run we will be self-sustaining, but we need time to get these things done. Kind of like our settlement gives us time to get things done.

John Roberts: Thank you. William Adams

William Adams: William Adams, City of Klamath Falls City Counselor. I'm not going to talk about what I was initially going to talk about tonight, because I don't know that it makes sense, and I'm not sure I totally understand this. I'm opposed to the rule change. I'm concerned that this rule change will make it more difficult for our water department to operate. You're going to turn us into the water police. We supply water to a number of different things that aren't considered domestic use. We provide water for industry, golf courses, parks and recreation, our swimming pool, and other things like that that may not be considered a proper use for domestic purposes. It will be incredibly difficult for us to go out and monitor this. Most of our water comes out of the Conger Wellfield which isn't a big problem right now because the lower lake isn't regulated, but if things continue the way they are and they do something on the lower lake as well, we're going to have a real problem. What really gets me is that we're asked to curtail water in two of our wells while KID, who made the call on water this year, is still providing water for irrigation in the south suburbs. I really have a problem with them doing that and other people in the Ag business not getting water. I have a real problem with the way KID operates, and my having to pay dues to them.

John Roberts: Thank you. Linda Long.

Linda Long: I'm Linda Long. I'm from the Upper Basin. I'm Chairman of Modoc Point Irrigation District for one thing. Our district is very much in need of water after September 27th because the cattle stay around up until December. We're in need of that water to continue. There is no other way to get water in the Upper Basin. I also have Crater Lake Realty. I do a lot of rural agricultural real estate. In going around the whole basin, the stock water is very important to this community, especially the Upper Basin. It is critical for our communities as a whole to support this rule change. I believe it is critical to

our communities, our agricultural base, and our farmland. A lot of the farmland is grazed after the crops are taken off, and that isn't an option if there isn't stock water.

John Roberts: Thank you very much. Tom Mallams.

Tom Mallams: Thank you for having this 2nd hearing. I really appreciate that and so do the citizens. My name is Tom Mallams, I am a member of the Board of Klamath County Commissioners. I am also a small time irrigator. I want to make sure you know that. I do have a small land that we irrigate with groundwater and surface water both. I would like to read Representative Whitsett's statement who could not be here today (Rep. Whitsett's statement delivered to OWRD and available in Appendix 6). As a Commissioner, I gave testimony at the last hearing and I find this a little reminiscent of that. As I mentioned, changing the format of this hearing tonight and not having any advance knowledge of that. I specifically had people ask me if they could ask questions, and I specifically told them no. I told them the hearing is only to provide testimony, and they specifically told me they wouldn't come if they couldn't ask questions. I appreciate having the 2nd hearing, but I would have liked to know that there would be a Q & A segment beforehand. It was incorrect not to notify people of that. At first, this whole idea looked appealing. Who doesn't want to keep water for stock and for domestic use? But, is this really needed? There are already exemptions for stock water. Each well has a 15,000 gallon per day ability to be used for stock water and domestic purposes. They will be drilling more wells which will further eliminate the problem. I understand the issue for the cattlemen because this rule will sunset on September 27th, and I really take exception to that. In 2013 and 2014, as a Commissioner, we were lobbied by OWRD and the Governor's office to declare a drought early with the idea that there would be economic incentives for irrigator's. Had we declared drought at a normal time, we wouldn't be in this position. Had we waited a little longer, we wouldn't be in this position. Had we applied on a normal basis, we would have another 30 to 60 days without being shut off. I think there were background motives from OWRD and the Governor's office that I take exception to. There were no economic benefits for the Upper Basin irrigators to speak of. Nothing materialized. I mentioned to staff that I've never seen OWRD and the Governor's Office work that fast to get this approved and get the timestamp on it to allow it to sunset in the middle of our season. Also, it is problematic that this rule only applies to Klamath County. Why is Klamath County being singled out when Jackson County right next door hasn't had a study done yet? Jackson County has been adjudicated for years whereas we just had the adjudication for Klamath County. As soon as the Klamath was adjudicated they got this modeling program out there which is very debatable as to whether it has any veracity at all. Why is Klamath County at the top of the list when the Rogue Valley still hasn't been done? That's a case where that groundwater study puts the burden on those groundwater pumpers if they're going to be in conjunction with the surface water regulations. I believe this is very onerous and very improper, as you heard in Representative Whitsett's comments. Another issue I have personally, and Tom Paul did come to my office today, I appreciated that visit, it was unannounced but I did appreciate it. Interesting that one of the first things he says is the agenda has been changed for tonight, so we didn't start off on a good note, but I did appreciate the visit. In 2013, Tom Paul, Phil Ward, Richard Whitman, and Douglas Woodcock were all in my office and they gave a solemn promise that they would be in constant contact with the Commissioners as these things developed over time. How many times have I had contact with you in my

office? Twice maybe. That is not constant contact. I have only received a couple emails from Richard Whitman. That is not constant contact. I find that extremely disturbing. We are the elected body of all the citizens here. We represent all the citizens, and that's on all sides of the issue, whether they're tribal members, upper basin irrigators, pro-settlement, against settlement, all of them. The simple solution to all of this is don't apply for a drought permit early on like we were encouraged to do. I would like these rules to sunset at the first of the year. That would solve that problem, too. The Governor's drought declaration sunsets on December 31st, so these rules could be extended to the 31st and we wouldn't have this crunch time right now again. Again, this is what I think is nothing more than trying to put pressure on everyone to agree to a settlement that is very iffy and lacks a lot of support. Granted, there is a lot of support, some of my friends and neighbors are supporting it, and I'm not going to criticize them one bit because they have been pushed into a corner with a gun to their head in my opinion by OWRD and the Federal Government. I am extremely dissatisfied with the process going forward. I think it has had an agenda from the very beginning. Anyone that has been involved with this, and a lot of these people behind me have been involved for a number of years, find it onerous that our own government, especially OWRD, are basically trying to put us out of business, in my opinion. OWRD in the past has been a champion for irrigated agriculture, but now I think they are our worst enemies. That is very disheartening. That is nothing personal to the individual staff people, but I find it very disheartening that that is what it has come down to. I do appreciate you having this 2nd hearing and the extended comment period. For future reference, if you are going to have a question and answer session, please notify us in advance.

John Roberts: OK, Brandon Topham.

Brandon Topham: Brandan Topham, I'm representing myself. I'm opposed to the rule change. It is an unneeded rule. No other county has it, why do we need it? If you're going to do this rule change, do it to the whole state. It seems to me that you have singled out Klamath County. You are picking on us because we have limited financial means. You're setting the precedent here to eventually apply it to the whole state and shut everyone down. Anyway, I look at it as an unneeded rule. If it's good for us, make it good for everybody. Near as I can tell, this will only help two things this year. It will help the Modoc Irrigation District. I don't really know how it helps them, but they seem to think it will. The other one is the city. They do have a problem there, but it sounds like this would just make their lives even more difficult than it already is, so just leave it alone and look the other way. You guys are already ignoring a lot of things that shouldn't be ignored, you can ignore a few things that should be ignored.

John Roberts: Thank you. Joanna Lyons-Antley.

Joanna Lyons-Antley: My name is Joanna Lyons-Antley and I am the city attorney for the city of Klamath Falls. First of all, I want to say thank you. I know I had the opportunity to speak at the last hearing and at that point it had only been a couple hours since I had gotten the notice. At that time, my initial reaction was negative, because we simply did not understand the intent of the rule. The City appreciates that this rule change will benefit us. We understand that without this rule, the two wells that we have that have shown to substantially interfere with Upper Klamath Lake would not be able to be used, at least according to OWRD. As a city, we are looking into that ourselves, but as it stands now

we would not be able to use it for domestic uses but for human consumption uses, which I know has been pretty confusing. I think that one of the concerns I have, and the city has already submitted two different comments. The first was that we were adamantly opposed to the rules. After we submitted those comments, we had the Director come to explain the rules to us. We submitted a second round of comments that asked for clarification of the merging of surface and ground water. Clarification in the rules about this is our main concern. I think we can make it clear it is only when those items are regulated. I know that is what you had spoken with us about. The city is most concerned with the Conger wellfield. This is the main source of water for the city. Of course this is not one of the wells that has not been regulated this year, but we did not know whether this wellfield would be regulated, so we were opposed to this. We still have concerns, and I think having us on the Rules Committee would be tremendously helpful. I also think it would be appropriate to have a sunset at the beginning of the year due to the negative sentiment you've heard.

Tom Paul: Mr. Chair, if I could for clarification, Joanna indicated temporary rule. Are you saying adopt the rule as written with a sunset? Because terminology wise we have a temporary rule right now.

Joanna: Correct. So what I understood these comments to mean is that it would no longer be a permanent rule, but the language as adopted would sunset in December of 2014, in addition with the clarification that the city has suggested just to clarify that ground and surface water is only when it is regulated.

Tom Paul: OK, thank you.

John Roberts: Ok, Virginia Topham.

Virginia Topham: My name is Virginia Topham, and my family owns and operates the Flying T Ranch in Sprague River. I would like to know why the proposed changes target Klamath County. Why do you have a vendetta against us? I am opposed to the proposed rule. I don't think you should be targeting Klamath County. Please limit the proposed rules to surface water only. Withdraw the proposed rules and seek specific legislative approval before issuing rules that merge the legal authority of surface and ground water rights during periods of severe drought. OWRD continues to shut off groundwater and surface water at the same time without verifiable proof of interference. OWRD's only proof is a faulty computer model that agrees with OWRD's assumption of the connection of groundwater and surface water. I demand that the OWRD return to verifiable science driven rules and return a degree of common sense back into the state agency.

John Roberts: OK, Luther Horsely.

Luther Horsely: Mr. Chairman, my name is Luther Horsely. I'm a farmer/rancher in the lower lake, Midland area. I have no opinion for or against this rule change. I'm here to speak to the well-being of the cattle that are going to drink the water you are allocating for stock use. When OWRD allocates an amount for stock use they should take into account the soil composition and topography rather than a set amount per cow. I'm speaking specifically about Klamath Drainage District last summer when our water diversion point was shut off from the Klamath River. We got 4 or 5 cfs for stock water on 27,000

acres and that was just setting up a scenario for a wreck. When you have cattle drinking out of a ditch and that ditch gets shut off, the cattle will go down there and get mired in the mud. This causes many problems. The cow can die in the ditch, you'll stretch her spine out getting her out of the ditch and you'll have to put her down, or you'll get her out of the ditch and she'll be mad as hell and dent the hell out of your pickup. I think you need to take into account how the stock have to get a drink. If they're used to going to a ditch and it is dewatered, you're going to cause something that the people for the ethical treatment of animals wouldn't like and as a stock owner I would never do to my cattle. Thank you.

John Roberts: Thank you. Trish Syler.

Trish Syler: Trish Syler, Klamath Falls City Counselor. I'm following up from our earlier question and answer session. I ask the Commission to limit the number of continued temporary rules and expedite the process by which permanent rules are put in place. Temporary rules do not give anyone that would be affected by these rules any certainty. In addition, I would ask that our city attorney, Joanna Lyons-Antley, be appointed as a member of the committee that will be making this ruling in addition to our Director of Public Works, Mark Wilred. I think those two individuals would very well represent the needs of Klamath Falls.

John Roberts: OK, Scott Fenters.

Scott Fenters – OK, my name is Scott Fenters, the first way I'll introduce myself is as a Board Member of Klamath/Lake County Farm Bureau. I have a statement they want me to read for them (See Klamath/Lake County Farm Bureau written statement in Appendix 6). Now, I will reintroduce Scott Fenters, potato grower. I am not saying I am for or against the rule, but my concern is that the rule doesn't say you can't shut other people on the aquifer off in order to allow for human consumption and stockwater.

John Roberts: Thank you so much. OK, I have called everyone that has turned in a slip. Is there anyone else that wishes to comment at this point? OK, thank you for coming and providing us with your comments. The hearing is adjourned at 7:16.

SMITH Cindy S

From: PUSTIS Nancy N <nancy.n.pustis@state.or.us>
Sent: Tuesday, July 29, 2014 8:41 AM
To: RANCIER Racquel R; Tom Paul
Subject: FW: Public Comment for OAR 690-022-0020 to 690-022-0030
Attachments: City of Klamath Falls Public Comments Rulemaking.pdf

First comment on the Klamath Drought rules.

From: Joanna Lyons-Antley [<mailto:JLyons@ci.klamath-falls.or.us>]
Sent: Monday, July 28, 2014 4:57 PM
To: rule-coordinator
Cc: Nathan Cherpeski; Mark Willrett; Randy Travis
Subject: Public Comment for OAR 690-022-0020 to 690-022-0030

Rule Coordinator:

Attached is the comment from the City of Klamath Falls regarding proposed rule changes to OAR 690-022-0020 to 690-022-0030.

Thank you for the opportunity to comment.

Joanna Lyons-Antley
City Attorney
City of Klamath Falls
P.O. Box 237
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(541) 883-5323
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Oregon Water Resources Department
Attn: Rule Coordinator
725 Summer Street NE, Suite A
Salem, OR 97301-1271

Dear Rule Coordinator:

The City of Klamath Falls submits the following comments to the proposed changes to OAR Chapter 690, Division 22. These comments are timely submitted prior to the July 29, 2014, 5 p.m. deadline.

(1) Introduction.

The City of Klamath Falls has serious concerns about the Division 22 rulemaking process. In general, the proposed Division 22 rules would blur the clear line between surface and groundwater regulation during times of drought.

The City also has several specific concerns about the rulemaking process. First, the City is concerned that this rulemaking process has moved far too quickly, and that insufficient notice was given to interested parties. Second, the City is concerned that the rulemaking effort is based on an incomplete factual and technical record, and that the speed of the rulemaking is inappropriate given the lack of time-tested empirical data. Third, it the City believes that the proposed rules exceed the Water Resources Department's (the "Department") statutory authority to develop drought preference rules because the proposed rules would allow the use of groundwater out of priority.

The City requests that the Department either:

1. Limit the proposed rules to surface water only; or
2. Withdraw the proposed rules and seek specific legislative approval before promulgating rules that merge the legal authority over surface and groundwater rights during periods of serve, continuing drought.

(2) Background.

The City of Klamath Falls provides municipal water supply to more than 21,000 people and to many vitally important commercial and industrial water users in the City's service area. The City is almost exclusively reliant on groundwater as the source for its municipal water supply. The City's water rights holdings include a number of groundwater rights with relatively junior priority dates (1954 and later).

The City's commercial/industrial user group represents 8% of the total service connections and 25% of the total annual consumption.

The large water users served by the City include (MG=million gallons annually):

- Thomas Lumber (Manufacturing) 29.5 MG
- Klamath Cogeneration (Power Generation) 24.0 MG
- Kingsley Field (Air National Guard Base) 22.2 MG
- Jeld-Wen Fiber (Manufacturing) 17.9 MG
- Skylakes Medical Center (Hospital) 17.4 MG
- City Wastewater (Power Generation) 11.8 MG
- Klamath County Jail (Governmental) 11.2 MG

In addition, the City provides municipal water supply to two community water suppliers:

- Villa West Mobile Home Center (Residential) 13.5 MG
- Emerald Estates Mobile (Residential) 13.3 MG

In 2014, the Department notified the City that its groundwater rights were subject to regulation in order to satisfy senior surface water rights holders whose claims had been granted in the administrative phase of the Klamath Adjudication. The basis for the regulation appears to be a determination that the City’s wells are hydraulically connected to the surface water system.

The City has significant concerns that the Department has not yet developed sufficient factual and scientific justification to draw conclusions that the basin’s surface and groundwater systems are hydraulically connected. The proposed rules concern the City because they build on this unproven assumption by impermissibly linking surface and groundwater regulation.

(3) Notice of the rulemaking proceeding was inadequate.

ORS 183.341(4) requires an agency to adopt rules of procedure that provide a reasonable opportunity for interested persons to be notified of the agency’s intention to adopt, amend or repeal a rule. In this case, the Department has rushed forward with the proposed rulemaking—presumably because it is concerned that the temporary rule now in place will expire soon. It appears that the Department’s effort to notify stakeholders was not as comprehensive as is normally the case for the agency’s rulemaking efforts. As a result, interested parties in the Klamath Basin may not yet be aware that the rulemaking is underway. In fact, the City only learned of the pending proceeding last week when approached by a third party.

The City did not receive written notice regarding the rulemaking, although it is one of the potential parties affected by the proposed rules. OAR 690-001-000(4)(c) requires that cities and counties likely to be directly affected by proposed rules are mailed a copy of the notice at least 28 days before the effective date. While the Department may still have time to achieve technical compliance with this notice rule, the spirit of the requirement is to provide interested parties a chance to provide meaningful input to the rulemaking process. In this case, the Department’s lack of outreach has likely limited the input of interested and potentially affected parties.

(4) The Department lacks necessary justification for the rules.

The City has not had time to examine the official rulemaking record. However, given the Department’s limited amount of time and experience regulating in favor of senior surface claims in the Klamath Basin, it would be impossible for the Department to have developed a sufficiently

detailed body of evidence to support a basin-wide conjunctive management scheme. The Department has even less experience regulating groundwater rights. It is therefore premature for the Department to push forward a rule that seeks to tie these complex water systems together with the stroke of a pen.

We recognize that the Administrative Procedures Act ("APA") does not require the factual basis for the rules to appear in the record. *Int'l Cncl of Shopping Cntrs v. Env. Quality Comm.*, 27 Or App 321, 556 P2d 138 (1976), *rev den* 278 Or 157 (1977). However, in this particular case, where the Department is seeking to depart from historical precedent and to stretch its legislative authority, the factual and technical justification for the proposed rule is a critical element of the final decision.

The rulemaking notice posted on the Department's website makes no specific mention of the need or justification for the proposed policy change that would link the entire basin's surface and groundwater systems during times of drought. This is necessary information that the public and Water Resources Commission will need to fully evaluate the proposed rules.

The City specifically suggests that the Department consider the impacts that the proposed rule and its underlying policy shift would have on municipal return flows. The City discharges approximately 438,000,000 to 586,000 gallons annually into the river. This represents between 17% and 22% of the City's annual water production. Since the City's Wastewater Treatment Plant only includes City customers, other customers who use City water but that are served by South Suburban Sanitary District are not included in this calculation. It is reasonable to assume that the majority of South Suburban's discharge originated from the City's water system too. If the City's groundwater use is curtailed for any purpose, but if it is confined to human consumption use under this rule, the City's real-time augmentation of flow in the Klamath River will cease or be significantly curtailed. This creates the ironic result were regulation of the City's groundwater use will actually exacerbate the downstream shortage for senior water users during the irrigation season.

(5) The Department has no statutory authority to interpret ORS 536.750(1)(c) to include groundwater in the temporary preference.

The Water Resources Department cites ORS 536.750(1)(c) as the authority to promulgate the proposed rules. ORS 536.750 (1)(c) states, in part:

536.750. Commission's powers on declaration of drought

(1) Notwithstanding any provision of ORS chapters 536 to 543A, after a declaration that a severe, continuing drought exists, the Water Resources Commission may:

* * *

(c) Notwithstanding the priority of water rights, grant preference of use to rights for human consumption or stock watering use;

* * *

(2) The commission by rule may establish procedures for carrying out the provisions of this section and a schedule of fees that must accompany a request under subsection (1) of this section.

In this circumstance, the proposed rules merge groundwater and surface water laws to grant a preference to stock watering and human consumption. The City believes that this proposed merger is beyond the statutory authority granted by the Oregon Legislature to the Department because: (1) in the past, the term "water rights" as used in ORS 536.750 was used only for surface water, not groundwater; and (2) making a basin-wide determination that the surface and groundwater systems are hydraulically connected in a rulemaking proceeding is not consistent with Oregon law.

The term "water rights" as used in ORS 536.750(1)(c) has been interpreted to mean only surface water rights. This is demonstrated by the current temporary rule, OAR 690-022-0030, effective April 1, 2014, that confined the preference to only surface water. Further, last year's temporary rule for Klamath County, only confined the preference to surface water.

Historically, depending on whether the water was acquired from surface water or from groundwater, the Oregon Legislature established two different set of laws. While it may be true the some groundwater use impacts surface water availability, it is an extraordinary step to conclude that such a connection exists across an entire basin.

The Oregon Legislature enacted ORS 537.730 to address situations where there is hydraulic connection and substantial interference between water rights. The Legislature authorized the Department to promulgate rules to determine hydraulic connection and substantial interference. OAR 690-009-0040 requires that the Department determine whether groundwater is hydraulically connected to the surface water based on presumptions or scientific information which may be rebutted by the well owner.

The proposed rule disregards the processes set forth in ORS 537.730 and OAR 690-009-0040. The rulemaking has skipped over the scientific determination as to whether groundwater has a hydraulic connection and whether it substantially interferes with surface water in the Klamath basin. It also eliminates any burden on the Department to prove with any scientific modeling whether the groundwater use has a measurable effect on the surface water.

(7) There is no need for a permanent rule affecting only Klamath County.

In 2014, the Governor has declared drought in nine counties. The proposed rule only affects Klamath County. In the explanation of the rule, the Department presented no explanation about why this proposed rule applied only in Klamath County. Further, the Department has presented no evidence for the need to make a rule incorporating groundwater permanent.

OAR 690-019-0070 already provides rules for droughts that are "severe, continuing" and provides that the Commission determine that the order is necessary to protect the health and welfare of the people of Oregon. OAR 690-019-0070 states:

- (1) When the Governor declares that a severe, continuing drought exists, the Commission may grant a temporary preference of use to water rights for human consumption and/or stock watering. The temporary preference of use shall be by order of the Commission and

shall apply only to designated drought areas. Temporary preference may be given over other water uses regardless of priority date.

(2) Applications for preference for human consumption and/or stock water shall be submitted on a form provided by the Department.

(3) In considering designation of an area for preferential use, the Commission may review recommendations from the Drought Council, recommendations from the Water Availability Committee, recommendations from county government officials within a designated drought area, and any other available information.

(4) Before issuing an order granting a temporary preference of use the Commission shall determine that the order is necessary to protect the health and welfare of the people of Oregon. Any order issued by the Commission for preference of use shall include:

(a) The expiration date for the temporary preference of use granted under the terms of this rule which shall not exceed the term of the Governor's declared drought;

(b) The geographic area specified for the temporary preference of use which shall be within a designated drought area;

(c) A general statement outlining which water uses have been designated temporarily inferior;

(d) A statement that there is an immediate threat to the health and welfare of the people of Oregon; and

(e) A requirement that political subdivisions within the designated drought area submit water conservation or curtailment plans for the Director's approval.

(5) Upon issuance of the order the watermaster within the designated drought area shall be notified of the temporary preference of use.

This existing rule provides much the same relief that the Department is seeking, but requires the additional steps of the Department taking applications, the Commission determining whether there is an immediate threat to the health and welfare of the people, and the Commission making a determination which uses are temporarily inferior. It appears that the Department is attempting to avoid these additional steps -- steps that were created to ensure that the extraordinary step of suspending the priority system is only used when there is an immediate threat to the health and welfare of people and the Commission determines which uses are inferior. These steps are important because of the potential economic injury that such action can have. This existing process is appropriate and sufficient in this situation.

(8) The fiscal impact analysis is inadequate.

ORS 183.335 requires an agency to prepare a fiscal impact statement that identifies units of local government and members of the public that may be economically affected by the proposed rule. In this case, the Department has failed to assess the economic impacts that the proposed rules would have on the City of Klamath Falls or on its individual commercial and industrial customers who depend on the City's groundwater supply system.

(a) Compliance with the proposed rule would cost the City millions to enforce.

In the event that a senior water right makes a call for water, the City would be required to ensure that its users comply with preference for human consumption and stock watering. This would

cast the City in the role of watermaster for all of its customers, which amounts to more than 14,000 individual connections.

In order for the City to comply with a curtailment order, it would be necessary to read each customer's meter daily. The City would compare the usage with the winter consumption. Our best estimate, this would require an additional 22 – 25 staff members, costing the City well over \$1 million.

Another option for the City to comply with a curtailment order, would be to complete the radio-read meter installation and the Advanced Metering Infrastructure system. This would allow staff to read and monitor all meters from a remote central location. Cost estimates for a 100% AMI system would be \$3.2 to 4 million dollars and would require up to one year to complete.

Limiting water usage to human consumption and stock watering will greatly reduce the City's water revenue, limiting the City's ability to pay for the staff and infrastructure required to comply with the curtailment order and to maintain the water system. Water revenue also supports overhead for the entire City, so the effects could mean more than \$2 million in reduced revenue if there was a 40% reduction in the City's revenue stream.

(b) The fiscal impact analysis fails to consider the impact of granting an industrial preference to livestock over other vitally important industrial users in the basin.

The basin-wide merger of groundwater and surface water rights for the proposed rule would adversely impact many of the City's commercial and industrial users. Currently, in the event of a call for water by a senior surface water user during a period of declared drought, junior surface water users may only use water for stock watering and human consumption. The proposed rules extend that preference to groundwater uses as well. This would have the effect of elevating the livestock industry over other key economic drivers in the basin, such as Thomas Lumber, Jeld Wen Manufacturing, Kingsley Field and the Klamath Cogeneration Power Plant. Jeld-Wen employs 1,135 in Klamath County at its two manufacturing plants.

These important businesses are key economic engines for the Klamath Basin. If the drought preference is extended to the livestock industry, but not these other important industries, the Department is prioritizing one industry over others with respect to groundwater use. This unfairly prioritizes the stock industry over other industries in this area, and would have a potentially large economic impact that the Department has failed to consider. Indeed, it is possible that the economic impact of such a merger of the groundwater and surface water rights for this proposed rule could far exceed the Department's stated financial benefits of the temporary rule.

(9) The merger of groundwater and surface water could impact the geothermal wells within Klamath County, causing an unintended but related health and safety problem.

Geothermal wells are the primary heat source for many citizens in the Klamath Basin. The City operates its own geothermal utility and uses groundwater to assist in the geothermal heat. If these proposed rules are approved and the Governor's declaration of a severe, continuing drought

occurs and continues into the colder months, the City would not be able to provide geothermal heat to its customers. Heat is a public health and safety issue. Although many of its customers have alternative sources of heat, some of the customers do not.

Separate from the City's geothermal utility, many other citizens utilize geothermal heat in their own homes. Most do not have a secondary heat source, and if they do, they use woodstoves that may be affected by wood burning emission controls.

(10) Conclusion.

In conclusion, the City objects to the proposed rules for the reasons stated above and requests that the Department either:

1. Limit the proposed rules to surface water only; or
2. Withdraw the proposed rules and seek specific legislative approval before promulgating rules that merge the legal authority over surface and groundwater rights during periods of severe, continuing drought.

SMITH Cindy S

From: PUSTIS Nancy N <nancy.n.pustis@state.or.us>
Sent: Tuesday, July 29, 2014 1:50 PM
To: RANCIER Racquel R; Tom Paul
Subject: FW: Division 22 Rules, Human and Livestock Consumption emergency water provisions Klamath County Drought
Attachments: div 22 klamath human consumption livestock pdf.pdf; div 22 attachments.pdf

Second comment.....

-----Original Message-----

From: Kimberley Priestley [<mailto:kjp@waterwatch.org>]
Sent: Tuesday, July 29, 2014 1:30 PM
To: rule-coordinator
Cc: PUSTIS Nancy N
Subject: Division 22 Rules, Human and Livestock Consumption emergency water provisions Klamath County Drought

Hello,

Attached please find WaterWatch's comments on the proposed Division 22 rules regarding emergency water provisions in Klamath County. The comments are comprised of the two attached documents: (1) WaterWatch's written comments, (2) attachments to those comments (that are part of the comment).

If you could please confirm receipt that would be appreciated.

Thank you, Kimberley

--

Kimberley Priestley
WaterWatch of Oregon
213 SW Ash, Suite 208
Portland, OR 97204
ph: 503-295-4039, x 3
www.waterwatch.org



WATERWATCH

PROTECTING NATURAL FLOWS IN OREGON RIVERS

July 29, 2014

Rules Coordinator
Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271

RE: Proposed Rulemaking, OAR 690, Division 22

Dear Rules Coordinator,

Thank you for the opportunity to comment on the WRD's draft rules proposing to prioritize stock and human consumption water rights over other water rights whenever there is a Governor declared drought in Klamath County. WaterWatch of Oregon is a river conservation group that works to restore and protect flows necessary for fish and wildlife, recreation, clean rivers and other instream needs.

While we understand the need to provide water to serve basic human and livestock consumption needs, WaterWatch has four recommendations to ensure that these emergency drought rules for Klamath County limit the impact that this exception would have on other water right holders and scenic waterway flows.

1. Insert limits on the amount that can be diverted and/or appropriated to serve human and livestock consumption needs. As written, the rules offer no limit as to how much can be appropriated to serve human consumption or livestock needs. This oversight could lead to abuse of this exception to the detriment of senior water right holders and scenic waterway flows.

The Oregon Legislature has already determined the minimum amounts needed to serve these uses in the context of the scenic waterways. ORS 390.835(6) limits these uses to:

- Human consumption shall not exceed .005 cfs per household
- Livestock consumption shall not exceed 1/10th of 1 cfs per 1,000 head of livestock.

Groundwaters and surface waters of the Klamath basin feed the Klamath state scenic waterway. While ORS 536.750 allows the WRC to grant preference to water rights for human and livestock consumption notwithstanding the priority of other water rights, the statute does not provide an exemption to scenic waterway protections. To protect itself from potential liabilities, the WRD should restrict use to that provided for these uses under the Scenic Waterway Act. Inserting these limitations will not only minimize impacts on scenic waterway flows but will protect the limited water supplies during drought for other water right holders

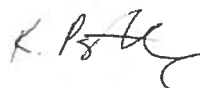
Inserting limits as to the amounts allowed under the exception is also necessary to protect against abuses under the rule. For instance, the attached article notes that Modoc Point Irrigation District diversion for stock watering amounted to "four or five cubic foot per second, what's been deemed just enough to provide drinking water to the 3,000 stock animals within the district". At 5 cfs for 3,000 stock animals, that amounts to 1,077 gallons per stock animal per day. That is more water than a stock animal drinks in a day whose

documented water needs range between 2 and 30 gallons per day. See attached, Livestock Daily Water Needs, NCAT & ATTRA . Under the applicable scenic waterway limits, 3000 cows are eligible to 3/10th of 1 cfs. Clearly, unlimited withdrawals to serve human and livestock consumption have serious impacts on other water rights and scenic waterway flows.

2. Clarify that conveyance water is not included in this exception: The statute only allows for exemptions for human and livestock consumption. ORS 536.750. The statute does not allow an exemption for conveyance water. We note this because in the attached Modoc Point Irrigation District article the district manager noted that the water had to go down five miles of ditch, with accompanying evaporation and loss of water via leaky dirt ditches. The water lost to leaky ditches and evaporation is not captured under the drought exemption statutes. In other words, the drought statutes do not allow exceptions for conveyance losses. Drought in the Klamath basin, unfortunately, is likely the new normal. Water users who will be utilizing this exception need to have the appropriate infrastructure in place (or need to truck water from the diversion point to the watering tank), so as to stay within the statutory limitation of human and livestock consumption only. This should be clarified in the rule, as well as adding limits to human and livestock consumption uses.
3. Require the water right holder to certify amount to be used and a commitment to stay within required limits: To aid the WRD in water management under this statute, the WRD should require anyone using this exemption to submit to the WRD a curtailment certification form (similar to that that is required in California, see attached). This document will inform the water master as to the use of the exemption and will also put the water right user on clear notice as to what the limits of use for human and livestock consumption are. The rules already require that “water right holders exercising the human consumption or stock water preferences established in this rule shall assure curtailment of water uses unrelated to the preference”. This form is a tool to ensure compliance and will help alleviate work required of the already overstretched Klamath basin water masters.
4. Clarifying edits: A couple of words in the proposed rules should be narrowed so as to ensure that the rules are consistent both with the intent as articulated in the notice or rulemaking. These small changes are highlighted in the attached redline.

Thank you for this opportunity to comment. If you have any questions please do not hesitate to contact me.

Sincerely,



Kimberley Priestley
Sr. Policy Analyst

Attachments



Our Klamath Basin Water Crisis
Upholding rural Americans' rights to grow food,
own property, and caretake our wildlife and natural resources.

<http://pioneer.olivesoftware.com/Olive/ODE/heraldandnews/default.aspx>

Modoc Point Irrigation District: Trading a dam for a pump station

by SAMANTHA TIPLER, Herald and News 7/21/13

[HERE for KBC 'Chiloquin Dam Page'](#)



Ed Combs discusses the pumping process for stock water, even though the rest of it has been shut off. H&N photo by Steven Siton

According to the gauge at the Modoc Point Irrigation District pump house on the Williamson River, the river's water level has not changed since the district had to shut off irrigation water on June 26.

On Wednesday plant manager and ditch rider Ed Combs checked the gauge.

"When they did the shutoff it was just about where it is now," he said. "It's about the same. When they say we're short, it's hard for me to get that when my measure says right here it's not."

The Modoc Point Irrigation District, like other upper Klamath Basin irrigators, had to stop pumping water from the river after the Klamath Tribes made a call for water on June 10.

Under Klamath County's new adjudication law, the Tribes' time immemorial right comes before even the Modoc Point's 1864 right, the oldest a non-native person can have according to district president Linda Long.

The Klamath Project irrigators also made a call for water, but they are downstream from Modoc Point. The Project call only applies to those junior to the Project's 1905 right, and downstream from Upper Klamath Lake, according to the Oregon Water Resources Department.

Long and other Modoc Point irrigators had thought they may be safe from water calls not only because of their early priority date, but also because of a stipulated agreement with the Tribes and the federal government that resulted in the construction of the pump station on the Williamson.

Trading a dam for a pump

In 2008 the Chiloquin Dam, which sat on the Sprague River, was removed. That was the place where the Modoc Point Irrigation District originally got its water.

The dam was built in 1914 and ownership went to the irrigation district when the Klamath Tribe was terminated.

The dam included a fish ladder, but in the mid-2000s government studies showed fish species – including the listed Lost River and shortnose suckers – had trouble bypassing the dam for upriver habitat.

An agreement between the irrigation district, the Bureau of Indian Affairs, the Oregon Water Resources Department, the Klamath Tribes and others enacted a plan to remove the dam on the Sprague River and install the pumping station on the Williamson River. The agreement included the BIA provides \$2.4 million to Modoc Point for upkeep of the pump and paying a plant manager.

Previous Herald and News stories said building the new pump station cost about \$9 million. Construction started in 2007.

Removing the dam opened up 80 miles of habitat, including spawning ground, previous newspaper stories said.

The negotiation included lowering the amount of water the district removed from the river from 3.5 acre feet to about 2.5 acre feet, Long said.

The district chose not to get involved with legal injunctions some upper Basin ranchers have filed against the water shutoffs because of the agreement, Long said. She thought the agreement would keep the district safe from adjudication shutoffs.

"We felt like we had an agreement with the Tribes," Long said. "We didn't think they would call on our water. But we were wrong."

The pump station today

Even though irrigation water has been curtailed for the Modoc Point Irrigation District, there is still a little water being pumped from the Williamson River to the district's ditches.

It amounts to four or five cubic feet per second, what's been deemed just enough to provide drinking water to the 3,000 stock animals within the district.

In a normal year, before adjudication and without a drought, the district would pump about 15 cubic feet per second for irrigation, Combs said. Pumping could start as early as May 15 and run through Oct. 15.

"Some years we don't need to start that early because it's a wet spring," Long said. "We don't just turn them on at a certain date. We assess the situation."

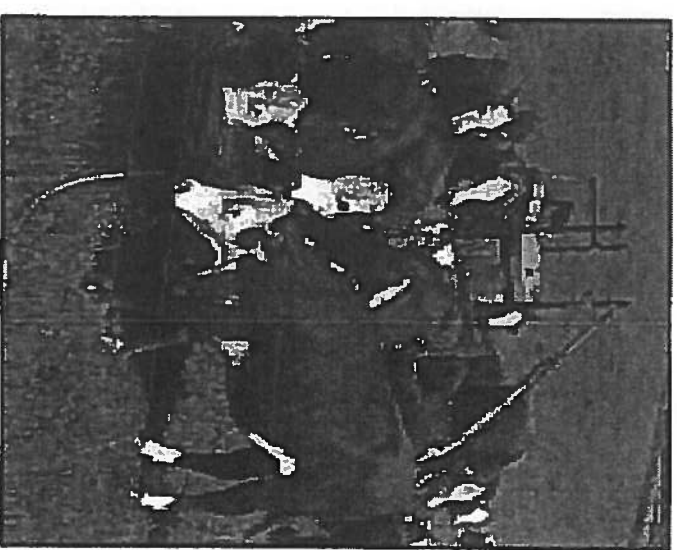
Now Combs must make sure the four cubic feet per second pumped gets to the properties it needs to within the district.

"There's several ditches it has to get down," he said. "The farthest ditch is five miles down. It has to go five miles. With evaporation and loss of water just in the dirt ditches – it's hard to get there."

stipler@heraldandnews.com ; @TiplerHN

Livestock Daily Water Needs

- **1000 lb dairy cow - 30 gallons**
- **Dry beef cow - 22 gallons**
- **Beef cow-calf pair - 20 gallons**
- **600 lb beef heifer – 12 gallons**
- **2000 lb beef bull - 19 gallons**
- **Sheep or goat - 2 gallons**



CURTAILMENT CERTIFICATION FORM

Please return within 7 days of receipt of the Notice of Curtailment of Water Diversion to:

State Water Resources Control Board
Division of Water Rights
P.O. Box 2000
Sacramento, CA 95814-2000

Email completed Curtailment Certification form to:
SWRCB-curtailment-certification@waterboards.ca.gov

Fax: 916-341-5400

WATER RIGHT SUBJECT TO THE 2014 WATER DIVERSION CURTAILMENT:

Please update Water Right Owner Information (if different from addressed):

Water Right Application or Statement No(s): _____

Owner: _____

Address: _____

City: _____ State: _____ Zip: _____

CURTAILMENT CERTIFICATION

Please check the applicable boxes below:

- NO DIVERSION** – I hereby certify that I will not be diverting any water under the above specified water right during the 2014 water diversion curtailment period.

- ALTERNATE SOURCE** – I hereby certify that I will not be diverting any water under the specified water right during the 2014 curtailment period. However, I will be serving all or a portion of its place of use with my alternate source(s) of water, as specified below:
 - Ground (well) water
 - Senior Post-1914 Appropriative Water Right (specify Permit/License No.): _____
 - Riparian water right(s) and/or pre-1914 appropriative water right(s)*
 - Water use is reported under Statement of Water Diversion and Use No(s): _____.
 - My use is excluded from filing a Statement of Water Diversion and Use under California Water Code section 5101 (generally, because the use included in other sufficient reports, or is from a spring that does not flow off your property).
 - None of the above.
 - Contract (purchased) water from _____
 - Will serve the place of use by withdrawing water stored under Permit/License No. ____ prior to start of this curtailment period.
 - Other source (specify) _____

- SOLE SOURCE OF WATER FOR HUMAN HEALTH & SAFETY** –
 - I hereby certify that the water right being curtailed is the only source of water available for human health & safety needs.
 - I also certify that I have looked into alternative water supplies from the following:
 - Groundwater Well
 - Bottled Water
 - Purchase Supply
 - Other _____

- HYDROELECTRIC POWER GENERATION** – I hereby certify that I am directly diverting water for hydroelectric power generation or other non-consumptive use and all water diverted is returned to the stream.

- OTHER** – I have attached an additional sheet explaining how much water I am diverting, the use of that water, the measures being undertaken to reduce use, and the basis on which I contend that the diversion and use is legally authorized notwithstanding the very limited amounts of water available during this drought emergency. _____

* Please note that only limited natural or abandoned water is available during a curtailment period. Water released from upstream storage projects is not available to divert under a riparian or pre-1914 right.

I declare that the information in this certification is true to the best of my knowledge.

Name: _____	Phone No.: _____
Signature: _____	Email: _____
	Date: _____

OREGON ADMINISTRATIVE RULES
WATER RESOURCES DEPARTMENT
CHAPTER 690
DIVISION 22
EMERGENCY WATER PROVISIONS – KLAMATH COUNTY

690-022-0020

Purpose and Statutory Authority

- (1) The purpose of these rules is to implement ORS 536.750(1)(c), which authorizes the Commission, pursuant to a gubernatorial declaration that a severe, continuing drought exists, to grant a temporary preference to water rights for human consumption or stock watering ~~use~~ over other water ~~uses~~ regardless of priority date. These rules address an immediate threat to the health and welfare of the people of Oregon that would otherwise occur if regulation of senior water rights in Klamath County curtailed or prohibited use of surface water for human consumption and stock watering as defined in these rules.
- (2) Executive Order No. 14-01: Determination of a State of Drought Emergency in Harney, Klamath, Lake and Malheur Counties Due to Drought and Low Water Conditions, was signed by Governor John A. Kitzhaber, M.D., on February 13, 2014.
- (3) These rules become effective on April 1, 2014 and will remain in effect for 180 days from the effective date or for the term of Oregon Governor Kitzhaber's Executive Order No. 14-01, whichever is shorter.
- (2) These rules become applicable upon declaration by the Governor of a severe, continuing drought in Klamath County. During the effective time period of a drought declaration under ORS 536.740 in Klamath County, the Commission grants a preference of use for water rights for human consumption and/or stock watering as provided in this rule. The temporary preference of use shall only apply to Klamath County and shall remain in effect only during the effective time period of the Governor's drought declaration in Klamath County.

Stat. Auth.: ORS 536.025; 536.027; 536.750
Stats. Implemented: ORS 536.750

690-022-0025

Definitions

TheUnless the context requires otherwise, the words and phrases used in Division 22 have the following meaning:

- (1) "Commission" means the Oregon Water Resources Commission.
- (2) "Department" means the Oregon Water Resources Department.
- (3) "Human Consumption" means the use of water for the purposes of drinking, cooking, and sanitation.
- (4) "Stock Watering Use" means the use of water for consumption by domesticated animals and wild animals held in captivity as pets or for profit.

Stat. Auth.: ORS 536.025; 536.027; 536.750
Stats. Implemented: ORS 536.750

right



Klamath County Commissioners

Tom Mallams, Commissioner
Position One

Dennis Linthicum, Commissioner
Position Two

Jim Bellet, Commissioner
Position Three

August 5, 2014

RECEIVED BY OWRD

AUG 11 2014

SALEM, OR

Water Resources Department
Attn: Rule Coordinator
725 Summer Street NE, Suite A
Salem, OR 97301

Dear OWRD and other interested parties,

Klamath County seems to have a never ending challenge dealing with various State and Federal agencies that are intent on regulating our citizens into extinction. Our County is heavily dependent on the ability to prudently use our local natural resources.

With a long history of contentious water issues within Klamath County, we find it extremely disheartening to discover that Oregon Water Resources Department, OWRD, had scheduled a hearing in Klamath Falls proposing new Division 22 rules, with literally the bare minimum of public notice. This meeting took place on July 29th in Klamath Falls. Citizens and elected officials did not have adequate time to be prepared to offer public and or written comments. Even the media was not aware of this hearing taking place.

The regulating of un-adjudicated groundwater in conjunction with surface water even during a drought declaration, certainly appears to be an attempt to validate, after the fact, what OWRD has already done. OWRD continues to turn off ground water and surface water at the same time with no verifiable proof of interference. Their only "proof" is a computer model that agrees with OWRD's assumptions on the connectivity of ground water and surface water. This is having an incredible negative impact on irrigators, local industry and citizens in general.

The rule changes are dealing with statewide rules that are now being changed specifically for Klamath County. It is not clear whether these changes could be extended to other Counties or the entire State of Oregon.

Historically, OWRD has been an advocate for irrigated agriculture, other businesses and municipalities that wisely utilize the use of this precious natural resource. Government agencies purpose is to serve the citizens, not enslave them.



Klamath County Commissioners

Tom Mallams, Commissioner
Position One

Dennis Linthicum, Commissioner
Position Two

Jim Bellet, Commissioner
Position Three

Pg. 2 – OWRD Letter

We demand that OWRD return to verifiable science driven rules and return a degree of common sense back into this State agency.

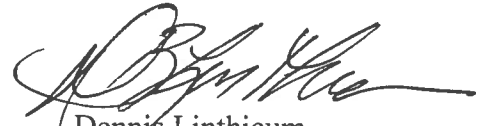
Sincerely,



Jim Bellet
Chair



Tom Mallams
Vice-Chair



Dennis Linthicum
Commissioner

RECEIVED BY OWRD

AUG 11 2014

SALEM, OR



Klamath County Commissioners Memorandum

DATE: August 7, 2014
TO: Water Resources Department
CC:
FROM: Klamath County
RE: OWRD Letter dated August 5, 2014

RECEIVED BY OWRD

AUG 11 2014

SALEM, OR

Enclosed is a revised letter from Klamath County. An error was found in the 2nd paragraph which listed the meeting day as July 29th instead of July 24th. Please disregard the first letter you may have received.



Klamath County Commissioners

Tom Mallams, Commissioner
Position One

Dennis Linthicum, Commissioner
Position Two

Jim Bellet, Commissioner
Position Three

August 5, 2014

RECEIVED BY OWRD

Water Resources Department
Attn: Rule Coordinator
725 Summer Street NE, Suite A
Salem, OR 97301

AUG 11 2014

SALEM, OR

Dear OWRD and other interested parties,

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The regulating of un-adjudicated groundwater in conjunction with surface water even during a drought declaration, certainly appears to be an attempt to validate, after the fact, what OWRD has already done. OWRD continues to turn off ground water and surface water at the same time with no verifiable proof of interference. Their only "proof" is a computer model that agrees with OWRD's assumptions on the connectivity of ground water and surface water. This is having an incredible negative impact on irrigators, local industry and citizens in general.

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Historically, OWRD has been an advocate for irrigated agriculture, other businesses and municipalities that wisely utilize the use of this precious natural resource. Government agencies purpose is to serve the citizens, not enslave them.



Klamath County Commissioners

Tom Mallams, Commissioner
Position One

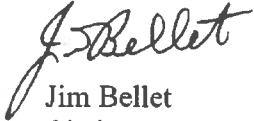
Dennis Linthicum, Commissioner
Position Two

Jim Bellet, Commissioner
Position Three

Pg. 2 - OWRD Letter

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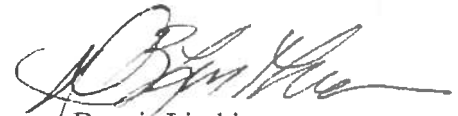
Sincerely,



Jim Bellet
Chair



Tom Mallams
Vice-Chair



Dennis Linthicum
Commissioner

SPANSAIL Joshua A

From: Joanna Lyons-Antley <JLyons@ci.klamath-falls.or.us>
Sent: Thursday, August 21, 2014 8:20 AM
To: rule-coordinator
Cc: Nathan Cherpeski; Mark Willrett; Randy Travis
Subject: RE: Public Comment for OAR 690-022-0020 to 690-022-0030
Attachments: Klamath Falls second round rulemaking comments 082014.docx

Rule Coordinator:

Attached are supplemental comments for OAR 690-022-0020 to 690-022-0030 from the City of Klamath Falls.

Thank you,

Joanna

From: Joanna Lyons-Antley
Sent: Monday, July 28, 2014 4:57 PM
To: 'rule-coordinator@wrd.state.or.us'
Cc: Nathan Cherpeski; Mark Willrett; Randy Travis
Subject: Public Comment for OAR 690-022-0020 to 690-022-0030

Rule Coordinator:

Attached is the comment from the City of Klamath Falls regarding proposed rule changes to OAR 690-022-0020 to 690-022-0030.

Thank you for the opportunity to comment.

Joanna Lyons-Antley
City Attorney
City of Klamath Falls
P.O. Box 237
500 Klamath Avenue
Klamath Falls, Oregon 97601
(541) 883-5323
Fax: (541) 883-5399
website: www.ci.klamath-falls.or.us

August 20, 2014

Oregon Water Resources Department
Attn: Rule Coordinator
725 Summer Street NE, Suite A
Salem, OR 97301-1271

Dear Rule Coordinator:

The City of Klamath Falls submits additional comments to supplement the comments submitted on July 28, 2014 on to the proposed changes to OAR Chapter 690, Division 22.

Since submitting comments on July 28th, city staff met with Interim Director Tom Paul and District 17 Watermaster Scott White. As Mr. Paul described the comment to the City, the Department does not wish to apply the rules to water rights that are not "regulated." "Regulated" water, as explained by Mr. Paul, is that water that is limited because a senior, downstream water right has made a call for more water to fulfill its right.

The City's largest well(s) is Conger Wellfield and supplies the majority of the city water. According to the Department, since Conger Wellfield is adjacent to the Link River, and the only senior, downstream surface water right holder has a relatively small water right, the Conger Wellfield is unlikely to be regulated. As explained by Mr. Paul, since Conger Wellfield is not likely to be regulated, the Department's intent is that the proposed rule would not apply to Conger Wellfield.

However, the City has concerns about the proposed rules and that such an important distinction is not reflected in the plain language of the proposed rules. As a result, the City recommends adding language to the proposed rule that clearly states that this preference only applies to water rights that are regulated. The proposed language is italicized and in blue:

690-022-0020

Purpose and Statutory Authority

- (1) The purpose of these rules is to implement ORS 536.750(1)(c), which authorizes the Commission, pursuant to a gubernatorial declaration that a severe, continuing drought exists, to grant a temporary preference to water rights for human consumption or stock watering use over other water uses regardless of priority date. ~~These rules address an immediate threat to the health and welfare of the people of Oregon that would otherwise occur if regulation of senior water rights in Klamath County curtailed or prohibited use of surface water for human consumption and stock watering as defined in these rules.~~
- (2) ~~Executive Order No. 14-01: Determination of a State of Drought Emergency in Harney, Klamath, Lake and Malheur Counties Due to Drought and Low Water Conditions, was signed by Governor John A. Kitzhaber, M.D., on February 13, 2014.~~
- (3) ~~These rules become effective on April 1, 2014 and will remain in effect for 180 days from the effective date or for the term of Oregon Governor Kitzhaber's Executive Order No. 14-01, whichever is shorter.~~
- (2) These rules become applicable upon declaration by the Governor of a severe, continuing drought in Klamath County. During the effective time period of a drought declaration under ORS 536.740 in Klamath County, the Commission grants a preference of use for water rights for human consumption and/or stock watering as provided in this rule. The temporary

preference of use shall only apply to Klamath County and shall remain in effect only during the effective time period of the Governor's drought declaration in Klamath County.

(3) These rules become applicable to a water right upon regulation by the Watermaster under ORS 540.045(1) and OAR 690-250-0100.

Applicability and Preference

Notwithstanding During the effective period of a drought declaration under ORS 536.740 in Klamath County, and notwithstanding any provision of Oregon Administrative Rules Division 690 to the contrary, the Commission grants a temporary preference for human consumption and/or stock watering as follows:

- (1) ~~These~~The preference described in these rules applies only to the diversion or use of ~~surface~~ water within Klamath County.
- (2) The preference described in these rules applies only to water rights that are regulated by the Watermaster under ORS 540.045(1) and OAR 690-250-0100.
- (3) ~~Uses of surface~~ water for human consumption and stock watering, to the extent authorized under a water right certificate, permit, decree, or findings of fact and order of determination issued in an adjudication subject to ORS Chapter 539, are granted a preference over all other water uses regardless of the priority date of the underlying water right.
- (4) The Department will regulate water rights in Klamath County in accordance with the preference for water rights for human consumption and stock watering use ~~granted in as~~ provided in subsection (2) of this section.
~~690-022-0030 (2) of these rules.~~
- (5) ~~Political subdivisions~~Water right holders exercising the human consumption or stock water preferences established in this rule shall assure curtailment of water uses unrelated to the preference consistent with this rule.

If these changes are made to the proposed rules, it would resolve many of the City's concerns. Therefore, the City respectfully requests that the Department incorporate the City's revisions to the proposed rules.

The City recognizes that the Department intended to benefit the City for its Wocus and Fremont wells, wells that are regulated wells. The City continues to be concerned about the Department moving too quickly to adopt a rule that affects both the Klamath Basin's surface and ground water rights. The City believes that it is important to have sufficient discussion with the stakeholders, such as the City, and such a discussion is essential to crafting a rule that accomplishes the purposes of the law and treats the stakeholders fairly. The City requests to be formally notified and included in any future rulemaking that involves water rights held by the City.

SPANSAIL Joshua A

Subject: FW: Stock water in draugt

>

> -----Original Message-----

> From: Rocky Liskey [<mailto:rdlkr1@aol.com>]

> Sent: Wednesday, August 20, 2014 8:34 PM

> To: RANCIER Racquel R

> Subject: Stock water in draugt

>

>

>

> Sent from my iPhone my name is Rocky Liskey and we live in Klamath county. We were regulated off on July 30 and we're told that we would not be slowed to divert stock water by the BOR. That was later removed but we were only allowed 15 gallons per head. That is certainly not enough water in 85/90 degree weather. Please include guidance in your rules that are more in line with the needs of a 1200/1500 pound cow and her calf.thank for your consideration.

SPANSAIL Joshua A

From: Jennifer Newman <Newmanranch2@aol.com>
Sent: Monday, September 15, 2014 9:04 PM
To: rule-coordinator
Subject: Drought rule

Due to the ongoing drought conditions in the Klamath Basin we need to continue the livestock and human consumption ruling until we receive some significant amounts of moisture. The Klamath Basin does not currently have the infrastructure to handle the long term effects of the continuing drought.

Sincerely,
Kevin Newman

Sent from my iPad

SPANSAIL Joshua A

From: Teresa Foreman <atforeman1@yahoo.com>
Sent: Monday, September 15, 2014 8:08 PM
To: rule-coordinator
Subject: Rule 22 comment

Due to continued drought conditions in the Klamath basin, it is necessary that we, the livestock producers, are able to survive by continuing the livestock and human consumption ruling until we receive some significant amounts of moisture. The Klamath Basin does not currently have the infrastructure to handle the long term effects of the continuing drought.

Allen Foreman

SPANSAIL Joshua A

From: Caren Goold <gammg1926@yahoo.com>
Sent: Monday, September 15, 2014 5:10 PM
To: rule-coordinator
Subject: Rule 22

Due to continued drought conditions in the Klamath basin, we need to continue the livestock and human consumption ruling until we receive some significant amounts of moisture. The Klamath Basin does not currently have the infrastructure to handle the long term effects of the continuing drought. Please listen to and act on our comments.
Thank You.

Sincerely,
Jim and Caren Goold
Goold's Sprague River Ranch, Inc
Sprague River, Or 97624

SPANSAIL Joshua A

From: Randall Kizer <randall.kzr@gmail.com>
Sent: Monday, September 15, 2014 10:05 AM
To: rule-coordinator
Subject: Rule 22

Due to continued drought conditions in the Klamath basin, we need to continue the livestock and human consumption ruling until we receive some significant amounts of moisture. The Klamath Basin does not currently have the infrastructure to handle the long term effects of the continuing drought

Randall Kizer

Regarding Proposed Rule 690-022-0020

The Klamath-Lake County Farm Bureau supports the new permanent rule that will sunset at the end of December 2014 (Rule 690-022-0020). We only support as long as the rule does not address, impact, or modify how the department determines whether ground water and surface water are connected for the purposes of regulation and it does not define how the department proves that a well substantially interferes with surface water. (refer to attached letter dating August 15, 2014 from OWRD titled) (Oregon Water Recourses Department announces Extension of Public Comment Deadline and Scheduling of Second Public Hearing on Drought Rules for Klamath County)

Klamath-Lake County Farm Bureau
President



John Moxley

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SEP 16 2014

OWRD

Klamath-Lake County Farm Bureau would like to add some additional testimony on the proposed rule 690-022-0020.

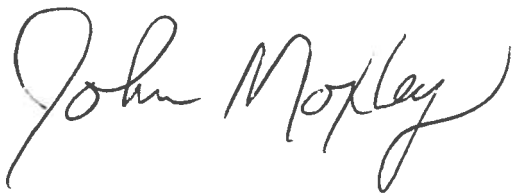
Under section 1. Of the rule, it states that “to grant a temporary preference to water rights for human consumption or stock water use over other water uses regardless of priority date.” We believe that this could be interpreted to give the right of a neighbor or town to call on irrigation water of a senior water right if there well was going dry: as an example. We believe that the attention of the rule is to only protect the neighbor or town from having their water right called on, not to let them make a call on other users.

We hope that this statement would be clarified before the rule is adopted and hope that it sunset in December to make sure there are no other problems.

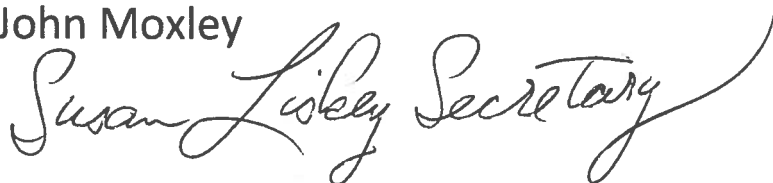
Thank you for your time and consideration.

Klamath-Lake County Farm Bureau

President

A handwritten signature in cursive script that reads "John Moxley".

John Moxley

A handwritten signature in cursive script that reads "Susan Liskey Secretary".



Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department

North Mall Office Building
725 Summer Street NE, Suite A
Salem, OR 97301-1266
503-986-0900
FAX 503-986-0904

Contact: Racquel Rancier
Telephone: 503-986-0828
Cell Phone: 503-302-9235
E-mail: racquel.r.rancier@ wrd.state.or.us

FOR IMMEDIATE RELEASE
August 15, 2014

Oregon Water Resources Department Announces Extension of Public Comment Deadline and Scheduling of Second Public Hearing on Drought Rules for Klamath County

Under Oregon Law, the Water Resources Commission may grant a preference to water rights for stock water and human consumption, when the Governor declares a drought emergency in an area. This preference means that holders of water rights for stock water and human consumption uses – that would otherwise be shut off during a call by a senior water user – would be allowed to continue use of that water for those purposes. Before the preference can take effect in an area, the Commission must adopt rules granting the preference in the region.

In 2013, and again in 2014, the Governor declared a drought emergency in Klamath County. In order to assure that animals would have access to water for drinking, and that people would have access to water for drinking, cooking, and sanitation, the Water Resources Commission adopted temporary rules in 2013, and yet again in 2014. The temporary rules allowed water rights for stock and human consumption to receive a preference, so that these types of uses would not be regulated off upon receipt of a call by a senior water user. Stock water and water for human consumption are often included together with irrigation in older water rights. Human consumption use is included within municipal water right uses.

The existing rules are temporary and can only be in effect for 180 days, expiring September 27, 2014. The temporary rules cannot be extended without undertaking the rulemaking process for permanent rules. Therefore, the Department began the permanent rulemaking process in July, holding a public hearing in Klamath Falls on July 24th and accepting public comments.

In reviewing the feedback received, the Department believes that there are misconceptions about this rule. The rule does not address, impact, or modify how the department determines whether groundwater and surface water are connected for the purposes of regulation. It does not define how the Department proves that a well substantially interferes with surface water. These topics are to be the subject of a future rulemaking as required by the Upper Klamath Comprehensive Agreement, but are not addressed by these rules.

These rules specifically pertain to providing water for human consumption and stock during a drought for those water rights that would have otherwise been regulated off were these rules not in place. This means that during a Governor's declared drought, water rights that include human consumption and stock water uses – that are being regulated to satisfy senior water right holders – may continue those uses when other types of uses under the water right are regulated off. For example, without these rules, a water right that includes the uses of irrigation, human consumption, and stock would be

regulated off to satisfy a valid call by a senior water right holder. With these rules in place, water used under the water right for the purposes of human consumption, as well as for stock water would not be regulated off during the Governor's drought declaration.

The Department received feedback that additional notice should be provided to the community and that the public comment period should be extended to provide the opportunity for further comment. The Department values public input in the rulemaking process. As a result, the Department is undertaking efforts to further engage the community in the rulemaking process, so that the Department can understand the full spectrum of opinions about the rules.

The Department is extending the public comment deadline to September 19, 2014. It will also hold another public hearing to accept public comment on the proposed rules on September 18, 2014. The hearing will be held at the Oregon Institute of Technology from 6:00 pm-7:00 pm in the Mt. Mazama Room.

The Department requests that individuals interested in these rules provide comment. Further information about the rules is available on the Department's website.

Frequently Asked Questions

Why does this apply only in Klamath County?

Other areas of the state have had a long history of regulation under the doctrine of prior appropriation. Other basins across the state, therefore, already have infrastructure and systems in place to address human consumption and stock water needs during a call by senior users. The Klamath Basin is unique in that regulation began for the first time in 2013 in most of the basin, as a result of the completion of the first phase of the Klamath Adjudication. This meant that senior pre-1909 water users could begin to request enforcement of their water rights. In the Klamath Basin, stock owners and cities have not been faced with regulation in the past and drought has exacerbated the potential for impacts. Therefore, systems are not fully in place to ensure that both people and stock have access to water outside of systems used under their existing water rights.

Does this rule change how groundwater is regulated?

In reviewing the feedback received, the Department believes that there are misconceptions about the effects of this rule. This rulemaking process does not address, impact or modify how the department determines whether groundwater and surface water are connected for the purposes of regulation. It does not define how the Department determines that a well substantially interferes with surface water. These topics are to be the subject of a future rulemaking as required by the Upper Klamath Comprehensive Agreement. This is not the objective of this particular rulemaking, which specifically pertains to providing water for human consumption and stock during a drought for those water rights that would have otherwise been regulated off.

Why doesn't the Commission provide a preference to other types of uses?

The Oregon Legislature, recognizing the potential impacts to human and animal welfare during a drought, authorized the Commission, pursuant to a declaration by the Governor that a severe, continuing drought exists, to grant a temporary preference to water rights for human consumption or stock watering use over other water uses regardless of priority date (see ORS 536.750(1)(c)). The Department has no authority to grant a preference to other uses or rights. Its authority is limited to human consumption and stock water.

SPANSAIL Joshua A

From: pinemtnco@aol.com
Sent: Tuesday, September 16, 2014 8:30 PM
To: rule-coordinator
Subject: Klamath drought rule modification

The proposed drought rule modification for Klamath county is the first step in allowing the communities of the Klamath basin to begin to build the capacities and infrastructures to deal with drought conditions. With newly adjudicated water rights that have only been regulated for two seasons and the ongoing drought conditions there is a need to modify owrd drought rules and regulations for Klamath county, so that home owners, land owners, businesses, rural municipalities and urban municipalities have a opportunity to find and or create ways to mitigate the negative impacts of multi year droughts. Without the modification Klamath county will suffer even more economic damage and hard ship.

Thank you,

Garrett Roseberry

SPANSAIL Joshua A

From: Chet Vogt <vranch@vogtsilversmiths.com>
Sent: Wednesday, September 17, 2014 8:20 AM
To: rule-coordinator
Subject: livestock water

To whom it may concern -

This comment is in regard to the Division 22 rule making -

Please be advised that any failure to extend the drought relief for livestock owners would have significant negative consequences for livestock producers. The ability to access water for livestock in drought conditions regardless of water priority date is critical for the sustainability of a livestock operation.

sincerely,
Chet Vogt
Bly, Klamath County, Oregon

SPANSAIL Joshua A

From: Becky Hyde <yainix@mac.com>
Sent: Wednesday, September 17, 2014 9:53 AM
To: rule-coordinator
Subject: Rancher Support for Rule 22

Sept. 17, 2014

To whom it may concern,

Due to continued drought conditions in the Klamath basin, we need to continue the livestock and human consumption ruling (Rule 22), until we receive some significant amounts of moisture. The Klamath Basin does not currently have the infrastructure to handle the long term effects of the continuing drought.

Thank you. Becky Hyde

**GAIL WHITSETT
STATE REPRESENTATIVE**



HOUSE OF REPRESENTATIVES

Testimony for the OWRD Klamath Hearing September 18, 2014

OWRD should leave the word "surface" in the proposed permanent rule as it appears in its current emergency rule. The exemption is needed because current law does not appear to have a surface water exemption in place to allow diversion for stock water.

Conversely, each ground water well has the automatic exemption to use up to 15,000 gallons per day for domestic uses including stock water. Many additional stock water wells are currently being constructed in Klamath County. All of these wells will include an exemption for domestic use, including stock water.

Further, OWRD acknowledged that stock water use is so small that "they are unlikely to provide a timely and effective benefit to the senior user." Even if OWRD actually had the authority to regulate groundwater pursuant to its Finding of Fact and Final Order of Determination in the Klamath River Adjudication, a call on wells to discontinue the use of groundwater in quantities sufficient to water livestock would be a futile call because it would not measurably benefit the senior priority water right holder.

We believe that OWRD's computer ground water modeling fails to rise to the level of the PREPONDERANCE of evidence proof statutorily required to authorize groundwater regulation in favor of a senior surface water right. The removal of the word "surface" from the proposed permanent rule appears to include all water, INCLUDING GROUNDWATER under its regulation authority. This provision could easily be used to infer connectivity between ground water and surface water that may be regulated under the FFOD. This could lend credibility to OWRD's apparent intent to institute and support, a non-field tested and non-empirically derived computer model which in my opinion as a geologist, lacks scientific veracity. This has the potential to result in a fallacious effort to show there is a connection between ground water and surface water that could justify OWRD's efforts to shut off wells in conjunction with surface water calls.

We find no viable reason or justification for this permanent rule to apply only to the Klamath River watershed in Klamath County. At least nine other Oregon counties are under gubernatorial drought declaration. It would seem that those counties should be experiencing similar issues. However, none of those counties appear to have a rule pertaining to the authorization of the use of water for watering livestock and certainly not for the use of groundwater for that purpose.

We fail to understand what apparently makes Klamath County unique in the regulation of stock water use, and strenuously oppose this objective.

Respectfully submitted,

Representative Gail Whitsett

Representative Gail Whitsett

House District 56

Klamath and Lake Counties

**Keno Irrigation District
9350 Highway 66
Klamath Falls, OR 97601
541-884-9594**

September 18, 2014

TO: Water Resources Department
Attn: Rule Coordinator
725 Summer Street NE, Suite A
Salem, OR 97301

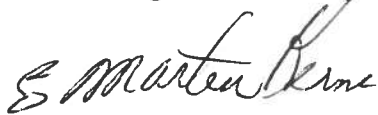
RE: Preference for Human Consumption and Stock Water Use in Klamath County
During Governor-Declared Drought (OAR Chapter 690, Division 22) ORS 536.750

After reviewing the above Proposed Rules, we can only support them if they are limited to surface water only. This should be specifically stated in the final rules as it was in the original proposal.

It is critical to all Klamath County livestock owners who have no other source for stock water that provision be made that allows them to continue their use of surface water throughout the remainder of this year. In the future, applying for the Drought Declaration so the expiration date would be later than what happened this year would be appropriate.

Sincerely,

Keno Irrigation District,



E. Martin Kerns, Secretary

SPANSAIL Joshua A

From: Henry Hummel <henryhummel@att.net>
Sent: Friday, September 19, 2014 11:17 AM
To: rule-coordinator
Subject: rule 22

Please consider extending the time for stock water that we are currently using. We are reducing our flock size due to the lack of water. If we can maintain stock water, we will be able water what we will be keeping.
thank you
andy



3415 Commercial St. SE, Ste. 217
Salem, Oregon 97302
Phone: (503) 361-8941 • Fax: (503) 361-8947
www.orcattle.com

September 19, 2014

To: Oregon Department of Water Resources

FROM: Oregon Cattlemen's Association

RE: OAR 690 Division 22 Rulemaking: Klamath Co. – Preference for Human Consumption and Stock Water use during drought.

The Oregon Cattlemen's Association believe a permanent rule to allow for human consumption of water and stock water during a declared drought in the Klamath area would favorably service those who would otherwise lose their access to water during a senior water right holders call for water during a drought. However, there are several concerns that come with our appreciation for providing water for human consumption and livestock for junior water right holders who may otherwise would be without:

- Why is it necessary in the Klamath area when it isn't necessary statewide and if the need for a permanent rule isn't necessary elsewhere wouldn't the same developments in other similar situations also develop in the Klamath over a couple of years or more without the need for a permanent rule?
- Wouldn't the same outcome be established within rule if there was no reference to groundwater? The inclusion of groundwater assumptions of connectivity to surface water are not scientifically determined within all the river miles of the Klamath area and it doesn't seem necessary for this inclusion in the rulemaking.
- Furthermore, there is always concern when there is an apparent lack of public notice which was brought up by many of the landowners in the Klamath area.

We thank you for extending the public comment period and ask that there would continue to be an opportunity for junior water rights holders to access water for human consumption and stock water.

Sincerely submitted,

Oregon Cattlemen's Association

Contact: Jim Welsh, Political Advocate
(541) 554-8043
jdwelshco@msn.com

SPANSAIL Joshua A

From: Paul Lewis <lambchop@whitedorper.com>
Sent: Friday, September 19, 2014 11:45 AM
To: rule-coordinator
Subject: OAR Chapter 690, Division 22 comments

I would like to object to the proposed rule due to the following statement from Sen. Doug Whitsett: OWRD has not expended the resources necessary to determine by a preponderance of evidence that individual Klamath County wells are connected to surface water and that the regulation of their use would result in timely and effective relief of interfere with priority surface water rights. That preponderance of evidence can only be established by individual empirical field well tests that produces data sufficient to proves that the well is connected and is causing timely and effective interference.

Because of your failure to determine if a well effects surface flow. You should not be able to shut off any wells until this is proved on a scientific basis. Without this proof, there is no need for a rule to allow stock and human water, since wells cannot be legally shut down.

Paul Lewis
12661 East Langell Valley Rd.
Bonanza, OR 97623
541-591-2510



September 19, 2014

Transmitted via facsimile
rule-coordinator@wrd.state.or.us

Water Resources Department
Attn: Rules Coordinator
725 Summer Street NE, Suite A
Salem, OR 97301

RE: OAR Chapter 690, Division 22
Preference for Human Consumption & Stock Water Use

On behalf of the membership of Water for Life, Inc., I would like to submit the following comments in regard to the above noted administrative rules.

First, absent of express statutory authority, administrative agencies lack the ability to promulgate, or in this case, modify administrative rules. In this respect, we suggest the specific reference to the "Purpose" of the rules retain the term "Statutory" for current, as well as future review.

Second, as contained in subsection (1) of OAR 690-022-0033, the identifying term of "surface water" is apparently modified to "water." Thus, with this modification, it appears the Water Resources Department is attempting to extend the scope of the rules to all waters within Klamath County, as opposed to surface water resources.

Water for Life, Inc., opposes this effort to substantially broaden the scope of the administrative rules as they relate to the regulation of water resources during a declared drought. Additionally, we believe the statutory authorities maintained by

the Department (ORS 536.700 to 536.780) as they relate to “Emergency Water Shortage Powers” extend to surface water resources. Similarly, we do not believe such authorities grant the Department authority to extend such administrative rules to ground water resources.

To illustrate this distinction, one should review existing statutory provisions contained in ORS 536.750(1)(f) (Powers of commission after declaration of drought rules). Such provisions provide for the distinction between the regulation of surface and ground water resources during a declared drought. During a declared drought, in accordance with ORS 536.750 (1)(f), the Commission may:

Utilize an expedited notice and waiting requirement established by rule for the substitution of a supplemental ground water right for a primary water right under drought conditions in place of the notice and waiting requirement provided in ORS 540.524.

Thus, such provisions identify the distinction between authorities to regulate surface water resources and ground water resources during a declared drought.

Third, with respect to the proposed administrative rules, Water for Life, Inc., would like to raise a number of pertinent policy questions. During the 2014 calendar year, the Governor has issued five Executive Orders declaring drought conditions in 10 individual Oregon Counties. In the event the proposed administrative rules are intended to address the regulation of surface water resources during a declared drought, it would seem appropriate such rules would be extended to the other county jurisdictions on a uniform and consistent basis.

Another significant policy question is whether there is actually a need for the administrative rule being proposed. As contained in ORS 536.310, preferences for human and livestock consumption during periods of insufficiency are clearly identified.

ORS 536.310

(12) When proposed uses of water are in mutually exclusive conflict or when available supplies of water are insufficient for all who desire to use them, preference shall be given to human consumption purposes over other uses and for livestock consumption over any other use.

P.O. Box 4233 – Salem, Oregon – 97114
Phone 503-302-6391

www.waterforlife.net

info@waterforlife.net

Provisions contained in ORS 536.750 additionally provide the Commission clear authority during a drought period:

ORS 536.750 (1)

(c) Notwithstanding the priority of water rights, grant preference of use to rights for human consumption or stock watering use.

Finally, Water for Life, Inc. believes the attempt to extend the scope of the proposed administrative rules to ground water resources conflicts with existing statutory provisions regarding the designation of a critical ground water area (ORS 537.730, et seq.). Such provisions provide a process to be followed when ground water resources are limited or insufficient.

In summary, Water for Life, Inc. recommends the proposed administrative rules be modified to: (1) exclude the proposed extension to ground water resources, (2) be evaluated for need in light of existing statutory provisions granting clear preferences for human and livestock consumption over other uses, and (3) be extended to other impacted counties with uniformity.

Thank you for your consideration.

Water for Life, Inc.

Amber McKinney
Executive Director



The Klamath Tribes

September 19, 2014

Rules Coordinator
Oregon Water Resources Department
725 Summer St. NE, Suite A
Salem, OR 97301

Email: rule-coordinator@wrp.state.or.us

Re: Klamath Tribes' Comments on Proposed OAR Chapter 690 Division 22
Rulemaking: RULE CAPTION: Preference for Human Consumption and Stock Water
Use in Klamath County during Governor-Declared Drought

Dear Rules Coordinator:

The Klamath Tribes are deeply concerned about the Proposed Rulemaking described above and appreciate this opportunity to comment and seek further review of the proposal. In short, we are concerned that the Proposed Rulemaking may not be well-founded and it asks senior water rights holders like the Tribes to contribute emergency water without providing sufficient safeguards to assure the contribution is limited to what is truly necessary. Also, the proposal to make such provisions permanent is inappropriate, and a specific sunset provision should be included.

General Effect of the Proposed Rules

At the outset we note that the rules work a significant change in application of the prior appropriation doctrine that is the foundation of water law in Oregon. In short, the proposed rules elevate stock watering and human consumption to the highest priority, above all otherwise senior water rights including those of the Klamath Tribes that enjoy a "time immemorial" priority date.

That outcome may be acceptable in certain very limited circumstances. But in the forefront of the discussion must be kept the unavoidable fact that water dedicated to these purposes necessarily comes at someone else's expense. During a drought in a basin like the Klamath, there is no extra water for the Department to allocate to needy stockmen. Thus this rulemaking is not

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(541) 783-2219 ~ Fax (541) 783-3706



just a matter of providing emergency relief to certain citizens; it is a volitional and direct decision that the relief will be provided not by the State or the Department, not by the United States nor by the County, but by the Tribes and perhaps other senior water right holders.

As a result, it is reasonable for the Tribes and the Department to insist that the proposed rules be tightly drawn as to both the conditions of their invocation, their duration, and the processes of their application. As we explain below, the proposed rules are not so drawn.

Also, it warrants noting that when, as the saying goes, the shoe was on the other foot there was no equivalent effort, when drought struck, to get others to provide emergency water for the relief of the Tribes' resources. That is, there was no proposed rulemaking to provide water to tribal fisheries at the expense of other water uses in the Basin. It is of course too late to correct that now, but those facts are nonetheless part of the landscape in which the current rulemaking is taking place. And they add emphasis to the need, now that the Tribes are asked to provide relief to others, to assure that exemptions to the prior appropriation doctrine are absolutely necessary, are not prolonged inappropriately, and are as narrow as possible.

Promulgating New, Permanent Rules Now Is Unnecessary, Inappropriate, and Premature

The rules currently in place were intended to provide emergency relief for 180 days then expire. For several reasons, making them permanent is not appropriate. First, the rules are, after all, *emergency* rules to help distressed stockmen through an immediate crisis. The rules are not intended to provide stockmen with permanent relief from drought (again, we note, at the ongoing expense of the Tribes). Rather, the rules provide the opportunity – and a substantial one, at that, lasting six months through nearly all the irrigation season – for people to take steps to adapt to conditions. If people have not taken the necessary actions, it is not the responsibility of the Department to require that the Tribes provide continued relief.

Second, the likely impact of expiration of the emergency rule is not great. The Bureau of Reclamation's Klamath Project, whose call on the Klamath system is a large part of the basis for invoking the emergency rule, is near the end of its irrigation season and its call will soon end. Also, the other operative call in the Basin, by the Klamath Tribes, is limited in quantity to the Specified Instream Flow agreed to by the many parties to the Upper Klamath Basin Comprehensive Agreement, so it has a very limited impact on access to stock water or water for human use.

Third, the Basin is at or near the time of year when much of its livestock is shipped to other locations for the winter. Thus, the need for extending the emergency rules is much reduced. More, this shipping is the kind of step for which the emergency rules, as noted above, have carved out time. If that time was not well used by stockmen, it is not the responsibility of the Tribes or the Department to provide continued relief.



In all, the legitimate and likely impact of allowing the emergency rule to expire as initially contemplated does not begin to justify indefinitely compromising the senior water rights of the Klamath Tribes by making the rule permanent. The same is true of human consumption where people have had six months to secure alternative sources. Again it is not the responsibility of the Department or the Tribes to provide ongoing emergency relief.

An extension of the rule through next year, 2015, with the rule automatically expiring at the end of that year, would begin to address the necessary limitations. And it would send a clear message that emergency relief of this type will end soon because it is intended only to provide a short transition time as people adjust to the new situation in the Klamath Basin.

Applicability of the Rules to Federal Reserved Rights

It seems to us unlikely that the proposed rules in any form could be enforced at the expense of the Tribal water rights. As federally reserved and treaty reserved water rights, the Tribes' water rights cannot be involuntarily reduced or compromised by state action. Both federal and state courts have made this clear. Rules that reduce or compromise the Tribes' water rights in unlimited amounts and for indeterminate lengths of time are particularly inappropriate.

By submitting these comments we do not in any way make concessions on, or contradict, that principle. Rather, we seek to work with the Department and others to develop outcomes of the state rulemaking process that will not require invocation of that principle in an already difficult situation. We believe others share this intent and will work with us in good faith.

Content of the Proposed Rules

In the following comments we do not mean to take issue with the overall goals of the proposed rules, to wit, providing emergency water for stock and human use to alleviate declared droughts during a transition period. Quite possibly it may be worth OWRD to consider a separate rule for each use – human consumption and stock watering. As discussed above, however, the proposed rules need to be as narrow as possible. As currently drafted, they do not satisfy that requirement. We illustrate that with the following examples, discussions, and recommendations.

Efficiency of use of emergency water. The rules should require the most efficient possible use of emergency water. As written, the proposed rules can be read to allow sufficient diversion of water to fill a long, leaky canal in order to deliver water to stock at considerable distance from the water source. This is wasteful and those whose water rights are being compromised in order to provide the emergency water should not be forced to bear this additional burden.

More, it is not unheard of that such “stockwater” users find ways to, along a long, leaky canal, irrigate lands that would otherwise not have a right to irrigation water. We know the Department does not intend or condone such abuse, but the rules should be written in a way that more effectively empowers the Department to prohibit it.



Again, if the waste of water came at the state's expense it might be possible to live with loose emergency rules. But that is not the case. And if the Department wants to have senior water users contribute emergency water, then those water users are more than justified in requiring the Department to do all in its power to minimize that contribution. Requiring efficient delivery of water by piping or trucking to remote stock seems a minimal demand on junior water users who otherwise would get no water whatsoever.

Duration of application of the proposed rules. The proposed rules, once invoked by the Governor's declaration of a drought, potentially apply indefinitely. This seems backwards because it essentially makes the emergency rules permanent until further action demobilizes them. It puts the momentum behind continuing application of the rules by making the burden one of showing the drought has eased, rather than showing the drought, and the need for application of the extraordinary rules, continues.

The burden should not be on those donating water for emergency relief to demonstrate why they should get their water back. To the contrary, the burden should be on those continuing to want emergency water to show that the situation continues to warrant extraordinary relief.

But more importantly, the rules should reflect their fundamental reason for existence in the Klamath Basin. That is, it has been decided (not necessarily with the assent of the Tribes) that a period of transition should be provided during which water users can adjust to the new situation regarding enforcement of water priorities in the Basin. Thus any extension or modification of the current rule should include a "sunset" provision of no later than the end of 2015. And it is important that the Department and the Commission take steps to remind people who make use of these rules that the rules will not be available much longer.

The rules must minimize flow reductions in Basin streams. As written, the proposed rules do not prevent the complete dewatering of a stream and consequent destruction of fisheries. This is plainly not a fair request to make of the Tribes and must be avoided.

The purpose of the emergency water for stock is to prevent loss of that resource to stockmen. That purpose must not be achieved at the price of destroying the Tribes' resources. Such a result would be a complete inversion of everything that water law, and the Department, stand for. The proposed rules must eliminate that possibility.

Our comment here is consistent with section 3.20 of the recent Upper Basin Comprehensive Agreement in which the Department and others with direct interest in this matter have committed to avoiding dewatering of streams. The proposed rules could take advantage of the enormous amount of work that went into the Comprehensive Agreement by incorporating into the rules the concepts and quantities pertaining to the Agreement's "Specified Instream Flow" (SIF). Any extension or modification of the rules should provide that the emergency drought rules apply only when the SIFs are being met.



The rules should not allow for indefinite expansion of human and stock demand. As written, the proposed rules allow the demand for emergency water to expand as the human and livestock populations in the Basin grow. Such growth can cause the "emergency" rules eventually to overwhelm the seniority system. Again, this is too much to ask of senior water rights holders who are contributing the emergency water.

People in the Basin need to adapt to the realities of the limited water supply and to limit, not expand, demand. The rules must encourage this limitation, not accommodate continued growth in demand. Here again, this problem can be addressed by having a specific expiration date for the rules.

The application of the proposed rules to Klamath County alone is suspect. Our understanding is that there are two reasons why the proposed rules are drafted to apply only to Klamath County. Neither is convincing, and the first raises serious concerns.

The first reason offered is that water users in other basins are accustomed to being regulated off, have made drought preparations by developing stock ponds or the like, or have otherwise accommodated the need to cope with drought. In contrast, the Klamath Basin is unique and must be given time to adapt to the new realities of enforcement of water priorities and rights.

It is jarring, to say the least, to learn that the Klamath Tribes are thus virtually the only water right holder in Oregon being asked by the Department to compromise their water rights in order to provide emergency water to junior users because of drought. This remarkable fact adds terrific emphasis to nearly every other paragraph in this letter.

The second reason is that the Governor is required to issue drought declarations on a county-by-county basis. That may be so, but it does not alleviate the difficulties described above.

We are troubled by the Klamath-only aspect of the proposed rules and need reassurance that the unique demands made of senior water rights holders in the Klamath Basin are legitimate. If it is true that the Klamath Basin needs time to achieve the sophistication described as being present in other basins, then the proposed rules should sunset soon.

The proposed rules should provide penalties for abuse. Undeniably, the proposed rules invite junior water right holders to take water that they otherwise would not have a right to take. There needs to be a disincentive to abuse this opportunity. Either the proposed rules should include explicit penalties for abuse, or they should refer directly to other enforcement and penalty mechanisms available to the Department. Otherwise, experience teaches that junior water users can be expected to take more water than is strictly needed under a tight emergency watering regime.



Conclusion

The proposed rules demand of senior water rights holders extraordinary contributions of emergency water for the benefit of junior users. Again, if the emergency water were coming at the expense of the state or the county a loose and indefinite set of rules might be acceptable. But it is not. It is coming at the expense of Tribal rights and resources. Consequently the rules must be made as tight, and short-lived as possible.

The Tribes' preference is that the temporary emergency rules be allowed to expire as originally contemplated. But if the rules are extended and/or modified, we strongly recommend (i) that they expire by their own terms no later than the end of 2015, and (ii) that they specify that the emergency relief is available only when the Specified Instream Flows established in the Upper Basin Comprehensive Agreement are being met.

Thank you again for your time and attention.

Very truly yours,



Don C. Gentry
Chairman

cc: Tom Paul
Doug Woodcock
Richard Whitman
Racquel Rancier



drought rule modification

Thank you for giving me the opportunity to commit on the drought rule modification for the Klamath basin

Without the rule modification human consumption use of water and livestock water could be regulated at the end of September 2014.

The negative impacts to businesses, home owners, land owners, urban municipalities and rural municipalities would be catastrophic.

New regulation of water and a two year drought was brought to light just how unprepared and unequipped the people of the Klamath basin are in dealing with long term drought conditions.

Are diversified communities are looking for ways to mitigate long term drought, but it takes time and perseverance and that is why the drought rule modification is so important.

The drought rule modification would allow our communities the flexibility to develop and create the tools necessary to mitigate drought short term and long term drought.

Pine Mountain Cattle Co.

Linda Long, Principal Broker

OREGON WATER RESOURCES RULE 22

I am the owner of Crater Lake Realty, Inc. and specializing in agricultural real estate.
I am also, with my husband Pete Bourdet, owner of nearly 1000 acres with irrigation, 1300 head of yearling cattle grazing through the summer plus 45 head of horses.
I am also the Chair of Modoc Irrigation District.

In all of these endeavors it is critical that we have livestock water and water for human consumption.

My request is that the Governor's Declaration of Drought and the subsequent allowance of use for stock water and human consumption be extended until December 31 of the drought year. In our cattle operation and with our year around horse operation it is critical that we have access to water throughout the year. Others in MPID as well as other livestock producers likewise have stock year around depending on these water sources as well.

Thank you for your consideration
Linda Long



Linda Long, Principal Broker/Owner
Crater Lake Realty, Inc.
PO Box 489/33550 Hwy 97N
Chiloquin, OR 97624
Cell: 541-891-5562
541-783-2759/Fax 541-783-2724
Linda@CraterLakeRealtyInc.com
www.CraterLakeRealtyInc.com



35133 Sprague River Road
Sprague River, OR 97639
September 18, 2014

Oregon Water Resources Department
Attn: Rule Coordinator
725 Summer Street NE, Suite A
Salem, ORS 97301-1271

Dear Rule Coordinator:

I am opposed to the proposed changes to OAR Chapter 690, Division 22. Please limit the proposed rules to surface water only and withdraw the proposed rules and seek specific legislative approval before issuing rules that merge the legal authority over surface and ground water rights during periods of severe, continuing drought.

OWRD continues to turn off ground water and surface water at the same time with no verifiable proof of interference. OWRD's only "proof" is a faulty computer model that agrees with OWRD's assumption on the connectivity of ground water and surface water.

I demand that OWRD return to verifiable science driven rules and return a degree of common sense back into the State agency.

Sincerely,

A handwritten signature in black ink, appearing to read "Bruce S. Topham", written in a cursive style.

Bruce S. Topham

35133 Sprague River Road
Sprague River, OR 97639
September 18, 2014

Oregon Water Resources Department
Attn: Rule Coordinator
725 Summer Street NE, Suite A
Salem, ORS 97301-1271

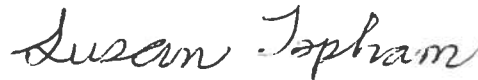
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I demand that OWRD return to verifiable science driven rules and return a degree of common sense back into the State agency.

Sincerely,

A handwritten signature in cursive script that reads "Susan Topham".

Susan Topham

35133 Sprague River Road
Sprague River, OR 97639
September 18, 2014

Oregon Water Resources Department
Attn: Rule Coordinator
725 Summer Street NE, Suite A
Salem, ORS 97301-1271

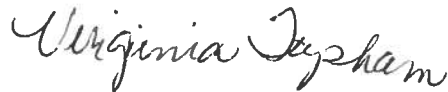
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Sincerely,

A handwritten signature in cursive script that reads "Virginia Topham".

Virginia Topham

35133 Sprague River Road
Sprague River, OR 97639
September 18, 2014

Oregon Water Resources Department
Attn: Rule Coordinator
725 Summer Street NE, Suite A
Salem, ORS 97301-1271

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Sincerely,

Brandan Topham



Oregon Water Resources Department
Attn: Rule Coordinator
725 Summer Street NE, Suite A
Salem, ORS 97301-1271

Dear Rule Coordinator:

I am opposed to the proposed changes to OAR Chapter 690, Division 22. Please limit the proposed rules to surface water only, withdraw the proposed rules and seek specific legislative approval before issuing rules that merge the legal authority over surface and ground water rights during periods of severe, continuing drought.

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I demand that OWRD return to verifiable science driven rules and return a degree of common sense back into the State agency.

Sincerely,

A handwritten signature in black ink that reads "Joan Amaral Sees". The signature is written in a cursive style with a large, looping initial "J".

Joan Amaral Sees
40627 Highway 140 E
Beatty, OR 97621

Oregon Water Resources Department
Attn: Rule Coordinator
725 Summer Street NE, Suite A
Salem, ORS 97301-1271

Dear Rule Coordinator:

I am opposed to the proposed changes to OAR Chapter 690, Division 22. Please limit the proposed rules to surface water only, withdraw the proposed rules and seek specific legislative approval before issuing rules that merge the legal authority over surface and ground water rights during periods of severe, continuing drought.

OWRD continues to turn off ground water and surface water at the same time with no verifiable proof of interference. OWRD's only "proof" is a faulty computer model that agrees with OWRD's assumption on the connectivity of ground water and surface water.

I demand that OWRD return to verifiable science driven rules and return a degree of common sense back into the State agency.

Sincerely,

A handwritten signature in cursive script that reads "Larry Sees".

Larry Sees
40627 Highway 140 E
Beatty, OR 97621



Oregon

John A. Kitzhaber, MD, Governor

Water Resources Department

North Mall Office Building
725 Summer Street NE, Suite A
Salem, OR 97301-1266
503-986-0900
FAX 503-986-0904

Contact: Racquel Rancier
Telephone: 503-986-0828
Cell Phone: 503-302-9235
E-mail: racquel.r.rancier@wrdd.state.or.us

FOR IMMEDIATE RELEASE

August 15, 2014

Oregon Water Resources Department Announces Extension of Public Comment Deadline and Scheduling of Second Public Hearing on Drought Rules for Klamath County

Under Oregon Law, the Water Resources Commission may grant a preference to water rights for stock water and human consumption, when the Governor declares a drought emergency in an area. This preference means that holders of water rights for stock water and human consumption uses – that would otherwise be shut off during a call by a senior water user – would be allowed to continue use of that water for those purposes. Before the preference can take effect in an area, the Commission must adopt rules granting the preference in the region.

In 2013, and again in 2014, the Governor declared a drought emergency in Klamath County. In order to assure that animals would have access to water for drinking, and that people would have access to water for drinking, cooking, and sanitation, the Water Resources Commission adopted temporary rules in 2013, and yet again in 2014. The temporary rules allowed water rights for stock and human consumption to receive a preference, so that these types of uses would not be regulated off upon receipt of a call by a senior water user. Stock water and water for human consumption are often included together with irrigation in older water rights. Human consumption use is included within municipal water right uses.

The existing rules are temporary and can only be in effect for 180 days, expiring September 27, 2014. The temporary rules cannot be extended without undertaking the rulemaking process for permanent rules. Therefore, the Department began the permanent rulemaking process in July, holding a public hearing in Klamath Falls on July 24th and accepting public comments.

In reviewing the feedback received, the Department believes that there are misconceptions about this rule. The rule does not address, impact, or modify how the department determines whether groundwater and surface water are connected for the purposes of regulation. It does not define how the Department proves that a well substantially interferes with surface water. These topics are to be the subject of a future rulemaking as required by the Upper Klamath Comprehensive Agreement, but are not addressed by these rules.

These rules specifically pertain to providing water for human consumption and stock during a drought for those water rights that would have otherwise been regulated off were these rules not in place. This means that during a Governor's declared drought, water rights that include human consumption and stock water uses – that are being regulated to satisfy senior water right holders – may continue those uses when other types of uses under the water right are regulated off. For example, without these rules, a water right that includes the uses of irrigation, human consumption, and stock would be

regulated off to satisfy a valid call by a senior water right holder. With these rules in place, water used under the water right for the purposes of human consumption, as well as for stock water would not be regulated off during the Governor's drought declaration.

The Department received feedback that additional notice should be provided to the community and that the public comment period should be extended to provide the opportunity for further comment. The Department values public input in the rulemaking process. As a result, the Department is undertaking efforts to further engage the community in the rulemaking process, so that the Department can understand the full spectrum of opinions about the rules.

The Department is extending the public comment deadline to September 19, 2014. It will also hold another public hearing to accept public comment on the proposed rules on September 18, 2014. The hearing will be held at the Oregon Institute of Technology from 6:00 pm-7:00 pm in the Mt. Mazama Room.

The Department requests that individuals interested in these rules provide comment. Further information about the rules is available on the Department's website.

Frequently Asked Questions

Why does this apply only in Klamath County?

Other areas of the state have had a long history of regulation under the doctrine of prior appropriation. Other basins across the state, therefore, already have infrastructure and systems in place to address human consumption and stock water needs during a call by senior users. The Klamath Basin is unique in that regulation began for the first time in 2013 in most of the basin, as a result of the completion of the first phase of the Klamath Adjudication. This meant that senior pre-1909 water users could begin to request enforcement of their water rights. In the Klamath Basin, stock owners and cities have not been faced with regulation in the past and drought has exacerbated the potential for impacts. Therefore, systems are not fully in place to ensure that both people and stock have access to water outside of systems used under their existing water rights.

Does this rule change how groundwater is regulated?

In reviewing the feedback received, the Department believes that there are misconceptions about the effects of this rule. This rulemaking process does not address, impact or modify how the department determines whether groundwater and surface water are connected for the purposes of regulation. It does not define how the Department determines that a well substantially interferes with surface water. These topics are to be the subject of a future rulemaking as required by the Upper Klamath Comprehensive Agreement. This is not the objective of this particular rulemaking, which specifically pertains to providing water for human consumption and stock during a drought for those water rights that would have otherwise been regulated off.

Why doesn't the Commission provide a preference to other types of uses?

The Oregon Legislature, recognizing the potential impacts to human and animal welfare during a drought, authorized the Commission, pursuant to a declaration by the Governor that a severe, continuing drought exists, to grant a temporary preference to water rights for human consumption or stock watering use over other water uses regardless of priority date (see ORS 536.750(1)(c)). The Department has no authority to grant a preference to other uses or rights. Its authority is limited to human consumption and stock water.

What uses are included in human consumption and stock water?

“Human Consumption,” as defined in the rules, means the use of water for the purposes of drinking, cooking, and sanitation. “Stock Watering,” as defined in the rules, means the use of water for consumption by domesticated animals and wild animals held in captivity as pets or for profit.

Why can’t the Department just extend the temporary rules and consider this later?

The existing rules are temporary and can only be in effect for 180 days, expiring September 27, 2014. The temporary rules cannot be extended without undertaking the rulemaking process for permanent rules – even if the Department decides to only make these rules effective through the end of the year. Therefore, the Department plans to call a Water Resources Commission meeting at the end of September to consider adoption of these rules.

In addition, instead of making this a permanent rule, the Department is considering having these rules in effect through December 2014. This will allow the Department and community to further assess solutions to water needs and determine whether these rules are needed in future years. Public comment will assist the department in determining whether these rules should sunset at the end of the year.

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**OREGON ADMINISTRATIVE RULES
WATER RESOURCES DEPARTMENT
CHAPTER 690
DIVISION 22
EMERGENCY WATER PROVISIONS – KLAMATH COUNTY**

690-022-0020

Purpose and ~~Statutory~~ Authority

- (1) The purpose of these rules is to implement ORS 536.750(1)(c), which- authorizes the Commission, pursuant to a gubernatorial declaration that a severe, continuing drought exists, to grant a temporary preference to water rights for human consumption or stock watering use over other water uses regardless of priority date. ~~These rules address an immediate threat to the health and welfare of the people of Oregon that would otherwise occur if regulation of senior water rights in Klamath County curtailed or prohibited use of surface water for human consumption and stock watering as defined in these rules.~~
- ~~(2) Executive Order No. 14—01: Determination of a State of Drought Emergency in Harney, Klamath, Lake and Malheur Counties Due to Drought and Low Water Conditions, was signed by Governor John A. Kitzhaber, M.D., on February 13, 2014.~~
- ~~(3) These rules become effective on April 1, 2014 and will remain in effect for 180 days from the effective date or for the term of Oregon Governor Kitzhaber's Executive Order No. 14—01, whichever is shorter.~~
- (2) These rules become applicable upon declaration by the Governor of a severe, continuing drought in Klamath County. During the effective time period of a drought declaration under ORS 536.740 in Klamath County, the Commission grants a preference of use for water rights for human consumption and/or stock watering as provided in this rule. The temporary preference of use shall only apply to Klamath County and shall remain in effect only during the effective time period of the Governor's drought declaration in Klamath County.

Stat. Auth.: ORS 536.025; 536.027; 536.750
Stats. Implemented: ORS 536.750

690-022-0025

Definitions

~~The~~Unless the context requires otherwise, the words and phrases used in Division 22 have the following meaning:

- (1) "Commission" means the Oregon Water Resources Commission.
- (2) "Department" means the Oregon Water Resources Department.
- (3) "Human Consumption" means the use of water for the purposes of drinking, cooking, and sanitation.
- (4) "Stock Watering **Use**" means the use of water for consumption by domesticated animals and wild animals held in captivity as pets or for profit.

Stat. Auth.: ORS 536.025; 536.027; 536.750
Stats. Implemented: ORS 536.750

690-022-0030

Applicability and Preference

Notwithstanding During the effective period of a drought declaration under ORS 536.740 in Klamath County, and notwithstanding any provision of Oregon Administrative Rules Division 690 to the contrary, the Commission grants a temporary preference for human consumption and/or stock watering as follows:

- (1) ~~These~~ The preference described in these rules ~~apply~~ applies only to the diversion or use of ~~surface~~ water within Klamath County.
- (2) Uses of ~~surface~~ water for human consumption and stock watering, to the extent authorized under a water right certificate, permit, decree, or findings of fact and order of determination issued in an adjudication subject to ORS Chapter 539, are granted a preference over all other water uses regardless of the priority date of the underlying water right.
- (3) The Department will regulate water rights in Klamath County in accordance with the preference for water rights for human consumption and stock watering use granted in as provided in subsection (2) of this section.
~~690-022-0030 (2) of these rules.~~
- (4) ~~Political subdivisions~~ Water right holders exercising the human consumption or stock water preferences established in this rule shall assure curtailment of water uses unrelated to the preference ~~consistent with this rule.~~

Stat. Auth.: ORS 536.025; 536.027; 536.750

Stats. Implemented: ORS 536.750

DRAFT