



# Oregon

Kate Brown, Governor

**Water Resources Department**

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## MEMORANDUM

**TO:** Water Resources Commission

**FROM:** Thomas M. Byler, Director

**SUBJECT:** Agenda Item M, March 13, 2015  
Water Resources Commission Meeting

**Request for Adoption of Rules – OAR Chapter 690, Division 25,  
Regulation of Groundwater in the Off-Project Area During the  
Irrigation Season for Senior Surface Rights in the Klamath Basin**

### I. Introduction

At the May 2014 Water Resources Commission meeting, staff were directed to convene a rules advisory committee and develop draft rules pertaining to the regulation of wells in the Off-Project area of the Klamath Basin for the benefit of senior surface water rights. Staff will provide an overview of the rulemaking process and present the rules to the Commission for consideration for adoption (Attachment 1, OAR Chapter 690, Division 25, The Control of Wells in the Off-Project Area ).

### II. Background

Irrigators in the Upper Klamath Basin worked with the Klamath Tribes, the State of Oregon and the United States to resolve water, land and economic issues in the upper basin. The result of this effort is contained in the Upper Klamath Basin Comprehensive Agreement (Agreement), ceremonially signed on April 18, 2014.

The Agreement provides in detail how regulation of groundwater use will proceed once a call for water is validated by the Watermaster. The Agreement further states that the Oregon Water Resources Department will recommend to the Commission they adopt rules consistent with the Agreement (Attachment 2). The draft rules presented herein meets the intent of this provision of the Agreement.

### **III. Discussion**

#### **A. Existing Regulatory Authority**

The Department's authority to regulate groundwater resides in Oregon Revised Statutes, Chapters 537 and 540, and is further detailed within Oregon Administrative Rule 690-009 (Division 9, Attachment 3). Division 9 pertains to the allocation and regulation of groundwater in hydraulic connection with surface water and has statewide applicability. Division 9 also contemplates and authorizes the adoption of rules that locally supersede Division 9 (690-009-0030). The draft rules before the Commission constitute a local rule that works in conjunction with and supersedes portions of Division 9. As detailed in a memo to the Department from the Oregon Department of Justice, the Commission has authority to adopt local rules (Attachment 4)

#### **B. Draft Rule Development**

Beginning in October 2104, a rules advisory committee was convened that included representation from upper basin irrigators, the Klamath Tribes, Crater Lake National Park, City of Klamath Falls, Klamath Water Users (representing On-Project water users), WaterWatch of Oregon, Water For Life, The Nature Conservancy, and the U.S. Geological Survey. The first meeting was held October 22, 2014 in Klamath Falls, Oregon, and a second meeting was held November 18, 2014, also in Klamath Falls. Two additional committee meetings in December were conducted by conference call.

Throughout the rules development process a concerted public outreach effort was made each step of the way. Five open houses were held to provide the public an opportunity to meet with Department staff (including watermaster and groundwater staff) and ask questions about the draft rules, groundwater science, and water regulation. The Department sent out press releases related to the rule development, open houses, and public comment opportunities. These press releases were sent to local radio, television, and newspapers, as well as interested parties, which resulted in interviews with a radio station, and the *Klamath Herald and News* newspaper. Meeting announcements and the draft rules were made available on the Department's website and were also emailed to interested parties and local officials. The public comment period was open for 60 days. During that comment period, three public hearings were conducted in Klamath Falls, two in January and one in February of 2015.

#### **C. Division 25**

The draft rules, if adopted, will be placed within OAR Chapter 690, Division 25. The rules closely follow language developed in the Upper Klamath Basin Comprehensive Agreement. As stated above, the rules work in conjunction with and supersede portions of Division 9. The rules are only applicable to the Off-Project Area, consisting of the Williamson and Sprague River basins, and the Wood River Valley, including Sevenmile Creek (See Attachment B of the draft rules.) The rules are only applicable during the irrigation season. Outside of the irrigation season, the Department will rely on existing Division 9 authority to regulate wells, though no regulation of wells is anticipated outside of irrigation season.

There are several regulatory considerations in the proposed rules that are not directly a part of Division 9. Three items of note are explained below: (1) gaining reach, (2) a senior water right deficiency versus well distance, and (3) the test that determines whether a regulatory action would provide a timely benefit to a senior water user. Collectively, these three items define the standard of “effective and timely” regulation, a concept included in Division 9 but left undefined. Additionally, as explained below, the final proposed rules address what would happen in the event the rules are adopted and the Settlement Agreement is subsequently terminated.

*Three Parts of Effective and Timely*

1) Gaining Reach

A gaining reach is an identified stream reach where there is a notable increase in streamflow as a result of groundwater discharge to the stream. These reaches are mapped and incorporated into the Settlement Agreement, and included as Attachment A (East and West) in the proposed final rules contained in Attachment 1. While Division 9 limits regulation of wells hydraulically connected to surface water to those wells within one mile of a stream, the proposed Division 25 draft rules further refine this by limiting regulation, with some exceptions, to wells within one mile of a *gaining reach* of a stream. Thus, if we apply the two standards to the same stream, under Division 9, we would look at all wells within one mile of the stream, while under Division 25 we would address only those wells within one mile of gaining reaches on the stream (as noted, some exceptions apply). Using the gaining reach concept does result in a reduction in the number of wells subject to regulation; however, focusing on gaining reaches offers a greater certainty that regulation of wells will provide a timely benefit to the stream and, thus, to the senior water right holder. Gaining reach is included in definitions in Attachment 1.

2) Senior Water Right Deficiency versus Well Distance

Consistent with the Settlement Agreement, the draft rules define a relationship between the quantity of water needed to fulfill the senior right that is deficient and the distance from the gaining reach of a stream in which a well may be regulated. There is much detail in the Settlement Agreement, but the general concept is:

Where the:

Flow deficit is less than 5% of the senior right	→	wells out to ¼ mile may be regulated
Flow deficit is 5 to 10% of the senior right	→	wells out to ½ mile may be regulated
Flow deficit is greater than 10% of the senior right	→	wells out to 1 mile may be regulated

For example, if a senior user makes a valid call on a water right, of 100 cfs, and the Watermaster determines the flow available to the senior right is 93 cfs, then the shortfall is 7 cfs. This equates to a deficit of 7%, which under the Settlement Agreement and the draft rules has the result that wells out to one-half mile from a gaining stream reach may be regulated to satisfy the call.

In addition to this quantity-distance relationship, the rules provide further limitations to when regulation can occur based on the timing of a call for water. Calls for water that occur after August 31 can only apply to wells within ¼ mile of a gaining reach, due to the fact that this late in the irrigation season it is difficult for distant wells, if regulated, to provide a meaningful

benefit to the stream. Calls for water that occur after July 31 can only apply to wells within ½ mile of a gaining reach. These concepts are found in Attachment 1 at OAR 690-025-0010(10).

### 3) The Test for Effective and Timely Regulation

Division 9 states: “Prior to controlling the use of any well greater than 500 feet from a surface water source, the Department shall determine whether any control would provide relief to the surface water supply in an effective and timely manner.” (OAR 690-009-0050(2)(a)) “Effective and timely manner” is not defined in Division 9, but requires the Department to make the determination based on the specific case.

The final proposed rules in Division 25 provide a three-part definition of effective and timely comprised of: (1) well distance to gaining reaches; (2) the percentage deficit of a senior water right; and (3) a test that quantifies the timing and magnitude of the relief of stream depletion. If the first two parts (discussed in sections one and two above) of the effective and timely definition are met, the Department would regulate a given well if the well satisfies the requirements of the stream depletion test. The proposed test, based upon the best information available, seeks to determine through the use of an analytical calculation, whether control of a well would produce at least 0.1 cubic feet per second of relief to the stream after 90 days of well shutoff. The benefit in defining this test is that it will provide more certainty to water users about whether their well would be subject to regulation, providing consistency in how regulation is applied. The analytical test standard is proposed in Attachment 1 at OAR 690-025-0010(13).

### *Settlement Agreement Termination*

Because the draft groundwater rules are intended to carry out the provisions of the Upper Klamath Basin Comprehensive Agreement, it was necessary to address what would happen if the Settlement Agreement were to terminate. The proposed rules at OAR 690-025-0010(16) states that if the Settlement Agreement terminates then regulation in the Off-Project Area will be in accordance with the statewide authority, OAR 690-009.

## **IV. Public Comment and GWAC Recommendation**

A 60-day public comment period was conducted from January 1 to March 2, 2015. During this period, three public hearings were held to take oral testimony on the draft rules. Four people provided testimony at the three public hearings, with one person testifying twice. There were sixteen written comments on the rules provided to the Department over the 60-day public comment period. The summaries of the comments and the Department responses are provided in Attachment 5. The transcripts of the public hearings are provided in Attachment 6. Copies of written comments received are provided in Attachment 7.

The draft rules were presented to the Commission’s Groundwater Advisory Committee on January 30, 2015. This committee is charged with reviewing all proposed rules related to groundwater. After broad discussion, this nine-member committee voted to recommend that the Commission adopt the draft rules. One member abstained, citing a lack of familiarity with the rules and a desire to read through them more thoroughly later. In abstention, he did not wish to obstruct the committee recommendation.

After review of all public input, there were no changes made between the Division 25 draft rules for public comment and the Division 25 rules provided to the Commission for consideration of adoption.

## **V. Summary**

The proposed final OAR Chapter 690, Division 25 rules were developed by a rules advisory committee comprised of local and statewide interests and involved significant public outreach. The final proposed rules are consistent with the language and form of the negotiated Upper Klamath Basin Comprehensive Agreement, while at the same time fitting squarely within the foundation of existing regulatory authority. As a result, the draft rules work with and replace portions of Division 9 to provide an agreed upon method of regulating wells for the benefit of senior water rights in the Off-Project Area of the Klamath Basin. The Division 25 rules will terminate if the Settlement Agreement is terminated. There were no changes from the public hearing draft to the proposed final rules presented to the Commission for consideration.

## **VI. Alternatives**

The Commission may consider the following alternatives:

1. Adopt the proposed final OAR 690, Division 25 rules governing regulation of groundwater in the Off-Project Area of the Klamath Basin as provided to the Commission in Attachment 1.
2. Not adopt the rules and direct staff to rely on the existing OAR 690-009 authority to address regulation of groundwater in the Off-Project Area.

## **VII. Recommendation**

The Director recommends Alternative 1, to adopt the proposed final rules in OAR 690, Division 25.

- Attachment 1: Proposed Final OAR 690-25-0010
- Attachment 2: Upper Klamath Basin Comprehensive Settlement Agreement, Section 3.11.8
- Attachment 3: OAR Chapter 690, Division 9
- Attachment 4: Oregon Department of Justice Memo on Commission Authority to Adopt Local Rules
- Attachment 5: Summary of Public Comments and Department Responses
- Attachment 6: Transcripts of Public Hearings Held on January 15 and 16, and February 18, 2015
- Attachment 7: Copies of Written Comments Received

**OREGON ADMINISTRATIVE RULES  
WATER RESOURCES DEPARTMENT  
CHAPTER 690  
DIVISION 25**

**REGULATION OF GROUNDWATER IN THE OFF-PROJECT AREA DURING THE  
IRRIGATION SEASON FOR SENIOR SURFACE RIGHTS IN THE KLAMATH BASIN**

**690-025-0010**

(1) The following definitions apply solely to OAR 690-025-0010:

(a) “Call Threshold” means the instream flow threshold associated with a Primary or Secondary SIF Measurement Location, to which the Klamath Tribes and the United States Bureau of Indian Affairs may call for regulation of junior water rights under the terms of the Settlement Agreement. The terms “Primary SIF Measurement Location” and “Secondary SIF Measurement Location” have the meanings given in Section 15 of the Settlement Agreement.

(b) “Gaining Reach” means a reach of a perennial stream where streamflow is increasing as a result of groundwater discharge to the stream, as shown in the Upper Basin Wells and Gaining Reaches Map (included as Attachment A to these rules), except that the Department may modify the location of a Gaining Reach for the purposes of OAR 690-025-0010 based on the best available information.

(c) “Irrigation Season” means the period from March 1 to October 31 of every year.

(d) “Off-Project Area” means the area by that name shown in the WUP Regions Map (included as Attachment B to these rules).

(e) “Rate” means the amount of water as expressed in cubic feet per second (cfs).

(f) “Scenic Waterways Act” means ORS 390.805 to 380.925.

(g) “Settlement Agreement” means the Upper Klamath Basin Comprehensive Agreement that took effect April 18, 2014.

(2) OAR 690-025-0010 implements Sections 3.11.3 through 3.11.9 of the Settlement Agreement, which address control of well use in the Off-Project Area when such use affects surface water supplies in the Klamath Basin.

(3) OAR 690-025-0010 only governs the Department’s control of well use in the Off-Project Area when the Department determines such use has the potential to cause substantial interference with surface water. OAR 690-025-0010 does not govern:

(a) applications for the use of groundwater;

(b) control of well use as a result of interference with another well;

(c) control of well use in any other part of the Klamath Basin or the state;

(d) control of well use pursuant to the Scenic Waterways Act or the Department's rules implementing the Scenic Waterways Act, or the enforcement of water permit conditions pertaining to the Scenic Waterways Act; or

(e) use of wells in the Off-Project Area outside the Irrigation Season.

(4) OAR 690-009 also governs the Department's control of well use that affects surface water supplies. OAR 690-009 applies statewide, but OAR 690-009-0030 authorizes the Oregon Water Resources Commission to adopt local rules governing control of well use when such use has the potential to cause substantial interference with surface water. OAR 690-025-0010 is a local rule adopted pursuant to this authority and to existing statutes governing the control of groundwater.

(5) As a local rule, OAR 690-025-0010 both works in conjunction with and supersedes some parts of OAR 690-009. OAR 690-009 provides a two-step process for control of well use that affects surface water supplies. First, the Department must determine that well use has the potential for substantial interference with a surface water source. OAR 690-009-0040 provides the process for making this determination. OAR 690-025-0010 does not modify this step. Second, if the well is greater than 500 feet from a surface water source, the Department must determine that control of the well would provide relief to the surface water supply in an effective and timely manner. OAR 690-025-0010 supersedes this step with respect to the control of well use in the Off-Project Area during the Irrigation Season by providing a detailed process for evaluating whether control of a well in the Off-Project Area will provide relief to the surface water supply in an effective and timely manner. Specifically, OAR 690-025-0010 supersedes OAR 690-009-0050(2). The following sections provide the process for making the effective and timely determination.

(6) The Department shall control the use of wells greater than one mile from a surface water source only through a critical ground water area determination in accordance with ORS 537.730 through 537.740.

(7) Notwithstanding section (5), the Department shall control the use of a well in the Off-Project Area that is no more than 500 feet from a Gaining Reach in a manner consistent with OAR 690-009.

(8) The Department shall control the use of a well in the Off-Project Area that is greater than 500 feet and less than or equal to one mile from a Gaining Reach if and only if control is allowed by both sections (9) through (12) and by section (13). Sections (9) through (12) describe criteria for control that are based on the distance from a well to the nearest Gaining Reach. Section (13) requires the Department to calculate the relief to the stream from control of the well use. Section (13) also provides a rate of relief to the stream that must be met or exceeded prior to control of the well use.

(9) The Department shall control the use of a well that is greater than 500 feet and less than one-quarter mile from a Gaining Reach in favor of senior surface water rights, provided that control is allowed pursuant to section (13).

(10) The Department shall control the use of a well that is between one-quarter mile and one mile of a Gaining Reach in favor of senior surface water rights as described in this section, provided that control is allowed pursuant to section (13):

(a) The Department shall control wells between one-quarter mile and one-half mile of a Gaining Reach, provided:

(i) a valid call is made by a senior surface water right holder; and

(ii) the rate of the shortfall of water validly called is equal to or greater than 5% of the amount of the senior water right call or the Call Threshold (as applicable); and

(iii) the first valid call based on a specific senior water right or Call Threshold (as applicable) is made on or before August 31. If the first valid call based on a specific senior water right or Call Threshold (as applicable) is made after August 31, the Department shall not control the use of a well that is between one-quarter mile and one-half mile of a Gaining Reach during that Irrigation Season.

For example, if a senior user makes a valid call on July 15<sup>th</sup> based on a water right or Call Threshold, as applicable, of 100 cfs, and the Watermaster determines the flow (measured at the appropriate location) is 93 cfs, then the shortfall is 7 cfs. This equates to a 7% shortfall, which under this provision has the result that wells between one-quarter mile and one-half mile of a Gaining Reach shall be controlled to satisfy the call. (In this scenario wells less than one-quarter mile from a Gaining Reach would also be controlled, pursuant to sections (7) and (9)).

(b) The Department shall control the use of a well that is greater than one-half mile and up to and including one mile of a Gaining Reach, provided:

(i) a valid call is made by a senior surface water right holder; and

(ii) the rate of the shortfall of water validly called is greater than 10% of the amount of the senior water right call or the Call Threshold (as applicable); and

(iii) the first valid call based on a specific senior water right or Call Threshold (as applicable) is made on or before July 31. If the first valid call based on a specific senior water right or Call Threshold (as applicable) is made after July 31, the Department shall not control the use of a well that is between one-half mile and one mile of a Gaining Reach during that Irrigation Season.

For example, if a senior user makes a valid call on July 15<sup>th</sup> based on a water right or Call Threshold, as applicable, of 100 cfs, and the Watermaster determines the flow (measured



at the appropriate location) is 87 cfs, then the shortfall is 13 cfs. This equates to a 13% shortfall, which under this provision has the result that wells between one-half mile and one mile of a Gaining Reach shall be controlled to satisfy the call. (In this scenario wells less than one-half mile from a Gaining Reach would also be controlled, pursuant to sections (7), (9), and (10)(a)).

(c) Notwithstanding sections (10)(a) and (10)(b), if a valid call is made by a senior surface water right holder, and the Department determines that the rate of the shortfall of water validly called has been greater than 5% of the amount of the senior water right call or the Call Threshold (as applicable) for more than thirty-one days within a contiguous forty-five day period, then the Department shall control the use of a well that is between one-quarter mile and one mile of a Gaining Reach.

(11) Notwithstanding section (10), if a valid call is made to a Call Threshold after the 25<sup>th</sup> day of a month, the Department may not control the use of a well that is between one-quarter mile and one mile of a Gaining Reach for the remainder of the month, unless the Department determines that the rate of the shortfall of water validly called is greater than 10% of the amount of the Call Threshold.

(12) For the purposes of section (10):

- (a) wells located between one-quarter and one-half mile of a Gaining Reach that are continuously cased and continuously sealed to a minimum depth of 500 feet below land surface will be regulated as if they are located between one-half mile and one mile of a Gaining Reach; and
- (b) wells located greater than one-half mile from a Gaining Reach that are continuously cased and continuously sealed to a minimum depth of 500 feet below land surface will be regulated as if they are located greater than one mile from a Gaining Reach, and will not be subject to regulation in the absence of a critical groundwater determination.

(13) If one or more of the criteria for control of a well in sections (9) through (12) are met, then prior to controlling the use of any well in the Off-Project Area that is greater than 500 feet and less than or equal to one mile from a Gaining Reach, the Department shall calculate (using an analytical test) the relief to a stream from control of a given well based on a calculated 30-day pumping cycle followed by a 90-day idle period. The calculation shall be based on the best available information, including historical pumping rates for a well (measured or estimated), and employ analytical or numerical methods. The Department shall control the use of the well if and only if the relief to the stream at the conclusion of the 90-day idle period is equal to or greater than 0.10 cubic feet per second. Relief to a stream is calculated as the streamflow reduction after the 30-day calculated pumping period of a well minus the remaining streamflow reduction after the 90-day idle period that followed. For example, if calculated use of a well reduces streamflow by 0.40 cfs after 30 days, and the streamflow reduction after the 90-day idle period that followed was 0.15 cfs, then the relief to the stream would be 0.25 cfs (0.40 minus 0.15 cfs) and the well

would be subject to control under sections (9) through (12). The Department shall periodically update the stream relief calculations for individual wells based on the best available information.

(14) Notwithstanding the requirements of sections (6) through (13), following a valid call made by a senior surface water right holder:

- (a) the Department shall control a well located within one mile of a spring or stream if use of the well would result in depletion of the flow of a Gaining Reach at a rate greater than 25 percent of the rate of appropriation within 30 days of pumping.
- (b) the Department shall control wells located within a one-mile radius of a particular spring if the combined use of these wells would result in depletion of the spring flow rate in an amount that is greater than 20 percent within 30 days of pumping.
- (c) the Department shall make the determinations described in subsections (14)(a) and (14)(b) based on the best available information, which could include employing at least one of the methods set forth in OAR 690-009-0040(4)(d). Prior to making such a determination, the Department shall notify the water right holder(s) subject to the call and the party or parties making the call, and provide them with an opportunity to submit additional information to the Department.

(15) For the purposes of OAR 690-025-0010, distances from individual wells to springs, streams, or Gaining Reaches, as applicable, will initially be determined based on the location of individual wells as shown in Exhibit F to the Settlement Agreement, relative to the location of the spring or the nearest edge of the water visible in the National Agricultural Inventory Program (NAIP) imagery for July 15 – August 1, 2012, subject to the provisions regarding such distances in subsections (a) through (e), below. If a well subject to OAR 690-025-0010 is not shown in Exhibit F to the Settlement Agreement, the Department will determine the location of the well based on the best available information. The Department shall correct any errors in well location based on the best available information. For the purposes of measuring distances from individual wells to springs, streams, or Gaining Reaches, as applicable, resulting from the changes described in subsections (a) through (e), the Department will use the most current year of NAIP imagery.

- (a) If a replacement or additional well under an existing registration, permit, or certificate is located at a distance greater than one mile from a surface water source, the well may not be regulated without a critical groundwater area determination.
- (b) If a riparian restoration action results in movement of the nearest edge of a surface water body to a well to an extent that would change how a well is regulated based on the distance measurement criteria in sections (6) through (14), then for the purposes of sections (6) through (14), the distance prior to the restoration action will continue to apply for that well.
- (c) A replacement or additional well under an existing registration, permit, or certificate shall be evaluated for the purposes of sections (6) through (14) based on the distance

criterion applicable to the original well; except that for the purpose of the stream relief calculation described in section (13), the replacement or additional well's measured distance, according to the applicable criterion, shall be used.

- (d) The Department may determine, based on the best available information, whether a natural change in stream location has caused a material change in the distance of a well to a Gaining Reach or stream. If the Department determines that a material change has occurred, then for the purposes of sections (6) through (14), the new distance shall apply. If the Department determines that there is a material change, the Department shall notify affected persons.
- (e) The Department may modify the location of a Gaining Reach for the purposes of OAR 690-025-0010 based on the best available information. The Department shall notify affected persons of a proposed modification and of the Department's decision on the proposed modification.

(16) If the Settlement Agreement terminates, groundwater regulation in the Off-Project Area will be in accordance with OAR 690-009.

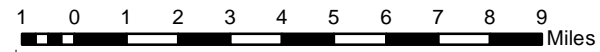
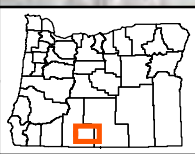
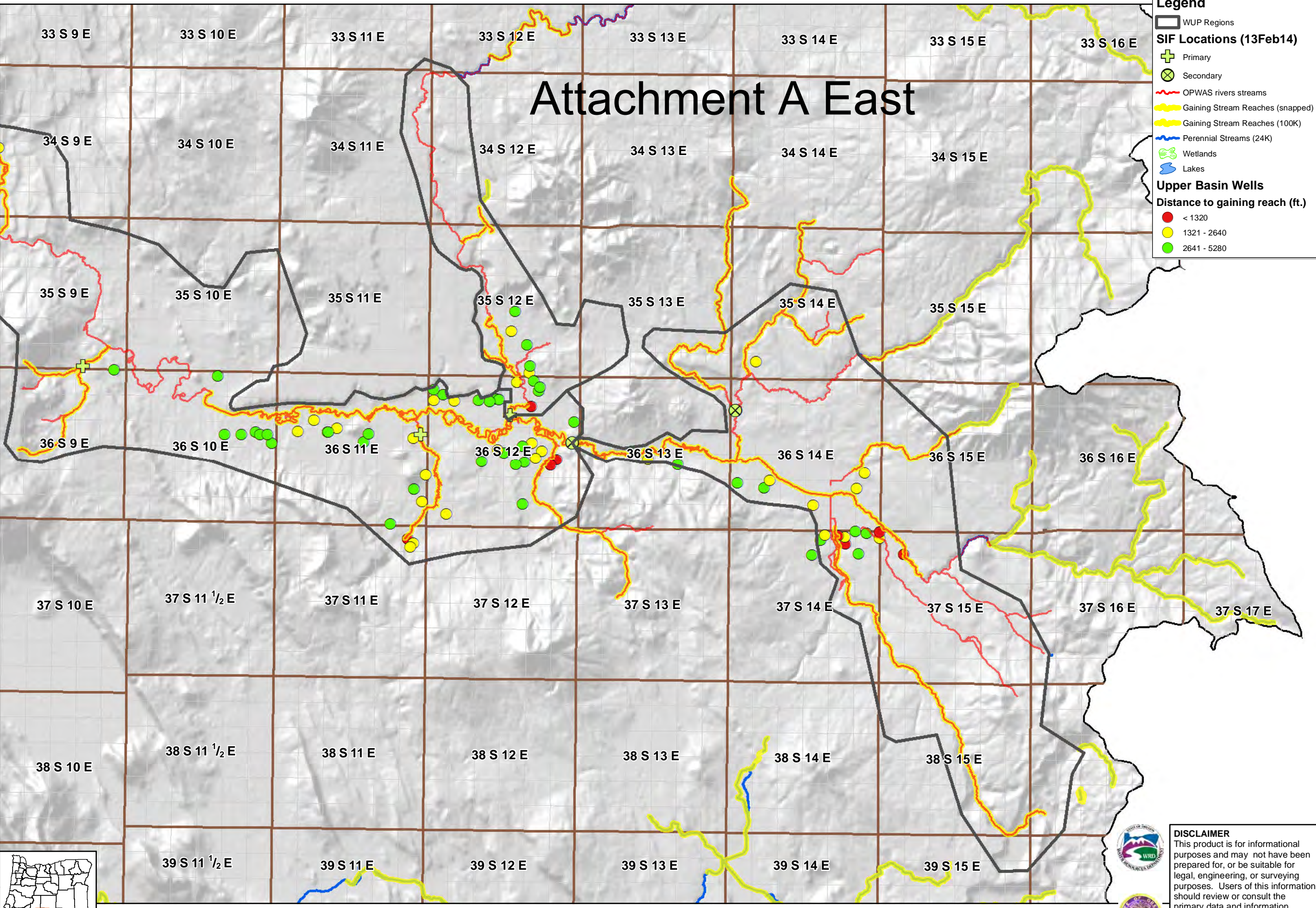
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# Attachment A East

**Legend**

- WUP Regions
- SIF Locations (13Feb14)**
  - Primary
  - Secondary
- OPWAS rivers streams
- Gaining Stream Reaches (snapped)
- Gaining Stream Reaches (100K)
- Perennial Streams (24K)
- Wetlands
- Lakes
- Upper Basin Wells**
- Distance to gaining reach (ft.)**
  - < 1320
  - 1321 - 2640
  - 2641 - 5280



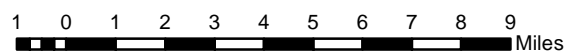
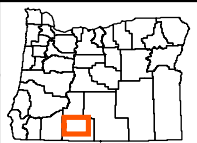
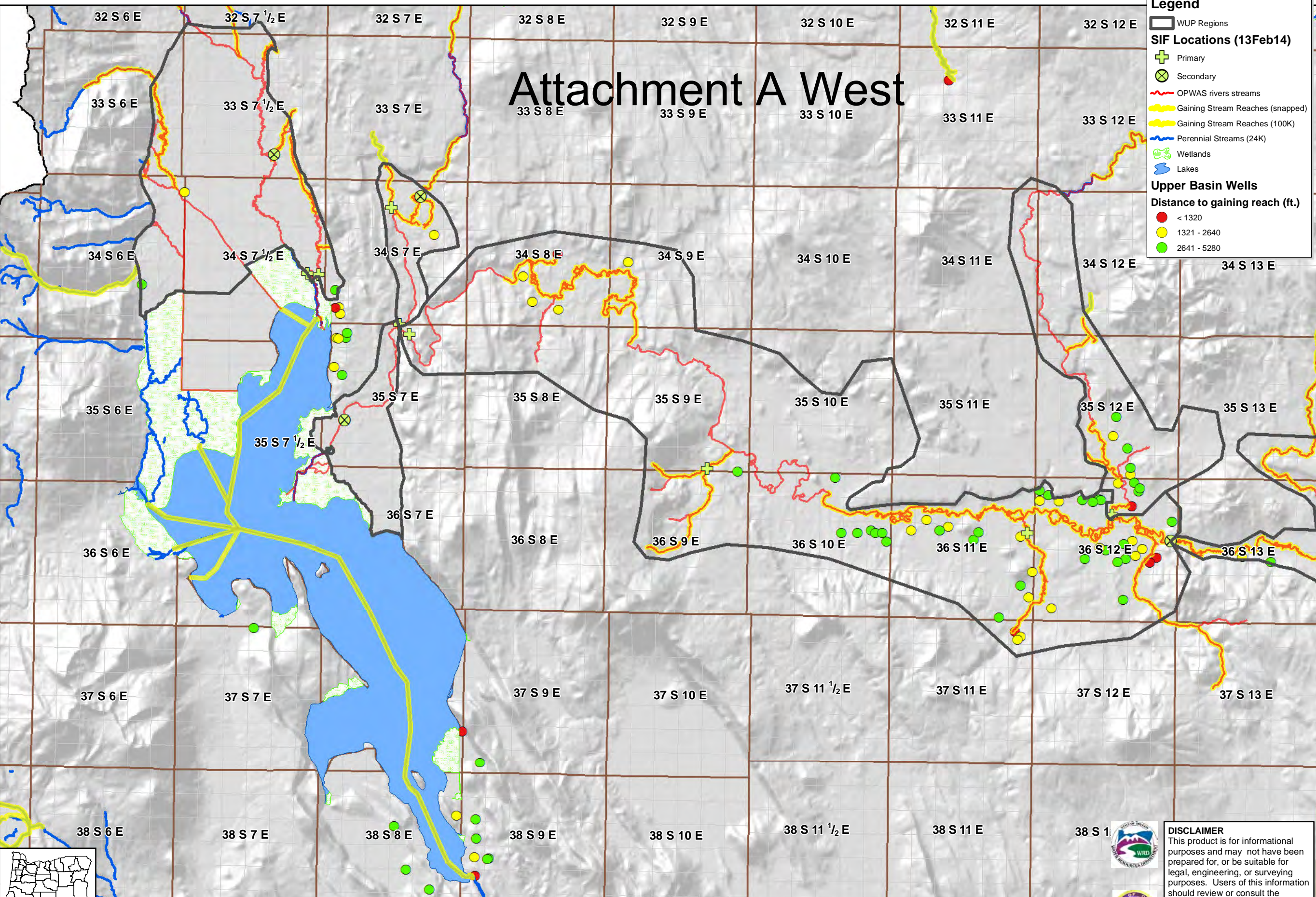
**DISCLAIMER**  
 This product is for informational purposes and may not have been prepared for, or be suitable for legal, engineering, or surveying purposes. Users of this information should review or consult the primary data and information sources to ascertain the usability of the information.



# Attachment A West

### Legend

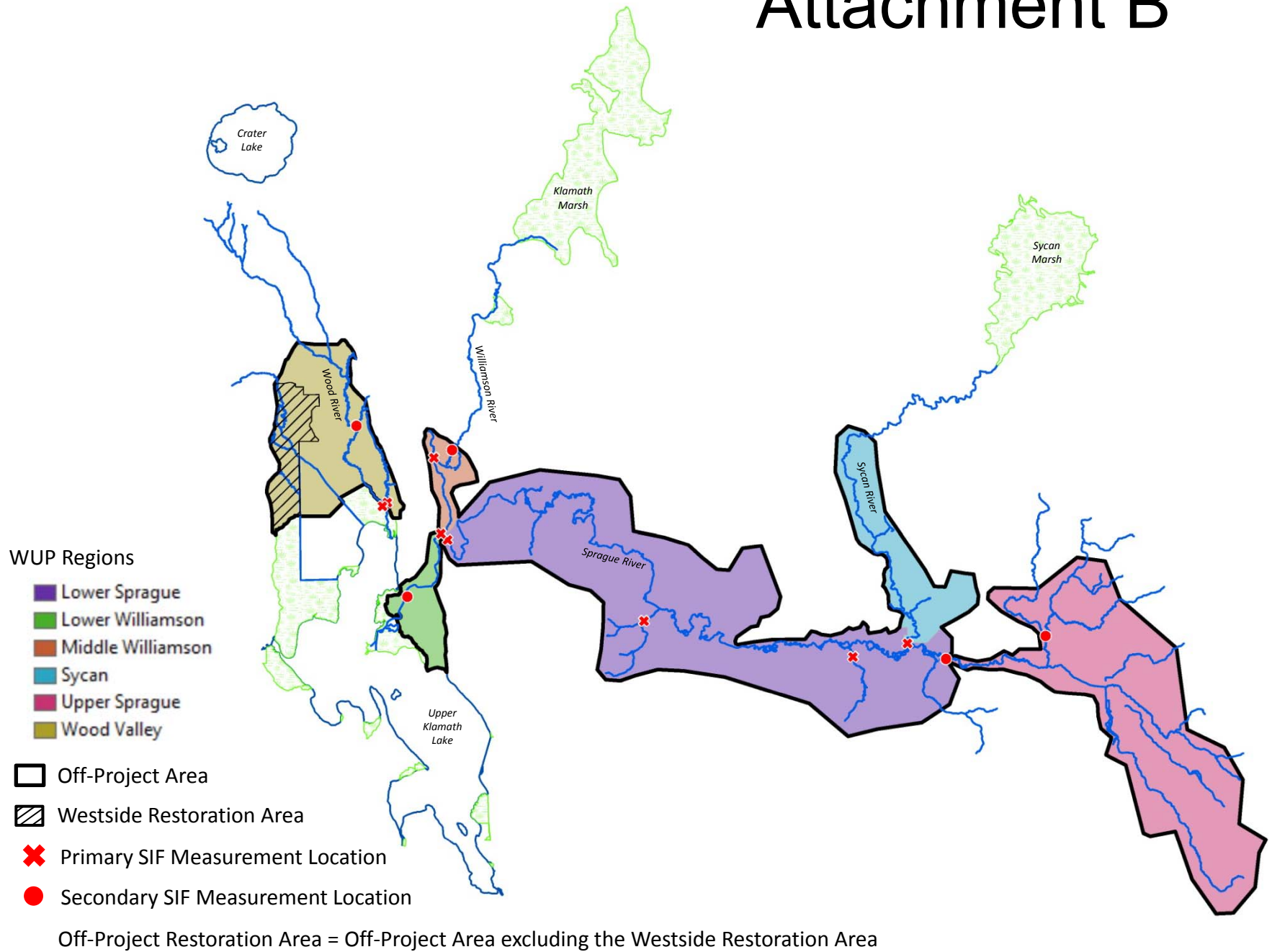
- WUP Regions
- SIF Locations (13Feb14)**
- Primary
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- Distance to gaining reach (ft.)**
- < 1320
- 1321 - 2640
- 2641 - 5280



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# Attachment B



## Attachment 2

**3.11.8.** The OWRD agrees to propose to the Oregon Water Resources Commission that the Commission adopt, pursuant to OAR 690-009-0030, local rules applicable to groundwater uses with a place of use within the Off-Project Area that are consistent with subsections 3.11.3 through 3.11.7 of this section within 60 days after the Effective Date, and to recommend adoption of such rules. The proposed rules will provide that they apply to calls for regulation that affect water rights in the Off-Project Area, regardless of where the call is made from. If the proposed rule is consistent with this section, the Parties, other than OWRD, agree to support the adoption by the Commission of the proposed rules. In the event that the Commission fails to adopt the proposed rules, the Parties other than OWRD agree that groundwater regulation will be in accordance with OAR Chapter 690 Division 009, as of December 2, 2013, notwithstanding anything in subsections 3.11.3 through 3.11.7 to the contrary.

## WATER RESOURCES DEPARTMENT

### DIVISION 9

#### GROUND WATER INTERFERENCE WITH SURFACE WATER

##### 690-009-0010

###### Basis for Regulatory Authority and Purpose

The right to reasonable control of the ground waters of the State of Oregon has been declared to belong to the public. Through the provisions of the Ground Water Act of 1955, [ORS 537.505 to 537.795](#), the Water Resources Commission has been charged with administration of the rights of appropriation and use of the ground water resources of the state. These rules govern the use of ground waters, pursuant to [ORS 537.730 and 537.775](#), where the ground water is hydraulically connected to, and the use interferes with, surface waters.

Stat. Auth.: ORS 537

Stats. Implemented:

Hist.: WRD 17-1988, f. & cert. ef. 11-4-88

##### 690-009-0020

###### Definitions

(1) "Confined Aquifer": means an aquifer in which ground water is under sufficient hydrostatic head to rise above the bottom of the overlying confining bed, whether or not the water rises above land surface.

(2) "Commission": means the Water Resources Commission.

(3) "Confining Bed": means a layer of low permeability material immediately overlying a confined aquifer.

(4) "Department": means the Water Resources Department, and consists of the Director of the Department and all personnel employed in the Department including but not limited to all watermasters appointed under [ORS 540.020 \(536.039\)](#).

(5) "Director": means the Water Resources Director.

(6) "Hydraulic Connection": means that water can move between a surface water source and an adjacent aquifer.

(7) "Unconfined Aquifer": means an aquifer in which the hydrostatic head at the upper surface of the ground water is atmospheric.

Stat. Auth.: ORS 537

Stats. Implemented:

Hist.: WRD 17-1988, f. & cert. ef. 11-4-88



## 690-009-0030

### General Policy

The following rules establish criteria to guide the Department in making determinations whether wells have the potential to cause substantial interference with surface water supplies and in controlling such interference. The rules apply to all wells, as defined in [ORS 537.515 \(7\)](#), and to all existing and proposed appropriations of ground water except the exempt uses under [ORS 537.545](#). The authority under these rules may be locally superseded where more specific direction is provided by the Commission after the effective date of adoption of these rules.

Stat. Auth.: ORS 537

Stats. Implemented:

Hist.: WRD 17-1988, f. & cert. ef. 11-4-88

## 690-009-0040

### Determination of Hydraulic Connection and Potential for Substantial Interference

For the purposes of permitting and distributing ground water, the potential for substantial interference with surface water supplies shall be determined by the Department.

(1) The Department shall determine whether wells produce water from an unconfined or confined aquifer. Except for wells that satisfy the conditions in section (2) of this rule the Department shall further determine whether the aquifer is hydraulically connected to the surface water source. The basis of the determination shall be information provided on the Water Well Report for any well in question. If there is no Water Well Report available or if the information provided is inadequate, the Department shall make the determination on the basis of the best available information. Such information may include other Water Well Reports, topographic maps, hydrogeologic maps or reports, water level and other pertinent data collected during a field inspection, or any other available data or information that is appropriate, including any that is provided by potentially affected parties.

(2) All wells located a horizontal distance less than one-fourth mile from a surface water source that produce water from an unconfined aquifer shall be assumed to be hydraulically connected to the surface water source, unless the applicant or appropriator provides satisfactory information or demonstration to the contrary. Department staff may provide reasonable assistance to the applicant or appropriator in acquiring the satisfactory information.

(3) The Department shall determine the horizontal distance between any well in question and the nearest surface water source on the basis of the edge of the surface water source as also determined by the Department.

(4) All wells that produce water from an aquifer that is determined to be hydraulically connected to a surface water source shall be assumed to have the potential to cause substantial interference with the surface water source if the existing or proposed ground water appropriation is within one of the following categories:

(a) The point of appropriation is a horizontal distance less than one-fourth mile from the surface water source; or

(b) The rate of appropriation is greater than five cubic feet per second, if the point of appropriation is a horizontal distance less than one mile from the surface water source; or

(c) The rate of appropriation is greater than one percent of the pertinent adopted minimum perennial streamflow or instream water right with a senior priority date, if one is applicable, or of the discharge that is equaled or exceeded 80 percent of time, as determined or estimated by the Department, and if the point of appropriation is a horizontal distance less than one mile from the surface water source; or

(d) The ground water appropriation, if continued for a period of 30 days, would result in stream depletion greater than 25 percent of the rate of appropriation, if the point of appropriation is a horizontal distance less than one mile from the surface water source. Using the best available information, stream depletion shall be determined or estimated by the Department, employing at least one of the following methods:

(A) Suitable equations and graphical techniques that are described in pertinent publications (such as "Computation of Rate and Volume of Stream Depletion by Wells", by C.T. Jenkins, in: "**Techniques of Water-Resources Investigations of the United States Geological Survey: Book 4, Chapter D1**");

(B) A computer program or ground water model that is based on such or similar equations or techniques.

(5) Any wells, other than those covered in section (4) of this rule, that produce water from an aquifer that is determined to be hydraulically connected to the surface water source may be determined by the Department to have the potential to cause substantial interference with the surface water source. In making this determination, the Department shall consider at least the following factors:

(a) The potential for a reduction in streamflow or surface water supply; or

(b) The potential to impair or detrimentally affect the public interest as expressed by an applicable closure on surface water appropriation, minimum perennial streamflow, or instream water right with a senior priority date; or

(c) The percentage of the ground water appropriation that was, or would have become, surface water; or

(d) Whether the potential interference would be immediate or delayed; or

(e) The potential for a cumulative adverse impact on streamflow or surface water supply.

(6) All wells that produce water from an aquifer that is not hydraulically connected to a surface water source shall be assumed not to interfere with the surface water source.

[Publications: The publication(s) referred to or incorporated by reference in this rule are available from the agency.]

Stat. Auth.: ORS 537

Stats. Implemented:

Hist.: WRD 17-1988, f. & cert. ef. 11-4-88

## **690-009-0050**

### **Ground Water Controls**

(1) The Department shall review existing ground water appropriations to determine the potential to cause substantial interference with a surface water source on a case-by-case basis, in accordance with OAR 690-009-0040, whenever substantial interference with a surface water source is suspected to exist by the Department.

(2) Whenever the Department determines that substantial interference with a surface water supply exists, the Department shall control those groundwater appropriations that have been determined under section (1) of this rule to have the potential to cause substantial interference. The controls shall be similar to or

compatible with, but not more restrictive than controls on the affected surface water source, in accordance with the relative dates of priorities of the ground water and surface water appropriations:

(a) Prior to controlling the use of any well greater than 500 feet from a surface water source, the Department shall determine whether any control would provide relief to the surface water supply in an effective and timely manner. The Department shall make the determination on the basis of the best available information, employing at least one of the methods set forth in OAR 690-009-0040(4)(d);

(b) The Department shall control the use of wells greater than one mile from a surface water source only through a critical ground water area determination in accordance with [ORS 537.730](#) through [537.740](#).

Stat. Auth.: ORS 537

Stats. Implemented:

Hist.: WRD 17-1988, f. & cert. ef. 11-4-88

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DEPARTMENT OF JUSTICE  
GENERAL COUNSEL DIVISION

MEMORANDUM

DATE: March 5, 2015

TO: Tom Byler

FROM: Jesse D. Ratcliffe, Assistant Attorney General   
Natural Resources Section

SUBJECT: Authority to regulate ground water to prevent interference with senior surface water rights and to adopt local rules governing such regulation

Pursuant to your request, this memorandum explains the Oregon Water Resources Commission's (Commission's) and the Oregon Water Resources Department's (Department's) authority to regulate junior ground water rights when the Department determines that junior ground water appropriations are substantially interfering with senior surface water rights, including the authority to adopt rules governing such regulation that apply to specific geographic areas within the State.

Ground water is a public resource held in trust by the State of Oregon.<sup>1</sup> Under the Ground Water Act of 1955, the Commission and the Department have authority over the appropriation and management of ground water.<sup>2</sup> Pursuant to its authority to formulate an integrated and coordinated program for the use and control for all water resources of this state, the Commission has adopted a program for the integrated management of ground water and surface water. The Commission's policy states that ground water and surface water "shall be managed conjunctively" and that interference between groundwater uses and competing surface water uses shall be prevented and controlled "to protect the water resource and existing rights."<sup>3</sup>

Regulation of ground water and surface water is in accordance with the prior appropriation doctrine, which can be characterized as "first in time is the first in right" according to priority dates of record.<sup>4</sup> With regard to the integrated regulation of ground water and surface water, the Legislature has declared that whenever the "impairment of or interference with

<sup>1</sup> ORS 537.525(1).

<sup>2</sup> ORS 537.505 – 992.

<sup>3</sup> ORS 536.300(2); OAR 690-410-0010(1) & (2)(a).

<sup>4</sup> ORS 537.777(1); ORS 540.045; *Teel Irrigation District v. Water Resources Department*, 323 Or 663, 664 (1996).

existing rights to appropriate surface water \* \* \* exists or impends,” the Commission may control the use of groundwater under voluntary joint action by the Water Resources Commission together with affected water users and, if that does not occur or is ineffective, by the Commission alone, acting pursuant to its police power.<sup>5</sup> In administering this policy, the Legislature has directed that the Commission may not make a determination that ground water use will impair, substantially interfere or unduly interfere with a surface water source unless that determination is based on “substantial evidence,” which may include reports and studies, or the application of generally accepted hydrogeological principles to the specific use.<sup>6</sup>

The Commission has the authority to adopt rules to carry out this legislative direction and authority.<sup>7</sup> The Commission may choose to adopt rules that are applicable statewide. The Commission may also choose to adopt rules that apply to specific geographic areas of the state. As described above, the relevant statutes provide a standard for determining when regulation is authorized (interference with existing rights must “exist or impend,” and the interference determination must be based on “substantial evidence”). But provided that this standard is met, the statutes do not further specify how or where regulation occurs. That authority is delegated to the Commission.

The Commission has exercised this authority in adopting its Division 009 rules. These rules authorize the Department to control ground water appropriations that have the potential to cause substantial interference with surface water appropriations “in accordance with the relative dates of priorities of the ground water and surface water appropriations.”<sup>8</sup> If the Department determines that a junior ground water use has the potential to cause substantial interference with a senior surface water right, the Department may regulate in favor of the senior surface right. Before controlling the use of any well greater than 500 feet from a surface water source, the Department must also determine whether regulation of the ground water use would provide relief to the surface water supply “in an effective and timely manner.”<sup>9</sup> While the Division 009 rules apply statewide, the Division 009 rules envision and authorize separate rules that have a more limited geographic scope. OAR 690-009-0030 provides that “the authority under these rules may be locally superseded where more specific direction is provided by the Commission....”

The proposed Division 025 rules would locally supersede part of the Division 009 rules. Specifically, the Division 025 rules would supersede, as to the regulation of wells in the Off-Project Area, OAR 690-009-0050(2) by providing a detailed process for evaluating whether control of a well in the Off-Project Area will provide relief to the surface water supply in an effective and timely manner. As described above, the Commission has the authority to adopt a local rule in this context.

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<sup>5</sup> ORS 537.525(9).

<sup>6</sup> ORS 537.780(2)(b).

<sup>7</sup> ORS 537.780(1)(h).

<sup>8</sup> ORS 537.780; OAR 690-009-0050(2).

<sup>9</sup> OAR 690-009-0050(2)(a).

## Summary of Public Comments Received and Department Responses

Between January 1 and March 2, 2015, the Department received comments supporting and opposing the proposed rules. All comments received by the deadline were reviewed and considered. Summaries of the comments and the Department's responses are included below. The complete written and oral comments received are included in Attachments 5 and 6.

### Summary of Comments in Support of Rule

Don Gentry – Klamath Tribes Chairman – Oral comments, first public hearing

- I want to express the Klamath Tribes' support for the adoption of the proposed rules. It is our position that adoption is essential to provide for appropriate and balanced regulation of groundwater affecting the off-project community and consistent with the Upper Klamath Basin Comprehensive Agreement. It is very important that we move forward and hopefully have these rules adopted to provide for the protection of all interests on all sides and make sure that regulation is consistent and appropriate. We support the rulemaking.

Anna Bennett – Klamath Tribal Council – Oral comments first public hearing

- I am a member of the Klamath Tribal Council and also a member of the Klamath Tribes Negotiating Team. We also are irrigators and we do run cattle and hay. I'd like to thank you for the opportunity to participate in the rulemaking process. I just want to say we fully support the groundwater rules. I think it is an important piece of the puzzle in ensuring our rights are protected as well as the irrigators. I think it levels out the playing field so everybody knows how it works, and I think they have done a pretty good job in doing that.

John Flynn – Flynn Ranches, Beatty, Oregon (Written)

- I do feel that the draft is acceptable to the Flynn family.

Kevin Newman – Rancher (Written)

- The Upper Basin Ranchers and Irrigators thank you for the opportunity to comment on the new groundwater rules, and believe they are consistent with the Upper Basin Comprehensive Agreement.

Roger Nicholson – Rancher (Written)

- I am writing in regards to the Groundwater Rule change pertaining to the Upper Klamath Off-Project Area. I am in favor of the rules as proposed, as they are consistent with the Upper Klamath Basin Comprehensive Agreement and are necessary to the implementation of the Agreement.

Upper Klamath Landowners Improvement District (Written)

- The Klamath Groundwater Rulemaking will assist the landowners within the Off-Project Area in complying with the terms of the Agreement. The landowners will be providing additional water instream to satisfy senior instream water rights of the Klamath Tribes. The State of Oregon also has instream water rights with a very late priority date of 1990. These instream water rights will be satisfied by providing for the senior instream water rights of the Klamath Tribes. This groundwater rulemaking will not infringe of the instream water rights of the Klamath Tribes or the State of Oregon. Instead as part of implementing the larger Agreement, these rule changes will allow for more water to remain instream.

The Klamath Groundwater Rulemaking is an essential part of the bargained for benefits provided to landowners within the Agreement. The rulemaking will allow landowners to clarify when wells will be considered timely and effective in delivering water to the instream claims and when the wells will not provide timely and effective relief to senior instream water right holders. The landowners can then manage their remaining water to adequately retire irrigation rights and provide the water instream to augment instream flows throughout the summer months.

Dani Watson – Ranch and Range Consulting, LCC (Written)

- I am writing in support of the proposed adoption of Division 025 in chapter 690 of the Oregon Administrative Rules. The adoption of this rule would provide more certainty to both surface and groundwater irrigation users in the Off-Project area of the Klamath Basin. As irrigators in the Off-Project area look for approaches to reduce surface water use in an effort to reduce the impacts on in-stream flows, ground water regulation plays an integral part in an irrigators decision. The proposed process for determining the effect ground water wells have on in-stream flows and whether the regulation of that well provides a timely and effective relief in the event of a senior water call is paramount to the survival of irrigators in the Basin. I encourage the adaption of this proposed rule.

Dave Thompson – Rancher (Written)

- I am urging support of the Ground water rules modification currently under review by the State. Although I do not personally have groundwater that would be affected, I do strongly believe that it is important to have these rules modification in place to make the comprehensive water agreement work properly for all parties. It is important for the irrigating community to have security in considering retirement of any surface water that they have workable rules to safeguard use of any groundwater that they have. These proposed rules have been well thought out by state staff with a tremendous amount of input from the tribe, landowners, and other groups.

Lisa Zimmerman – Rancher (Written)

- I am writing to request the adoption of the Klamath Basin Off-Project Groundwater Rules. My interest lies with the fact that our family owns a working cattle ranch in Fort Klamath and without adoption we would not be able to sustain the land to continue our business in providing stock water. As a family business that has a vested interest in the importance of this rule, I hope your committee strongly considers the interest of the land-owners and other small businesses whose livelihood depend on this rule and not in individuals who are part of groups and are told to write letters opposing this rule strictly because of a perceived environmental impact interest.

Fort Klamath Critical Habitat

Sprague River Water Resource Foundation (Co-Written)

- Fort Klamath Critical Habitat and Sprague River Water Resource Foundation are writing in support of the proposed ground water rule changes as currently proposed. The rule changes are consistent with the benefits provided to landowners in the Upper Klamath Comprehensive Agreement. Please vote for the proposed ground water rule changes as currently presented. Fort Klamath Critical Habitat and Sprague River Water Resource Foundation are non-profit organizations representing 63 landowners who irrigate in excess of 55,000 acres in the Off-Project Area. The Upper Klamath Comprehensive Agreement is essential to these landowners, in that without the Agreement there will not be irrigation (surface or ground) water available to these landowners. This rule change is one piece of the larger Agreement. By agreeing to the rule change as presented, the landowners are one step closer to implementing the Agreement and securing some irrigation water in the Off-Project Area.

Randall Kizer – Landowner Entity, Chair (Written)

- I am Randall Kizer. I own a ranch in the Wood River Valley and have been a member of the negotiating team for the UKBCA. I have a surface water right, but do not have a ground water source. So how do the ground water rules affect me? The agreement was negotiated with the Klamath Tribes to balance the resources of the upper Klamath Basin. Without these assurances for the ground water community, surface water retirement will become very difficult to achieve. If the LE cannot meet the bench marks set forth in the UKLCA, then the agreement as whole becomes vulnerable. Without the agreement Agriculture in the upper basin will cease to exist. A loss of agriculture in the upper basin adversely affects the County and its residents including the Klamath Tribe. These rules were negotiated in good faith between the Klamath Tribes and the Landowners keeping the environment center stage. We need ground water to supplement the surface water but not to over pump and lead to depletion of the aquifer. I ask the commission to research these rules and accept them as negotiated.

Trout Unlimited (Written)

- We are writing to express our support for the rules proposed in the “Upper Klamath Basin Off-Project Area Groundwater Rulemaking Division 25 - Local Rules Governing Control of Well Use in the Off-Project Area in the Klamath Basin”, as currently drafted.

The proposed rules will facilitate two critical actions that Trout Unlimited deems to be essential to the ecologic recovery of the Upper Klamath Lake watershed: 1) The rules delineate an appropriate methodology to regulate groundwater use in the basin, with deference to senior water right holders; and 2) the rules facilitate implementation of the Upper Klamath Basin Comprehensive Agreement (UKBCA). Implementation of the UKBCA is necessary to provide increased certainty of water deliveries to irrigators in the off-project area, as well as to provide for 224 miles of extensive riparian and flow restoration in the watershed to the benefit of multiple native species including the Lost River sucker, shortnose sucker, bull trout, and redband rainbow trout which are listed to varying degrees under the federal and state Endangered Species Acts.

Klamath Tribes (Written)

- Representatives of the Klamath Tribes served on the rules advisory committee established to provide input to the Oregon Water Resources Department on the initial draft of the Proposed Rules released in October 2014. The current version of the Proposed Rules reflects modifications made based on input from the committee. As a party to the UKBCA and a member of the rules advisory committee, the Klamath Tribes strongly support the Proposed Rules and urge their adoption by the Commission.

With one clarification [See Klamath Tribe’s comment and Department response under Comments Questioning Rule below], the Klamath Tribes strongly support the Proposed Rules and encourage their adoption by the Commission to facilitate implementation of the UKBCA, which is an important component of the Klamath Settlement Agreements and the result of a major collaboration between stakeholders to resolve long-running disputes over the allocation of scarce water resources in the Klamath Basin, while building a sustainable environmental restoration strategy.

*Department Response to Comments in Support:* The Department recognizes the importance and the value of these rules to the water users and the Klamath Tribes. These rules, consistent with the Upper Klamath Basin Comprehensive Agreement, provide the framework for consistent groundwater regulation in the Off-Project Area.



## Summary of Comments Questioning Rule

John Flynn – Flynn Ranches, Beatty, Oregon (Written)

- Brown Creek should no longer be called a “Gaining Reach.” Brown Creek does not have a main source of water and is usually dry after the first of April. We use the creek bed to carry our well water to our property when needed.

*Department Response:* Department technical staff are looking into whether Brown Creek is a gaining reach or not. The Department will have this determination prior to regulation on Brown Creek.

Kevin Newman – Rancher (Written)

- One point I would like to address, is Oregon's use of well analysis to define timely and effective. To date we only receive a debit for the well, no credit for what is added to the stream or river. For example, if 3 acre feet of water is put on an acre of ground and the net consumptive use on that acre is 1.5 per acre feet, then 1.5 acre feet is added to the stream. This should in my opinion, act as a credit. In the Bly, Oregon area where my ground is, I have looked at some net consumptive use numbers that have ranged anywhere from .7 to 1.84 acre feet. So I am concerned and hope that this can be looked into.

*Department Response:* Water use from a well is limited by the rate and volume allowed under the permit or certificate and the amount that is used beneficially for that permitted use. The subject of well water contributing to streamflow centers on the issue of beneficial use of the water. Well water applied beyond the needs of the crop, such that the excess flows into a stream, is not a beneficial use under an irrigation right and, therefore, is not considered as a credit in evaluating for regulation.

Klamath Water Users Association (Written)

- Summary Comment 1: KWUA has no comments on the substance or technical aspects of the rule beyond those offered in the rules advisory committee. However, the proposed rule may not actually reflect how OWRD will regulate groundwater in the future. Last year, OWRD excluded a large number of wells from regulation for reasons that are unrelated to the proposed rule or to whether regulation of that water use would provide timely and effective relief to downstream surface water users. No action should be taken on adoption of the rule until OWRD makes a decision regarding assertions of “Walton” rights in groundwater. Otherwise, the relevance of the rule is in doubt.

*Department Response:* The issue of the *Walton* rights for groundwater (essentially, a claim of a federally reserved right for groundwater) is a legitimate concern and did result in wells within the former Klamath Tribal Reservation continuing to operate in 2014 without regulation. This claim of federally reserved groundwater is being reviewed by the Oregon Department of Justice. The outcome of that review and the Department’s policy determination based on that review is uncertain, and may be subject to legal challenge. As a result, final resolution of this separate issue may take a significant period of time. Wells outside of the former reservation boundary will remain subject to regulation. The Department concludes that the proposed rules provide meaningful clarity to water users regardless of how and when the issue of *Walton* rights for groundwater is resolved, and the rules should not be delayed pending a final determination of that issue.

- Summary Comment 2: KWUA is concerned that the groundwater modeling OWRD based the rule on may not adequately represent the effect groundwater use in the Off-Project area has on surface water resources. It is KWUA’s understanding that the model analyzed each well individually without considering whether other wells were pumping simultaneously. If other wells are pumping, it seems that a lowering of the water table would occur. This lowering of the water table is likely relevant to determine the effect on streamflow of turning on a particular well.

KWUA suggests that OWRD fully consider the actual circumstances under which a well would be expected to operate.

*Department Response:* The stream depletion impacts from pumping wells were calculated on a well-by-well basis. Hydrologic principles tell us the cumulative stream depletion impact is the sum of the individual well-by-well analyses.

Klamath Tribes (Written)

- There is... one provision of the Proposed Rules about which we would appreciate receiving clarification from the Department. Under Section 15(c) of the Proposed Rules, regulation of a replacement or additional well under an existing registration, permit, or certificate is generally evaluated for regulation by the Department based on the location of the original well (with one exception). Our concern is that a water user not be able to use this provision to avoid regulation by locating a replacement or additional well closer to a surface water source. For example, that a well located greater than 1 mile away from a surface water source, and not subject to regulation under the Proposed Rules, not be permitted to be moved within a quarter mile or even 500 feet of the surface water source and still be exempt from regulation. (See full comment in Attachment 5.)

*Department Response:* The Klamath Tribal comments are correct in that section 15(c) of the draft rules do allow a replacement well to move and yet be considered at its original location when evaluating the group of wells in the respective distance categories for purposes of regulation (the categories being wells less than a ¼ mile from a gaining reach of stream, wells between ¼ and ½ mile, and wells between ½ and 1 mile). The 15(c) provision in the rules was intended to address replacement wells moving further from a stream than the original well's location (users trying to avoid regulation by moving their well into the next further distance category, and under the rule language the new well would be treated as if it was at its original location). At face value, the rule language would also allow wells to be moved closer to a stream and take advantage of the original, more distant location when the Department is evaluating for regulation.

However, the replacement of a well requires a transfer or a permit amendment to add the well to the permit or certificate. If the new well location moves closer to a stream, the technical review would likely reveal an injury to other users and would not be allowed. Specifically, the example provided in the comments above from the Klamath Tribes would not be allowed because the vast distance of the well relocation would result in a significant increase in stream depletion on already spoken-for surface water.

### **Summary Comments Opposing Rule**

Commissioner Tom Mallams, Klamath County – Oral comments at first and third public hearings

- Summary Comment 1: I don't believe there is statutory authority to do that type of modeling to show that is the best body of proof that there is interference between groundwater and surface water.

*Department Response:* The Water Resources Commission is charged through ORS 537.505 to 537.795 with the administration of the rights of appropriation and the use and distribution of the groundwater resources of the state. Oregon statutes do not preclude scientific studies or findings when determining water supply or aquifer characteristics. In 1988 the Commission adopted OAR 690-009, rules addressing groundwater interference with surface water. These rules specifically address the use of modeling techniques to quantify hydraulic interference.

- Summary Comment 2: Last year in the state house, I gave comment there, and the flavor of the conversation during those hearings was that the way this modeling was done the irrigator cannot prove themselves innocent. It would be very onerous to do that. In other words, you were guilty until proven innocent and you can't really prove yourself innocent unless you have a lot of money

to do a lot of studies. The burden of proof should be on OWRD, which this modeling they say meets that burden.

*Department Response:* The proposed rules either incorporate or do not differ from the burdens of proof set forth in 690-009. Division 690-025 incorporates the processes and burdens set forth in 690-009 for determining hydraulic connection or the potential for substantial interference. The proposed rules provide a more specific process for determining whether regulation of a well in the Off-Project Area would provide effective and timely relief to a senior surface water user. However, the proposed rules do not alter the burden of establishing effective and timely relief. Except for wells within 500 feet of a gaining reach (where effective and timely relief is assumed due to proximity), OWRD has the burden of establishing that the conditions set forth in the rules for determining whether relief would be effective and timely have been met. This is the same burden of proof set forth in 690-009. The Department is conservative in its approach and uses the best information available and sound principles of hydrology in making these determinations. The Department is open with its analyses, shares data with the well owner, and welcomes new and better information.

- Summary Comment 3: I feel the Oregon Water Resources Department is doing nothing more with these rules than attempting to validate surface water and groundwater regulation in conjunction with each other. All I have seen is what I consider a very flawed modeling process to justify this direction. There are many, many problems with the modeling program that they have used a very broad stroke to paint the entire upper basin. I believe they are going as far as saying all the river or all the creeks and rivers have 30 feet of sediment in the bottom of them, which is absolutely insane.

*Department Response:* The Department does not use a regional groundwater flow model when evaluating wells for regulation, as the comment suggests. The Department conducts a well-by-well analysis of the timing and magnitude of groundwater impacts on surface water using information local to the well. Stream, water well, and aquifer characteristics are varied from site to site and are based upon the available information.

- Summary Comment 4: These permanent rules are a piece of the bigger agreement package and I think that everybody has to remember that these rules will be permanent whether or not these agreements go forward. And I don't believe that these agreements will forward and then we are going to be stuck with these rules.

*Department Response:* These rules will not be in effect if the agreement does not go forward. Section (16) of the 690-025-0010 draft rules clearly state: "If the Settlement Agreement terminates, groundwater regulation in the Off-Project Area will be in accordance with OAR 690-009."

Robert Blake – Residential well User (Written)

- I have read through the proposed rules, and they do not seem to explicitly exempt residential wells. If my understanding of the intent is correct, then *at a minimum* the exemption of residential wells needs to be explicitly spelled out in the new rules.

*Department Response:* Exempt uses are specifically called out in ORS 537.545 as being exempt from the permitting requirement but not exempt from regulation, if that was to be necessary. The statute specifies that regulation of exempt uses will be by priority date, just like any other water right. The draft rules require a test, prior to control of a well, to determine if the regulation would provide effective and timely relief to the stream. Exempt uses (domestic, stock water, non-commercial lawn and garden, etc.) are small uses of water, relative to the irrigation rights considered in the Upper Klamath Basin Comprehensive Agreement. Because the rate of water use is a significant parameter in the effective and timely test, it is very unlikely an exempt use well would meet the test requiring regulation.

Senator Doug Whitsett – Oregon Senate District 28 (Written)

- Summary Comment 1: Although this is represented as affecting a specific geographic region, I believe that this sets a statewide precedent for broad rulemaking authority by the Water Resources Department. The proposed rules still need to have specific statutory authority, which is currently lacking.

*Department Response:* See Attachment 4, the memo from Department of Justice regarding authority to adopt rules governing the regulation of groundwater to benefit senior surface water users, and to adopt local rules for this purpose.

- Summary Comment 2: Section 3 states that OAR 690-025-0010 “only governs the Department’s control of well use in the Off-Project Area when the Department determines such use **has the potential to cause substantial interference with surface water.**” This can be interpreted rather broadly, and has the potential to cause a very slippery slope. The standard should be the actual interference with surface water, as opposed to the potential to cause it.

*Department Response:* OAR 690-025 incorporates and does not alter the current process for determining the potential for substantial interference that is set forth in OAR 690-009. The determination of potential for substantial interference is only one component of a decision to regulate a well. OAR 690-025 further directs the Department to determine, prior to regulation, which of the wells, if controlled, would provide relief to the stream in an effective and timely manner. The Department conducts a well-by-well analysis utilizing fundamental principles of hydrologic science and the best information available to separate out those wells which have the potential to interfere, from those wells that, if regulated, would provide an effective and timely benefit.

- Summary Comment 3: Another provision to which I strongly object effectively serves to shift the burden of proof from the agency to the property owner, which is another provision I strongly object to. The notion that the owner must prove non-interference is troubling at best.

*Department Response:* The proposed rules either incorporate or do not differ from the burdens of proof set forth in 690-009. 690-025 incorporates the processes and burdens set forth in 690-009 for determining the potential for substantial interference. The proposed rules provide a more specific process for determining whether regulation of a well in the Off-Project Area would provide effective and timely relief to a senior surface water user. However, the proposed rules do not alter the burden of establishing effective and timely relief. Except for wells within 500 feet of a gaining reach (where effective and timely relief is assumed due to proximity), OWRD has the burden of establishing that the conditions set forth in the rules for determining whether relief would be effective and timely have been met. This is the same allocation of burden set forth in 690-009. The Department is open with its analysis, shares data with the well owner, and welcomes new and better information.

- Summary Comment 4: Section 14 of the proposed rules states that “the Department shall make the determinations...based on the best available information, **which could include** employing at least one of the methods set forth” in OAR 690-009-0040. Once again, this language is very open to interpretation, and gives the agency broad authority. The application of this authority could be used in an arbitrary or capricious manner.

*Department Response:* The terminology “which could include” was intentional to provide the Department the flexibility to utilize the analytical tools called out in OAR 690-009-0040 (when those tools are appropriate) or other methods, such as direct measurement of springflow, if that provides the best available information on hydraulic interference.

- Summary Comment 5: I also bring into question portions of the fiscal and economic impact. The agency is claiming that “the proposed rules do not change the general approach to control of well use.” With all due respect, the rules proposed a significant change to the general approach to control of well use.

*Department Response:* OAR 690-025 incorporates much of the existing rule (690-009) governing the regulation of wells to control interference with surface water. OAR 690-025 supersedes OAR 690-009-0050(2) by providing a detailed process for evaluating whether control of a well in the Off-Project Area will provide relief to the surface water supply in an effective and timely manner, but it does not remove the effective and timely requirement. The draft rules, therefore, do not change the general approach to control of well use from existing authority and practice.

- Summary Comment 6: The Statement of Cost of Compliance includes, I believe, factually inaccurate information. The department states that the proposed rules do not expand its regulatory authority and therefore do not increase its regulatory costs. This is due largely to the shift of the burden of proof from the agency to property owners.

*Department Response:* OAR 690-025 incorporates much of the existing rule (690-009) governing the regulation of wells to control interference with surface water. OAR 690-025 supersedes OAR 690-009-0050(2) by providing a detailed process for evaluating whether control of a well in the Off-Project Area will provide relief to the surface water supply in an effective and timely manner, but it does not remove the effective and timely requirement. The rule therefore does not expand regulatory authority. Finally, as described above, the proposed rules either incorporate or do not differ from the burdens of proof set forth in the existing rules.

- Summary Comment 7: Finally, I take exception to the notion that the “increased certainty is likely to create a positive fiscal impact by creating a more stable environment for businesses’ investment and operations decisions.”

*Department Response:* Comment noted.

Joe Watkins – Well User, Merrill, Oregon – Oral comments third public hearing

- Summary Comment: I have a lot of people I work with in the Upper Basin area. I would like to comment on this and I feel that there are a lot of bad decisions that have been made and we're just compounding bad decisions with another bad decision. I feel the adjudication was a bad decision to start with, the amount of water that was given to the Tribes is devastating to the agricultural community in the Upper Basin. All the water regulation that is going to go on in the Klamath Basin through all the agreements and everything has a possibility of affecting agriculture by a -- possibly up to 20 percent, which is a 300 million dollar industry in Klamath County. A \$60,000,000 hit to Klamath County is not sustainable for the agricultural community. These other regulations that are being put in place of tying the wells to the river flows to the surface flows, I feel was another bad decision that was made, not based on science but modeling and then these regulation being proposed are another addition to that. And I don't fully understand all of them, I just get a lot of questions from the people in the Upper Basin about these issues.

*Department Response:* Comment noted. The Department has conducted open houses in the basin for residents to be able to meet with Department staff; if residents have further questions, they are encouraged to contact the Department.

WaterWatch (Written)

- Summary Comment 1: WRD should not undertake a rulemaking to implement a private settlement that reduces its ability to regulate in favor of state held instream water rights... While WaterWatch appreciates the improvements to the proposed rules made throughout the Rules Advisory

Committee process, we remain concerned that: a) the premise of the rulemaking was improper; and b) the rules would reduce the state's ability to regulate in favor of state held instream water rights in various ways (several of which are detailed below).

...WaterWatch suggests the following subsection be added to OAR 690-25-0010(3) to address these problems:

“Control of well use for the benefit of state instream water rights.”

This addition would address the central problem here—that the Department embarked on a rulemaking to implement a private settlement and has improperly imported the negotiated compromise of that private settlement into future regulation for state instream water rights in the Off-Project area.

*Department Response:* The draft rules provide a detailed process for evaluating whether control of a well in the Off-Project Area would provide relief to the surface water supply in an effective and timely manner. The rules apply to wells in the Off-Project Area regardless of who is making a call, and regardless of the type of use of the right held by the calling senior. Instream water rights held by the State are treated the same under the rules as any other surface water right held by any other user. WaterWatch's proposed language would treat State-held instream water rights as a special class of right, subjecting wells in the Off-Project Area to different processes for determining effective and timely relief depending on the identity of the water right holder making the call.

- Summary Comment 2: The draft rules improperly limit WRD's ability to regulate wells (determined to have the potential for substantial interference with surface water) in favor of state held instream water rights if certain thresholds of impact are not met. ...if the shortfall below a state held instream water right less than 5%, WRD will not regulate junior groundwater wells in favor of the instream water right. ... A more extreme restriction applies to use of wells greater than one-half mile and up to and including one mile away. There the deficit below the senior surface water right (including a state held instream water right) must be 10% before WRD would regulate in favor of the surface water right.

*Department Response:* Commenter misinterprets the proposed draft rule. There is not an allowance of up to 5% before the Department will regulate for an instream right (or any senior right that makes a call).

State law allows the Department to determine whether regulation of a junior groundwater user will provide relief to a calling senior surface water user in an effective and timely manner. The percentage thresholds, which are tied to distance from the stream, reflect an effort to define when regulation will be effective and timely as to wells in the Off-Project Area. The foundation for this approach is based on scientific hydrologic principles. The rules provide for wells out to ¼ mile from a gaining reach to be regulated when senior rights are less than 5% deficient; wells out to ½ mile when a senior right is deficient between 5% and 10% deficient; and out to 1 mile if the senior right is greater than 10% deficient.

In addition, it is important to understand how conjunctive regulation works. When a valid call is made by a senior surface water right holder, it is the Watermaster's responsibility to get water to the senior right as promptly as possible. Because groundwater usage is slow to impact a stream and relief is slow to materialize once the well is regulated off, the Watermaster will regulate through a combination of wells and surface water diversions. If the senior water right is over-satisfied by regulation (because groundwater will provide increasing relief with time), the Watermaster will turn senior users back on in a priority order until the balance between upstream usage and senior downstream requirements is met. Thus, the draft rules will not result in a diminishment of state instream rights or other rights making a valid call.

- Summary Comment 3: The draft rules improperly limit WRD’s ability to regulate wells (determined to have the potential for substantial interference with surface water) in favor of state held instream water rights if calls are not made by certain dates.

*Department Response:* The draft rules provide a detailed process for evaluating whether control of a well in the Off-Project Area would provide relief to the surface water supply in an effective and timely manner. The rules honor the hydrologic principle that regulation of distant wells takes longer to provide relief to the stream, and that a call for water late in the season will not be able to rely on distant wells for timely relief. As stated above, a combination of wells (nearby in this case) and surface water diversions will be regulated when a valid call is made. Instream rights will not be shorted as a result of Division 25.

- Summary Comment 4: The draft rules could allow impacts to state held instream water rights through addition or relocation of wells. This means that if a replacement well or additional well is relocated closer to a stream than the original well such that the location changes which regulation standard applies (for example, a well is relocated from >1 mile to within 500’ of a stream), then the new well will be regulated to a lesser standard than its location would otherwise dictate. ... This provision thus reduces WRD’s ability to regulate in favor of state instream water rights.

*Department Response:* See response to Klamath Tribe’s Summary Comment 2. In short, any well relocation under a permit or certificate requires either a permit amendment or a water right transfer with a technical review. A change in location that would result in a material increase in interference on surface water would be deemed injurious and not approved. In addition, if it were even allowed, wells within one mile of a gaining reach that moved closer to a stream could increase their exposure to regulation under 690-025-0010(13). This would be an expensive and risky move on the part of the water user.

- Summary Comment 5: The draft rules improperly limit WRD’s ability to regulate wells (determined to have the potential for substantial interference with surface water) in favor of state held instream water rights by requiring the well to impact a mapped “gaining reach.”

*Department Response:* The draft rules provide a detailed process for evaluating whether control of a well in the Off-Project Area would provide relief to the surface water supply in an effective and timely manner. This process incorporates the concept of the “gaining reach,” whereby streamflow is increasing as a result of groundwater discharge to a particular reach of stream channel. Stream depletion due to pumping wells and the relief provided by well regulation are realized most rapidly in these gaining locations. Tying the regulation of wells to the proximity of gaining reaches reduces uncertainty in the relief provided by the control of wells.

- Summary Comment 6: The draft rules improperly limit WRD’s ability to regulate wells (determined to have the potential for substantial interference with surface water) in favor of state held instream water rights based on a formula negotiated in a private settlement that may allow significant impacts. ... This formula reduces the state’s ability to regulate in favor of state instream water rights because even if there would be a significant impact to streamflow (and the instream water right) at 30- days, WRD could not regulate unless shutting down the well would show the specified recovery. WRD should be regulating against injury to the state instream water rights that is occurring in the first 30-days, not only if a certain recovery is reached after a 90-day idle period. Again, we are aware of no Oregon statutory authority to limit regulation in favor of senior instream water rights as proposed in this rule.

*Department Response:* The Commission’s rule 690-009-0050 directs the Department to make a determination prior to regulation that control of the well will provide an “effective and timely relief.” This phrase, which is the basis for beneficial regulation, is undefined in rule and statute. This requires Department staff to make this regulatory determination on a case-by-case basis and provides water users

less certainty how regulation will be conducted. The draft rules provide a standard by which all wells will be judged (690-025-0010(13)).

The proposed standard states that the Department will run an analytical test (not a field test) on each well that will quantify whether turning off the well after a simulated 30-day pumping cycle will provide at least 0.10 cubic feet per second (CFS) of stream depletion relief at the conclusion of 90 days of regulation. For example, if a water user is pumping 1.0 CFS (about 450 gallons per minute) and is regulated after 30 days of pumping, the test would provide insight into if that regulation results in a recovery to the stream of at least 0.10 CFS (about 45 gpm) after being regulated off for three months. If that simulated regulation doesn't provide 0.10 CFS to the stream after being off for most of the irrigation season, the well would not be controlled under this rule. The Department supports this standard in the proposed rule. The test uses information for each specific well, and is calculated for each individual specific well.

- Summary Comment 7: If the rules are not amended to exempt state instream rights, at a minimum, the rules should require that groundwater regulation reverts to OAR 690-009 where calls are not made or cannot be made under instream rights held by the Klamath Tribes. ... This section should be amended by adding the following sentence:  
“Additionally, if in any stream reach, the Klamath Tribes do not make a call under an instream right or call threshold, or if there is no instream right held by the Klamath Tribes for that reach, groundwater regulation in that reach shall be in accordance with OAR 690-009.”

*Department Response:* See the Department responses to WaterWatch's Summary Comment 1 and last paragraph in response to Summary Comment 2, addressing conjunctive regulation.

The State instream water rights in the Off-Project Area are mostly overlapped by Tribal instream claims with higher rates of flow and much older priority dates (October 26, 1990 for State instream water rights compared to Time Immemorial for Tribal claims). Regulating for the Tribal claims or Specified Instream Flows (per the Comprehensive Agreement) will see that the State rights are met. Where an instream water right is not met and the Tribes do not call on their claim, the Watermaster will regulate junior water users consistent with the proposed rules to see the instream water right is satisfied.



Rulemaking Hearing

Date: January 15, 2015

Hearings Officer: This hearing is now in session and is being tape recorded to maintain a permanent record. My name is name is John Roberts, and I am the hearing office. Today is January 15, and the time is 6:04.

The purpose of this hearing is to provide an opportunity for public comment on the proposed rules in OAR Chapter 690, Division 20 regarding local rules governing control of well use in the Off-Project area in the Klamath Basin. The purpose of this rule is to establish procedures in the Klamath Basin for the control of ground water uses in the Off Project area for the benefit of senior surface water rights. The Off Project area is defined and limits the rule application to the Williamson River Basin, Sprague River Basin and the Wood River Valley, including Sevenmile Creek. In addition to presenting oral arguments at this hearing, anyone may submit written comments until 5 p.m. on March 2, 2015, which is the close of the public comment period. Send comments to Joshua Spansail, at the Oregon Water Resources Department, 725 Summer Street NE, Suite A, Salem, OR 97301. Or fax comments to 503-986-0903, attention rule coordinator or email comments to *rule.coordinator@wrд.state.or.us*

Comments received after 5 p.m. March 2, 2015 shall not be reviewed or considered by the agency unless the agency decides to extend the public comment period for everyone. An open house was held prior to this hearing where staff were available to answer questions during this rulemaking. The department will not respond to questions during this hearing. Another open house will be held before tomorrow's public hearing from 8 a.m. to 9 a.m. where staff will again be available to answer questions.

After the close of the public comment period, department personnel will prepare a staff report which will be available from the department.

[Inaudible] Okay.

I had said Chapter 690-Division 20; it should be Division 25. Okay, got it. Okay, first comment from Don Gentry please.

D. Gentry: Thank you Chairman Roberts for the opportunity to comment, on behalf of the Klamath Tribes. I am chairman of the Klamath Tribes and the Klamath Tribes will provide written comment also in addition to my oral comments here by the deadline on March 2.

Um, I am here to express the Klamath Tribes' support for the adoption of the proposed rules. Any specific concerns or recommendations we may have will be noted in our written comments. It is our position that adoption is essential to provide for appropriate and balanced regulation of groundwater affecting the off-project community and consistent with the Upper Klamath Basin Comprehensive Agreement. It is very important that we move forward and hopefully have these rules adopted to provide for the protection of all the interests on all sides and make sure that regulations is consistent and appropriate. And, so we certainly support the rulemaking and thank you for the opportunity for commenting.

Hearings Officer: Thank you. Commissioner Mallams.

C. Mallams: Well it is good to see you again John. Under better circumstances would be better.

Hearings Officer: Okay.

C. Mallams: I do appreciate the time you have given us to voice our concerns. My name is Tom Mallins and my mailing address is 305 Main Street, Klamath Falls Oregon. I am here as a citizen and as a single Klamath County commissioner. But, I also want to acknowledge, which I have done in the past, I am an irrigator in the upper basin; a small irrigator, and the Ethics Commission has deemed that there is not a conflict of interest, although some people may have a perception that there is a conflict.

I represent all the citizens in Klamath County and I take that very seriously. I was elected to represent all the citizens, and I do that, I feel I do that. There are people in this room and others that aren't here that are supporting this rule and the other agreements that go along with this. That's there right and I do my best to represent them also.

Some of them are my friends and neighbors but we disagree on this and that's okay.

The citizens in Klamath County do not agree with what is going on here. There are some of the irrigators, yes, that have signed on to it, but, behind the scenes there are a lot of them that will flat out tell you the only reason they are signing on to this is because they think that they have no other choice. I was told a couple of times that they went to these meetings and begged for mercy. That the threat of being shut off in the future is just too staggering a thing to stare in the face and not capitulate to surrender. These modeling that we are talking about on this specific rules, I don't believe there is statute authority to do that type of thing of modeling to show that is the best body of proof that they have is interference between ground water and surface water. Last year in the State house I gave comment there, and it was basically, it wasn't openly admitted to, but the flavor of the conversation during those hearings was that the way this modeling was done and the irrigator cannot prove themselves innocent. It would be very onerous to do that. In other words, you were guilty until proven innocent and you can't really prove yourself innocent unless you have a lot of money to do a lot of studies. And that should have been the -- the burden of proof should be on the Oregon Water Resources Department, which this modeling they say, meets that burden. I don't believe that to be the case. To a bigger part of this -- these permanent rules are a piece of the bigger agreement package and I think that everybody has to remember that these rules will be permanent whether or not these agreements go forward. And I don't believe these agreements will go forward and then we are going to be stuck with these rules. And what you are doing in these rules is that you are admitting that there is interference between groundwater and surface water, and you are basically, in my opinion, giving up a right to oppose that down the road in the future. I think groundwater will be a thing of the past when this goes forward, and I think that is something that a lot of people have not really looked at too closely. I don't think these things will ever be legislated, and I think it is very short-sighted in agreeing to this. Do we need a settlement? Absolutely. I don't think this rises to that level to be considered a settlement. I consider it a surrender. This is something that a lot of work has been put into, and I appreciate that. I have been part of that for many, many years myself, and I don't discount the blood, sweat and tears that have gone into where we are today. But hard work does not equal success. And I think that is where

this is today, that these agreements, no matter how hard you work at it, it doesn't guarantee us success.

I think there are other venues that can make something work. We have been working on some of those and still are, still are working on some of those things that will actually to be a solution to the water problems that are here in the Klamath Basin. We talked about it in the meeting today, off stream storage should have been a piece of this. I'm fully supportive of going forward with off stream storage whether these agreements go forward or not. I think that is something that needs to happen. The problem with this agreement package is, if they go forward, the agreements say that any excess water will be deemed environmental water which can't be used in the future for irrigating agriculture, only for nonconsumptive uses. That will basically eliminate the opportunity for water that is specifically for irrigated agriculture. I think that's a very short-sighted piece of the agreement.

So, again, I thank you for being here. I thank you for doing your job. You are listening to the citizens. And I would like to see a lot more people in the room. Unfortunately, many won't come to the -- some will come and some won't say anything because if you sign on to these agreements, you agree to support and defend, including all legislation state and federal, in that signing process. So when you sign on to these agreements the way it is now, you give up a lot of your rights. That's my opinion, but it is written into the agreements also. You have to support and defend them, and part of that is you can't speak out against them, and I think that -- I guess you might say that is unconstitutional in my view. And every citizen has the right to voice their concerns or opposition no matter what, and that is not what this country is about. Again, thank you for your time.

Hearings Officer: Thank you. Anna.

Anna Bennett: Good evening, my name is Anna Bennett. I am a member of the Klamath Tribal Council and also a member of the Klamath Tribes Negotiating Team. I have lived here my entire life. We also are irrigators. And we do run cattle and hay. We -- I'd like to thank you for the opportunity to participate in a rulemaking process. And, as a participant in that, we fully support the rules, however, we are still reviewing them for consistency with the Upper Basin Agreement. That's our diligence that we need to do. We will provide written

comment. We don't have that with us tonight, but we will provide that before the due date. And, I just want to say we fully support the rules, the groundwater rules; I think it is an important piece of the puzzle in ensuring our rights are protected as well as the irrigators. I think that it levels out the playing field so everybody knows how it works, and I think they have done a pretty good job in doing that. So, I'd just like to thank you for that opportunity.

Hearings Officer: Thank you. I have called the names of everyone who has submitted registration cards. Is there anyone else who wishes to comment at this point?

Thank you for coming and providing us with your comments. The hearing is adjourned.

[Tape shut off]

[Tape turned on]

Hearings Officer: It is now 8 o'clock and the hearing is officially closed.

Rulemaking Hearing

Date: January 16, 2015

Hearings Officer: This hearing is now in session and is being tape recorded to maintain a permanent record. My name is name is John Roberts, and I am the hearing office. Today is January 16, and the time is 9:22.

The purpose of this hearing is to provide an opportunity for public comment on the proposed rules in OAR Chapter 690, Division 25 regarding local rules governing control of well use in the Off-Project area in the Klamath Basin. The purpose of this rule is to establish procedures in the Klamath Basin for the control of groundwater uses in the Off Project area for the benefit of senior surface water rights. The Off Project area is defined and limits the rule application to the Williamson River Basin, the Sprague River Basin, the Wood River Valley including Sevenmile Creek. In addition to presenting oral arguments at this hearing, anyone may submit written comments until 5 p.m. on March 2, 2015, which is the close of the public comment. Send comments to Joshua Spansail, at Oregon Water Resources Department, 725 N Summer Street NE, Suite A., Salem, OR 97301. Or fax comments to 503-986-0903, Attention rule coordinator or email comments to [rule.coordinator@wrд.state.or.us](mailto:rule.coordinator@wrд.state.or.us)

Comments received after 5 p.m. March 2, 2015 will not be reviewed or consider by the agency unless the agency decides to extend the public comment for everyone. An open house was held prior to this hearing where staff were available to answer questions about this rulemaking. The department will not respond to questions during this hearing. After the close of the public comment, department personnel will prepare a staff report which will be available from the department.

I will begin taking comments now if there are any. At this point I have no requests to comment sheets. Is there anyone out there that cares to comment further?

We will have a very short hearing then.

Okay. I will give everybody one more opportunity if you want to say something. Okay.

Well, thank you for coming then. The hearing is adjourned.

D. Woodcock: We will continue to stay here until the end of the hearing notice.

[Tape shut off]

[Tape turned on]

Hearings Officer: This hearing is closed at 11 a.m. January 17. Excuse me, January 16. There we go.

D. Woodcock: And we are done.

HEARING February 18, 2015  
Draft Rules

WOODCOCK: This hearing is now in session and is being tape recorded to maintain a permanent record. My name is Doug Woodcock and I am the hearing officer. Today is February 18, 2015 and the time is 6:32 p.m.

For the purpose of this hearing, excuse me. The purpose of this hearing is to provide an opportunity for public comment on proposed rules, Oregon Administrative Rule 690-25 - - Division 25 -- Regarding local rules governing control of well use in the off-project area in the Klamath Basin. The purpose of this rule is to establish procedures in the Klamath Basin for the control of groundwater uses in the off-project area for the benefit of senior surface water rights. The off-project area is defined and limits the rule application to the Sprague River Basin, Williamson River Basin and the Wood River Valley, including Sevenmile Creek. The area of applicability is displayed in Attachment B in the Draft Rules.

In addition to presenting oral comment at this hearing, anyone may submit written comments until 5 p.m. on March 2, 2015, which is the close of the public comment period. Send comments to Joshua Spansail at Oregon Water Resources Department, 725 Summer Street NE, Suite A, Salem, Oregon 97301. As I stated, that is over here on the table. His phone number is 503-986-0903. Or, excuse me. Retract. Or fax comments to 503-986-0903, attention Rule Coordinator or email comments to: RuleCoordinator@ wrd.state.or.us.



Comments received after 5 p.m. March 2, 2015 will not be reviewed or considered by the agency unless the agency decides to extend the public comment period for everyone. An open house was held prior to this hearing to answer questions. The department will not respond to questions during this hearing. After the close of public comment period, the department personnel will prepare a staff report which will be available from the department.

I will begin taking comments now. Let's start off with Commissioner Mallams.

**MALLAMS:** My name is Tom Mallams. I am a Klamath County Commissioner, but I am also a small irrigator in the Sycan area and Beatty area. I am here to give public comment as an irrigator and as a county commissioner. I feel the Oregon Water Resources Department is doing nothing more of these rules is trying to attempt to validate surface water and groundwater regulation in conjunction with each other. Their reasoning so far, all I have seen is what I consider a very flawed modeling process to justify this direction. There are many, many problems with the modeling program that they have used, using a very broad stroke the entire upper basin going as far I believe as saying all the river or all the creeks and rivers have, I think it was 30 feet of sediment in the bottom of them, which is absolutely insane. And these rules are being made consistent with settlement agreements which are not legislated. They are attaching, trying to attach these rules to something that doesn't even exist. It is very premature at the very least. I don't believe the coincidences, I think the adjudication was completed in--was being pushed to further the KBRA and dam removal process along. There are a lot of very good people within -- working within the Oregon Water Resources Department. The historical past problems I

**SPANSAIL Joshua A**

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**From:** Jennifer Newman <Newmanranch2@aol.com>  
**Sent:** Saturday, January 17, 2015 1:59 PM  
**To:** rule-coordinator  
**Subject:** Comment

To whom it may concern,

The Upper Basin Ranchers and Irrigators thank you for the opportunity to comment on the new groundwater rules, and believe they are consistent with the Upper Basin Comprehensive Agreement.

One point I would like to address, is Oregon's use of well analysis to define timely and effective. To date we only receive a debit for the well, no credit for what is added to the stream or river. For example, if 3 acre feet of water is put on an acre of ground and the net consumptive use on that acre is 1.5 per acre feet, then 1.5 acre feet is added to the stream. This should in my opinion, act as a credit. In the Bly, Oregon area where my ground is, I have looked at some net consumptive use numbers that have ranged anywhere from .7 to 1.84 acre feet. So I am concerned and hope that this can be looked into.

Sincerely, Kevin Newman

Sent from my iPad

## SPANSAIL Joshua A

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**From:** Robert Blake <robert\_blake@fastmail.fm>  
**Sent:** Monday, January 19, 2015 9:13 AM  
**To:** rule-coordinator; SPANSAIL Joshua A  
**Subject:** Re: Public comment on off-project upper Klamath Basin groundwater rules

Attention: Joshua Spansail or other Rules Coordinator

To my previous comments I would like to add the following comments:

One of the proper roles of a *legitimate* government is to protect the property rights of all citizens equally, not to favor the property rights of certain special interests (who have “special privilege” with said government) over the rights of everyone else. If property rights are not handled in a just manner, then it will certainly cause many people in the affected area to seriously question both the legitimacy and authority of the OWRD. Presently, the proposed rules do not seem to handle property rights in a just manner. With these proposed new rules, many people perceive either corruption, or a failure of philosophy and competency, or both. It is not in the interest of anyone for the OWRD to lose credibility or legitimacy among the people it is supposed to “serve”.

Best Regards,

Robert Blake

Sprague River OR

*"Power concedes nothing without a demand. It never has and it never will. Find out just what any people will quietly submit to and you have found out the exact measure of injustice and wrong which will be imposed upon them, and these will continue till they are resisted with either words or blows, or both. The limits of tyrants are prescribed by the endurance of those whom they oppress."*

-Frederick Douglas

On Sun, Jan 18, 2015, at 08:20 PM, Robert Blake wrote:

Attention: Joshua Spansail or other Rules Coordinator

CC: Doug Whitsett; Greg Walden; Pat Bushey, Herald and News Op Editor

I am writing to file a formal comment regarding the proposed off-project upper Klamath Basin groundwater rules. Because I do work for a living, I have not been able to attend any of the public meetings/hearings on this topic. I find filing my comments by email to be more time efficient than physical mail.

While I do not own or operate commercial properties or commercial wells in the proposed area, I do however own residential property and operate a residential well directly in the proposed area (immediately adjacent to the Sprague River).

My understanding of the proposed rules is that the *intended, primary* targets of the new rules are commercial wells, and groundwater being used for commercial purposes. If that understanding is not correct please inform me of such. I have read through the proposed rules, and they do not seem to explicitly exempt residential wells. If my understanding of the intent is correct, then *at a minimum* the exemption of residential wells needs to be explicitly spelled out in the new rules.

Furthermore, despite the fact that I do not own nor operate a commercial well, nor do I use groundwater for commercial purposes, I am fully *opposed* to the proposed rules. I based this opposition on several grounds including:

1. I would argue that the proposed rules utilize the property rights of senior water rights holders as a justification or *excuse* to *steal* property from other property owners. This appears to be nothing more than a transfer of property (water) from one land owner to another without just compensation, under the guise of "public use". Further, I would argue that if this *is* being conducted in the name of public use, then it is a violation of individual rights under the Fifth Amendment to the US Constitution. The aforementioned reads: "No person shall ... *nor shall private property be taken for public use, without just compensation.*"

I would also argue that the proposed rules violate Oregon ORS eminent domain laws, because the proposed rules offer no compensation to the property owners whose water is being seized. So if the state is going to seize the groundwater of land owners, which these proposed rules permit, then *at a minimum* those land owners need to receive just compensation under both Constitutional law and under Oregon eminent domain law. In this case just compensation would be the difference in fair market value between the value of the properties with working wells and the value of the properties without working wells. In other words, most of the value of the properties.

I do understand that under *current* Oregon law all water is allegedly publicly owned. However, if individuals have gone to the expense of purchasing land from rightful owners and have also gone to the trouble or expense of drilling wells, then the water beneath their land should rightly become the owner's private property via Locke's labor

theory of property (and Common Law property rights). The Oregon state law claiming that all water is publicly owned is incompatible with both private property and rights guaranteed under the US Constitution. Because water (either ground or surface) is pervasive, claiming that the state owns all water effectively destroys all real property rights in the state. I do not believe that such an approach is either rational or functional.

2. If the state wishes to claim custodianship of major surface waterways (e.g. rivers etc.) I will not argue that point at this time. However, Oregon Water Resource Department hydrologists have made the argument (for the well controls under these proposed rules) that because groundwater located in close proximity to surface water is connected to said surface water, that gives the OWRD the authority to put controls on these wells. I do have some knowledge of hydrology, and the statement that ground water is connected to surface water is often correct. However it is also completely irrelevant. Again, based on the Lockean and Common Law property rights of landowners, the water under their soil belongs to them. It should not fall under the custodianship jurisdiction of the state until it hits the surface via a major waterway.

You may be wondering why I am so concerned about this matter considering that I do not have any water related commercial interest in this situation. It is because I believe that principles matter, and if we accept in principle that it is acceptable for the OWRD to steal groundwater from rightful commercial landowners, then that sets the precedent that it is also acceptable for the OWRD to steal groundwater from rightful residential landowners as well. This is the proverbial "foot in the door" or the proverbial "camel's nose under the tent". As a result I find it imperative that we not allow this precedent to be created, or the next victim of water theft will likely be residential landowners. Residents within the city of Klamath Falls were already at risk of facing this fate this past summer as certain groundwater wells that serve residential customers were required by OWRD to be shut down.

I suspect that the legal opinion of the OWRD will be quite different from mine on this matter because their legal interpretation benefits the OWRD bureaucracy. But if there were someone so inclined (not myself), I believe there is significant legal justification for legal action in this matter, all the way up to and including the USSC.

Policy actions such as these strike me as being basically fascist or corporatist. The state is in collusion with and benefits financially from senior (commercial) water rights holders (via tax revenue and potentially other avenues). Thus the OWRD creates regulatory policy that benefits both those senior water rights holders, and further empowers the state, at the expense of small property owners.

I hope you will give these comments serious consideration, as I know there are many small landowners in the area in question that hold similar views, yet are either unable or unwilling to speak out about this matter.

Best Regards,

Robert Blake

Sprague River OR

***"When morality and the law contradict one another, the citizen has the cruel alternative of either losing his sense of morality or losing his respect for the law."***

**-Frederic Bastiat**

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<http://www.fastmail.com> - Faster than the air-speed velocity of an  
unladen european swallow

--  
<http://www.fastmail.com> - mmm... Fastmail...

January 27, 2015

Water Resources Commission  
Oregon Department of Water Resources

I am writing in regards to the Groundwater Rule change pertaining to the Upper Klamath Off-Project Area. I am in favor of the rules as proposed, as they are consistent with the Upper Klamath Comprehensive Agreement and are necessary to the implementation of the Agreement.

Roger Nicholson

A handwritten signature in black ink, appearing to read "Roger Nicholson". The signature is written in a cursive style with a large initial "R".

JAN 29 2015

SALEM, OR

Jan. 16, 2015

Rule Coordinator, Oregon Water Resources Department  
725 Summer St. NE Suite A  
Salem, Oregon 97301-1271

Subject: Written Comment  
Off-Project Upper Klamath Basin  
Ground water Rules

My name: John C. Flynn  
Address: 421 S. G St. Lakeview, OR 97630  
Represents: Flynn Ranches in Beatty, Oregon  
Property and well owners in Beatty, Oregon

I attended the Open House and Public Hearing at OIT in Klamath Falls on Thursday, Jan. 15 and 16, 2015 and had a great conversation with the people from the Water Resources Department. After looking at maps and visiting about our property that is located south of Beatty, I felt that we were in agreement that the creek bed, known as Brown Creek, should no longer be called a "Gaining Reach". Brown Creek does not have a main source of water and is usually dry after the first of April. We use the creek bed to carry our well water to our property when needed.

I hope my suggestion to no longer call Brown Creek a "Gaining Reach" will be considered in the final decision. I do feel that the draft is acceptable to the Flynn family.

Thank you for accepting my suggestions.

Sincerely,



John C. Flynn



## **UPPER KLAMATH LANDOWNERS IMPROVEMENT DISTRICT**

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January 29, 2015

**RE: Klamath Groundwater Rulemaking**

Oregon Department of Water Resources:


The Upper Klamath Landowners Improvement District (UKLID) is a water improvement district which was established by landowners within the Off-Project Area to implement portions of the Upper Klamath Comprehensive Agreement (Agreement). UKLID is working with landowners on the water management aspects of the Agreement. The water management efforts include meeting specified instream flows; retiring irrigation water rights and transferring them instream; and assisting landowners with managing remaining irrigation water (surface and groundwater) through rotational agreements.

The Klamath Groundwater Rulemaking will assist the landowners within the Off-Project Area in complying with the terms of the Agreement. The landowners will be providing additional water instream to satisfy senior instream water rights of the Klamath Tribes. The State of Oregon also has instream water rights with a very late priority date of 1990. These instream water rights will be satisfied by providing for the senior instream water rights of the Klamath Tribes. This groundwater rulemaking will not infringe of the instream water rights of the Klamath Tribes or the State of Oregon. Instead as part of implementing the larger Agreement, these rule changes will allow for more water to remain instream.

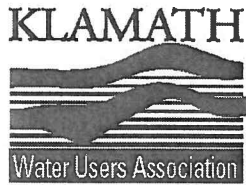
The Klamath Groundwater Rulemaking is an essential part of the bargained for benefits provided to landowners within the Agreement. The rulemaking will allow landowners to clarify when wells will be considered timely and effective in delivering water to the instream claims and when the wells will not provide timely and effective relief to senior instream water right holders. The landowners can then manage their remaining water to adequately retire irrigation rights and provide the water instream to augment instream flows throughout the summer months.

Please consider the Klamath Groundwater Rules as presented. As currently drafted, these rules comply with the various aspects of the Agreement.

Sincerely,



Randall Kizer  
President



735 Commercial Street, Suite 3000  
P.O. Box 1402  
Klamath Falls, OR 97601  
Phone: (541) 883-6100  
Fax: (541) 883-8893

February 11, 2015

*Via Electronic Mail Only*

Rule Coordinator  
Oregon Water Resources Department  
725 Summer St. NE, Suite A  
Salem, OR 97301-1271  
rule-coordinator@wrdd.state.or.us

**RE: Rulemaking for OAR 690, Division 25: Local Rules Governing Control of Well Use  
in the Off-Project Area in the Klamath Basin**

Dear Rule Coordinator:

This letter provides comments of the Klamath Water Users Association (KWUA) regarding the Oregon Water Resources Department's (OWRD) proposed rulemaking that sets local rules for governing control of well use in the off-Project area in the Klamath basin. KWUA has no comments on the substance or technical aspects of the rule beyond those offered in the rules advisory committee. However, the proposed rule may not actually reflect how OWRD will regulate groundwater in the future. Last year, OWRD excluded a large number of wells from regulation for reasons that are unrelated to the proposed rule or to whether regulation of that water use would provide timely and effective relief to downstream surface water users. No action should be taken on adoption of the rule until OWRD makes a decision regarding assertions of "Walton" rights in groundwater. Otherwise, the relevance of the rule is in doubt.

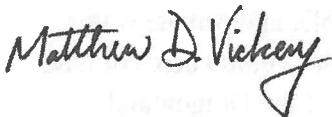
KWUA is a non-profit corporation whose members include public and private water delivery entities, primarily irrigation districts that deliver water to about 170,000 acres of land (including over 1,200 family farms and ranches) located on both sides of the Oregon and California border. Most KWUA members are contractors of the U.S. Bureau of Reclamation and receive water stored by and/or delivered through Reclamation's Klamath Project (Project). KWUA members hold water rights with priorities of 1905 and earlier, and there have been times when insufficient water was available to satisfy the demand for water served under those water rights. Thus, KWUA and its members have a strong interest in adherence to the prior appropriation doctrine.

Every drop of groundwater pumped in the off-Project area eventually affects the water supplies for the Project, which are already scarce and highly regulated. As such, KWUA views skeptically any additional rules affecting the Project's ability to make a call on the system.

However, KWUA representatives participated on the rule advisory committee and have no comments regarding the technical development of the regulation. KWUA's position is based on its understanding that the proposed regulation will not significantly alter how the watermaster would otherwise regulate junior water rights in the event of a call by a downstream senior water right holder.

KWUA does, however, question the utility of the rule when considering the recent assertions of *Walton* groundwater rights in the off-Project area. The proposed rule is derivative of the Upper Basin Comprehensive Settlement, which laid out the parameters of the proposed rule with the intent to help parties know when groundwater use would and would not be regulated. It is our understanding that, soon after the Upper Basin Comprehensive Settlement became public, some parties who would be subject to regulation under the rule asserted that they have rights to groundwater that have priorities much earlier than the priority date of their permits or certificates. Specifically, some individuals who own land that was once within the boundaries of the former Klamath Reservation argue that their groundwater wells carry a *Walton* right with an 1864 priority date. It is our understanding that as a result, during the 2014 irrigation season, OWRD elected not to regulate groundwater wells located within the boundaries of the former Klamath Reservation, whether the well owner had asserted a *Walton* right or not. If this practice continues, the great majority of wells that one would expect to be regulated under the proposed rule will not actually be regulated if the Project makes a call. It does not seem logical, or to be good policy, for OWRD to promulgate a rule with such potentially little connection to actual practice. We understand that OWRD may have needed some time to contemplate the unexpected assertions of *Walton* rights, but this should be resolved before the proposed rule is finalized.

Respectfully submitted,



Matthew Vickery  
Deputy Director



735 Commercial Street, Suite 3000  
P.O. Box 1402  
Klamath Falls, OR 97601  
Phone: (541) 883-6100  
Fax: (541) 883-8893

March 2, 2015

*Via Electronic Mail Only*

Rule Coordinator  
Oregon Water Resources Department  
725 Summer St. NE, Suite A  
Salem, OR 97301-1271  
rule-coordinator@wrdd.state.or.us

**RE: Rulemaking for OAR 690, Division 25: Local Rules Governing Control of Well Use in the Off-Project Area in the Klamath Basin**

Dear Rule Coordinator:

This letter provides supplemental comments, in addition to those submitted on February 11, 2015, of the Klamath Water Users Association (KWUA) regarding the Oregon Water Resources Department's (OWRD) proposed rulemaking that sets local rules for governing control of well use in the off-Project area in the Klamath basin.

KWUA is concerned that the groundwater modeling OWRD based the rule on may not adequately represent the effect groundwater use in the off-Project area has on surface water resources. It is KWUA's understanding that the model analyzed each well individually without considering whether other wells were pumping simultaneously. If other wells are pumping, it seems that a lowering of the water table would occur. This lowering of the water table is likely relevant to determine the effect on streamflow of turning on a particular well. KWUA suggests that OWRD fully consider the actual circumstances under which a well would be expected to operate.

Respectfully submitted,

A handwritten signature in black ink that reads "Matthew D. Vickery". The signature is written in a cursive style with a large, stylized "V" at the end.

Matthew Vickery  
Deputy Director

## **SPANSAIL Joshua A**

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**From:** Dani Watson <ranchrangeconsulting@yahoo.com>  
**Sent:** Tuesday, February 17, 2015 11:37 AM  
**To:** rule-coordinator  
**Subject:** public comment on Adoption Division 025

To Oregon Water Resources Dept,

I am writing in support of the proposed adoption of Division 025 in chapter 690 of the Oregon Administrative Rules. The adoption of this rule would provide more certainty to both surface and groundwater irrigation users in the Off-Project area of the Klamath Basin. As irrigators in the Off-Project area look for approaches to reduce surface water use in an effort to reduce the impacts on in-stream flows, ground water regulation plays an integral part in an irrigators decision. The proposed process for determining the effect ground water wells have on in-stream flows and whether the regulation of that well provides a timely and effective relief in the event of a senior water call is paramount to the survival of irrigators in the Basin.

I encourage the adaption of this proposed rule.

Thank you,

Dani Watson

Ranch and Range Consulting, LLC.

Klamath Falls, Oregon

(541) 891-4710

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Although this is represented as affecting a specific geographic region, I believe that this sets a statewide precedent for broad rulemaking authority by the Water Resources Department. The proposed rules still need to have specific statutory authority, which is currently lacking.

Section 3 states that OAR 690-025-0010 “only governs the Department’s control of well use in the Off-Project Area when the Department determines such use **has the potential to cause substantial interference with surface water.**” This can be interpreted rather broadly, and has the potential to cause a very slippery slope. The standard should be the actual interference with surface water, as opposed to the potential to cause it.

Another provision to which I strongly object effectively serves to shift the burden of proof from the agency to the property owner, which is another provision I strongly object to. The notion that the owner must prove non-interference is troubling at best.

Section 14 of the proposed rules states that “the Department shall make the determinations...based on the best available information, **which could include** employing at least one of the methods set forth” in OAR 690-009-0040. Once again, this language is very open to interpretation, and gives the agency broad authority. The application of this authority could be used in an arbitrary or capricious manner.

I also bring into question portions of the fiscal and economic impact. The agency is claiming that “the proposed rules do not change the general approach to control of well use.” With all due respect, the rules proposed a significant change to the general approach to control of well use.

The Statement of Cost of Compliance includes, I believe, factually inaccurate information. The department states that the proposed rules do not expand its regulatory authority and therefore do not increase its regulatory costs. This is due largely to the shift of the burden of proof from the agency to property owners.

Finally, I take exception to the notion that the “increased certainty is likely to create a positive fiscal impact by creating a more stable environment for businesses’ investment and operations decisions.”

Senator Doug Whitsett  
Oregon Senate District 28

## SPANSAIL Joshua A

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**From:** DAVID THOMPSON <dtcattle@sbcglobal.net>  
**Sent:** Friday, February 20, 2015 11:20 AM  
**To:** SPANSAIL Joshua A  
**Subject:** Ground Rule Modification

Mr Spansail,

I am urging support of the Ground water rules modification currently under review by the State. Although I do not personally have groundwater that would be affected, I do strongly believe that it is important to have these rules modification in place to make the comprehensive water agreement work properly for all parties.

It is important for the irrigating community to have security in considering retirement of any surface water that they have workable rules to safeguard use of any groundwater that they have. These proposed rules have been well thought out by state staff with a tremendous amount of input from the tribe, landowners, and other groups.

Thank you,

Dave Thompson  
10560 Williamson River Rd.  
Chiloquin, Or 97624

## SPANSAIL Joshua A

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**From:** Lisa Zimmerman <centraloregoncheetahs@gmail.com>  
**Sent:** Thursday, February 26, 2015 10:02 AM  
**To:** rule-coordinator  
**Subject:** Adopt Klamath Basin Off-Project Groundwater Rules

To Whom it may concern:

I am writing to request the adoption of the Klamath Basin Off-Project Groundwater Rules. My interest lies with the fact that our family owns a working cattle ranch in Fort Klamath and without adoption we would not be able to sustain the land to continue our business in providing stock water. As a family business that has a vested interest in the importance of this rule, I hope your committee strongly considers the interest of the land-owners and other small businesses whose livelihood depend on this rule and not in individuals who are part of groups and are told to write letters opposing this rule strictly because of a perceived environmental impact interest.

Thank you for your time,

Lisa Zimmerman

11821 Nicholson Road  
Fort Klamath, OR 97626



February 27, 2015

RE: Rule Changes on Ground Water in the Off-Project Area

Fort Klamath Critical Habitat and Sprague River Water Resource Foundation are writing in support of the proposed ground water rule changes as currently proposed. The rule changes are consistent with the benefits provided to landowners in the Upper Klamath Comprehensive Agreement. Please vote for the proposed ground water rule changes as currently presented.

Fort Klamath Critical Habitat and Sprague River Water Resource Foundation are non-profit organizations representing 63 landowners who irrigate in excess of 55,000 acres in the Off-Project Area. The Upper Klamath Comprehensive Agreement is essential to these landowners, in that without the Agreement there will not be irrigation (surface or ground) water available to these landowners. This rule change is one piece of the larger Agreement. By agreeing to the rule change as presented, the landowners are one step closer to implementing the Agreement and securing some irrigation water in the Off-Project Area.

Respectfully Submitted,

Roger Nicholson  
President  
Fort Klamath Critical Habitat

Eric Duarte  
President  
Sprague River Water Resource Foundation



February 27, 2015

Mr. Joshua A. Spansail  
Rules Coordinator  
Oregon Water Resources Department  
725 Summer St. NE, Suite A  
Salem, OR 97301  
Via email: [joshua.a.spansail@state.or.us](mailto:joshua.a.spansail@state.or.us)

RE: Upper Klamath Basin Off-Project Area Groundwater Rulemaking Division 25 – Local Rules  
Governing Control of Well Use in the Off-Project Area in the Klamath Basin

Dear Mr. Spansail:

We are writing to express our support for the rules proposed in the “Upper Klamath Basin Off-Project Area Groundwater Rulemaking Division 25 - Local Rules Governing Control of Well Use in the Off-Project Area in the Klamath Basin”, as currently drafted.

The proposed rules will facilitate two critical actions that Trout Unlimited deems to be essential to the ecologic recovery of the Upper Klamath Lake watershed: 1) The rules delineate an appropriate methodology to regulate groundwater use in the basin, with deference to senior water right holders; and 2) the rules facilitate implementation of the Upper Klamath Basin Comprehensive Agreement (UKBCA). Implementation of the UKBCA is necessary to provide increased certainty of water deliveries to irrigators in the off-project area, as well as to provide for 224 miles of extensive riparian and flow restoration in the watershed to the benefit of multiple native species including the Lost River sucker, shortnose sucker, bull trout, and redband rainbow trout which are listed to varying degrees under the federal and state Endangered Species Acts.

Implementation of the UKBCA is an essential component of the broader Klamath Basin Restoration Agreement and Klamath Hydroelectric Settlement Agreement to which TU is a party. These Agreements call for the removal of four of the dams on the mainstem Klamath River and the reintroduction of anadromous fish (Chinook, coho, and steelhead) to the Upper Basin. If implemented, these Agreements would result in one of the largest river restoration projects ever undertaken. The restoration would also make essential and important strides forward in fulfilling Tribal Treaty obligations to the Klamath Tribes, Yurok, and Karuk, and help to provide improved economic and cultural self-sufficiency for their members. Importantly, these goals are obtained while also providing protection of the agricultural economy of the Klamath Basin and the rural way of life that is important to many. The proposed groundwater rules are a critical piece of implementing these water settlements to the benefit of all stakeholders in the Klamath Basin, and we support their adoption.

Sincerely,

/s/ Tom Wolf

Tom Wolf  
Oregon Council  
Trout Unlimited  
22875 NW Chestnut Street  
Hillsboro, OR 97124  
503-640-2123



Chandra Ferrari  
Staff Attorney and Water Policy Advisor  
Trout Unlimited

CC: Doug Woodcock, [Douglas.E.WOODCOCK@state.or.us](mailto:Douglas.E.WOODCOCK@state.or.us)

## SPANSAIL Joshua A

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**From:** Randall Kizer <randall.kzr@gmail.com>  
**Sent:** Saturday, February 28, 2015 9:35 AM  
**To:** rule-coordinator  
**Subject:** Upper Klamath Basin Ground Water Rules

Commissioners

I am Randall Kizer. I own a ranch in the Wood River Valley and have been a member of the negotiating team for the UKBCA. I have a surface water right, but do not have a ground water source. So how do the ground water rules affect me? The agreement was negotiated with the Klamath Tribes to balance the resources of the upper Klamath Basin. Without these assurances for the ground water community, surface water retirement will become very difficult to achieve. If the LE cannot meet the bench marks set forth in the UKLCA, then the agreement as whole becomes vulnerable. Without the agreement Agriculture in the upper basin will cease to exist. A loss of agriculture in the upper basin adversely affects the County and its residents including the Klamath Tribe. These rules were negotiated in good faith between the Klamath Tribes and the Landowners keeping the environment center stage. We need ground water to supplement the surface water but not to over pump and lead to depletion of the aquifer. I ask the commission to research these rules and accept them as negotiated.

Randall Kizer

Upper Basin Landowner

## **SPANSAIL Joshua A**

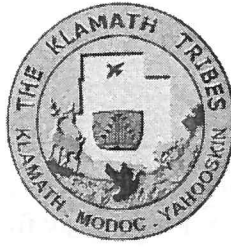
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**From:** Larry Nicholson <larry.nicholson.hayo@statefarm.com>  
**Sent:** Monday, March 02, 2015 12:47 PM  
**To:** rule-coordinator  
**Subject:** Klamath Basin Off-Project Groundwater Rules

Please strongly consider adopting the Klamath Basin Off-Project Groundwater Rules. It certainly appears we'll have another winter with very light snowpack which will result in early water shutoffs. Without these rules in place, the Upper Basin will be financially devastated. It will be hard enough to make our ranch operation somewhat work on a short season. Without stock water, most ranches will go financially broke, creating a major economic crisis in the Klamath Basin.

Thanks for your consideration.

Larry Nicholson  
Fort Klamath, OR



# The Klamath Tribes

March 2, 2015

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

Email: [rule-coordinator@wrdd.state.or.us](mailto:rule-coordinator@wrdd.state.or.us)

Re: Klamath Tribes' Comments on Proposed OAR Chapter 690 Division 25 Rulemaking:  
RULE CAPTION: Local Rules Governing Control of Well Use in the Off-Project Area in  
the Klamath Basin

Dear Rules Coordinator:

The Klamath Tribes appreciate this opportunity to comment on the Proposed Local Rules Governing Control of Well Use in the Off-Project Area in the Klamath Basin (the "Proposed Rules"). The Proposed Rules were developed and are proposed for adoption by the Oregon Water Resources Commission in accordance with Section 3.11 of the Upper Klamath Basin Comprehensive Agreement (the "UKBCA"). Representatives of the Klamath Tribes served on the rules advisory committee established to provide input to the Oregon Water Resources Department on the initial draft of the Proposed Rules released in October 2014. The current version of the Proposed Rules reflects modifications made based on input from the committee. As a party to the UKBCA and a member of the rules advisory committee, the Klamath Tribes strongly support the Proposed Rules and urge their adoption by the Commission.

There is, however, one provision of the Proposed Rules about which we would appreciate receiving clarification from the Department. Under Section 15(c) of the Proposed Rules, regulation of a replacement or additional well under an existing registration, permit, or certificate is generally evaluated for regulation by the Department based on the location of the original well (with one exception). Our concern is that a water user not be able to use this provision to avoid

501 Chiloquin Blvd. ~ P.O. Box 436 ~ Chiloquin, Oregon

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

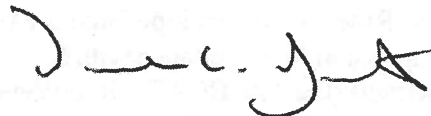


regulation by locating a replacement or additional well closer to a surface water source. For example, that a well located greater than 1 mile away from a surface water source, and not subject to regulation under the Proposed Rules, not be permitted to be moved within a quarter mile or even 500 feet of the surface water source and still be exempt from regulation. We understand that under existing Department regulations, not affected by the Proposed Rules, the Department would be required to evaluate the injury to other water users and the potential change in the hydrology of the Basin in order to approve the relocation of a well or an additional well, and that the Department will not approve a replacement or additional well that would injure the rights of other water users. We would appreciate getting further clarification of the particular rules that would apply and the analyses that would be performed by the Department should a water user seek to relocate a replacement or additional well closer to a surface water source after the Proposed Rules are in effect. We would also like to receive reassurance and confirmation from the Department that as a practical matter Section 15(c) will not allow replacement or additional wells that interfere with surface water sources to escape regulation under the Proposed Rules.

Again, apart from this one clarification, the Klamath Tribes strongly support the Proposed Rules and encourage their adoption by the Commission to facilitate implementation of the UKBCA, which is an important component of the Klamath Settlement Agreements and the result of a major collaboration between stakeholders to resolve long-running disputes over the allocation of scarce water resources in the Klamath Basin, while building a sustainable environmental restoration strategy.

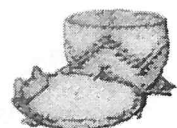
Thank you again for your time and attention.

Sincerely,



Donald C. Gentry, Chairman

cc: Tom Paul  
Doug Woodcock  
Richard Whitman  
Racquel Rancier





# WATERWATCH

PROTECTING NATURAL FLOWS IN OREGON RIVERS

Lisa Brown  
WaterWatch of Oregon  
213 SW Ash St., STE 208  
Portland, OR 97204

March 2, 2015

Rule Coordinator  
Oregon Water Resources Department,  
725 Summer St. NE, Suite A  
Salem, OR 97301-1271  
[rule-coordinator@wrд.state.or.us](mailto:rule-coordinator@wrд.state.or.us)

**RE: Draft rules for regulation of groundwater in the Klamath Off-Project area  
(OAR 690-25-0010)**

**Sent Via: email to [rule-coordinator@wrд.state.or.us](mailto:rule-coordinator@wrд.state.or.us)**

Dear Rule Coordinator:

Thank you for the opportunity to comment on the draft rules for “REGULATION OF GROUNDWATER IN THE OFF-PROJECT AREA DURING THE IRRIGATION SEASON FOR SENIOR SURFACE RIGHTS IN THE KLAMATH BASIN” (DRAFT OAR 690-25-0010). As we expressed in extensive statements to the Water Resource Commission at the May 29, 2014 meeting, WaterWatch has serious concerns with the premise of this rulemaking process which is to enact rules consistent with a settlement that was negotiated in private, was not inclusive and had no stated purpose of affecting regulation for instream water rights held in trust by the Oregon Water Resources Department (WRD) for the people of Oregon (which in fact the rules do). This and other specific concerns are discussed below.

### ***Relevant Background***

In July, 2013, Senators Wyden and Merkley, (then) Governor Kitzhaber and U.S. Representative Walden convened the Klamath Basin Task Force to address water, power and cost issues associated with forging solutions in the Klamath Basin. WaterWatch was invited to participate on the Task Force, but was not allowed to participate in the Task Force’s Water Subcommittee—



despite requesting specifically to participate in this Water Subcommittee.<sup>1</sup> WaterWatch, and others, were told they could not participate in the Water Subcommittee because it was solely for parties to the Klamath Basin adjudication to work out a settlement agreement pertaining to their water rights. (Then) Director Ward's May 29, 2014 Staff Report to the Commission correctly describes parties to the negotiation in stating that "irrigators in the upper basin met with the Klamath Tribes and the United States. . ." (Staff Report, Agenda Item F, May 29, 2014, p. 1).

It was within this limited Water Subcommittee that the Upper Basin Comprehensive Agreement (Agreement) was negotiated, purportedly as a settlement between adjudication parties as to how water between them would be regulated—specifically how junior groundwater wells (would be regulated based on calls made under the Klamath Tribes' senior instream rights. The Agreement includes negotiated specifics for how such regulation would occur, as well as a number of other settlement provisions.

At the May 29, 2014 meeting, (then) Director Ward sought direction from the Commission to develop local rules governing groundwater regulation *consistent with the Agreement*. WaterWatch raised the concern that because of the purportedly limited scope of the Agreement, such a rulemaking should not impact the state's ability to regulate for state instream water rights or state Scenic Waterways. After extensive discussion, the Director assured the Commission that WRD could do a rulemaking consistent with the Agreement that would also ensure no diminishment of regulation of state instream water rights and state Scenic Waterway flows.

This assurance did not come to pass because, while the draft rules state that they do not govern control of wells pursuant to the Scenic Waterways Act (DRAFT OAR 690-25-0010(3)(d)), the rules do not similarly exempt regulation for state instream water rights and would in fact reduce the state's ability to regulate in favor of those rights. While not a comprehensive list, key specific impacts to regulation in favor of state held instream water rights are discussed further below.

### ***Comments***

1. WRD should not undertake a rulemaking to implement a private settlement that reduces its ability to regulate in favor of state held instream water rights.

It is improper for WRD to undertake a rulemaking to establish rules "consistent with" an Agreement negotiated in private, without an appropriate balance of parties present, and purportedly intended only to settle water right regulation issues between the negotiating parties. To be clear, it's certainly appropriate for the Klamath Tribes and the irrigators to make whatever settlement they desire regarding regulation of *their own water rights* between them. However, it is clearly improper for WRD to then extend that private settlement to regulation of instream water rights held by the state in trust for the people of Oregon, as it has done here. While WaterWatch appreciates the improvements to the proposed rules made throughout the Rules Advisory Committee process, we remain concerned that: a) the premise of the rulemaking was improper; and b) the rules would reduce the state's ability to regulate in favor of state held instream water rights in various ways (several of which are detailed below).

WaterWatch suggests the following subsection be added to OAR 690-25-0010(3) to address these problems:

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<sup>1</sup> The Hoopa Valley Tribe and Oregon Wild, also members of the Task Force, were likewise excluded from Water Subcommittee work.

“Control of well use for the benefit of state instream water rights.”

This addition would address the central problem here—that the Department embarked on a rulemaking to implement a private settlement and has improperly imported the negotiated compromise of that private settlement into future regulation for state instream water rights in the Off-Project area.

2. The draft rules improperly limit WRD’s ability to regulate wells (determined to have the potential for substantial interference with surface water) in favor of state held instream water rights if certain thresholds of impact are not met.

The draft rules allow regulation in favor of a senior surface water right (including a state held instream water right) of a groundwater well between one-quarter mile and one-half mile away only if the rate of shortfall of water validly called is equal to or greater than 5% of the amount of the senior water right call (or call threshold which is a term specific to the Klamath Tribes’ rights). DRAFT OAR 690-25-0010(10)(a)(ii). In other words, if the shortfall below a state held instream water right less than 5%, WRD will not regulate junior groundwater wells in favor of the instream water right. That limitation does not exist in the currently applicable Division 9 rules (OAR 690-009), and represents a diminishment of the WRD’s ability to protect the instream water rights it holds in trust for the people of Oregon. We are aware of no Oregon statutory authority that would allow for or provide authorization for a rule that contemplates allowing junior groundwater use under these circumstances to injure a senior state instream water right by up to 5%.

A more extreme restriction applies to use of wells greater than one-half mile and up to and including one mile away. There the deficit below the senior surface water right (including a state held instream water right) must be 10% before WRD would regulate in favor of the surface water right. DRAFT OAR 690-25-0010(10)(b)(ii). This diminishes the state’s ability to regulate in favor of the instream water rights it holds in trust for the people of Oregon. Again, we are aware of no statutory authority under Oregon law that would allow this proposed reduction in regulation in favor of the senior instream water right.

3. The draft rules improperly limit WRD’s ability to regulate wells (determined to have the potential for substantial interference with surface water) in favor of state held instream water rights if calls are not made by certain dates.

The draft rules allow for regulation in favor of a senior surface water right (including a state held instream water right) of a groundwater well between one-quarter mile and one-half mile away only if a valid call is made before July 31, and in favor of a senior surface water right (including a state held instream water right) wells greater than one-half mile and up to and including one mile of a gaining reach only if a valid call is made before August 31. These date limits are apparently based on a system where the concern was ensuring that calls made for irrigation rights would be timely and effective (*i.e.* provide relief before the end of the irrigation season). However, that system should not be imposed on state held instream water rights which are year-round rights. While in most instances, state held instream water rights will be missed (and therefore, as we understand it, called) prior to these date limits, there is no basis to impose the limitation on the state’s ability to regulate in favor of the instream water rights it holds in trust for the people of Oregon.

4. The draft rules could allow impacts to state held instream water rights through addition or relocation of wells.

The draft rules specify that if a replacement or additional well is relocated, evaluation (and regulation) will occur based on the original location of the well. DRAFT OAR 690-25-0010(15)(c). This means that if a replacement well or additional well is relocated closer to a stream than the original well such that the location changes which regulation standard applies (for example, a well is relocated from >1 mile to within 500' of a stream), then the new well will be regulated to a lesser standard than its location would otherwise dictate. While some of the injury that could occur from such moves would likely be captured in the injury analysis performed by WRD in transfer proceedings, it appears such analysis would not be capable of preventing the additional injury in all circumstances. This provision thus reduces WRD's ability to regulate in favor of state instream water rights.

5. The draft rules improperly limit WRD's ability to regulate wells (determined to have the potential for substantial interference with surface water) in favor of state held instream water rights by requiring the well to impact a mapped "gaining reach."

The draft rules only allow for regulation if the affected reach is a "gaining reach." DRAFT OAR 690-25-0010(7)-(10). "Gaining reach" is defined by reference to a map developed as part of the Agreement, with allowance for WRD to modify the location of gaining reaches based on best available information. DRAFT OAR 690-25-0010(1)(b). While the concept of "gaining reach" may be appropriate in the context of regulation in favor of state held instream water rights, it is not clear how this map was developed or whether it is appropriate for this task.

6. The draft rules improperly limit WRD's ability to regulate wells (determined to have the potential for substantial interference with surface water) in favor of state held instream water rights based on a formula negotiated in a private settlement that may allow significant impacts.

The draft rules allow regulation in favor of a senior surface water right (including a state held instream water right) of a groundwater well greater than 500 feet from a gaining reach only if, based on a formula, "the relief to the stream at the conclusion of the 90-day idle period is equal to or greater than 0.10 cubic feet per second." DRAFT OAR 690-25-0010(13). Specifically, the formula prevents WRD from regulating a well if the formula shows that the 30-day pumping impact to a stream would not show relief after a subsequent 90-day idle period greater than or equal to 0.10 cubic feet per second.

This formula reduces the state's ability to regulate in favor of state instream water rights because even if there would be a significant impact to streamflow (and the instream water right) at 30-days, WRD could not regulate unless shutting down the well would show the specified recovery. WRD should be regulating against injury to the state instream water rights that is occurring in the first 30-days, not only if a certain recovery is reached after a 90-day idle period. Again, we are aware of no Oregon statutory authority to limit regulation in favor of senior instream water rights as proposed in this rule.

Additionally, the rules do not specify which model will be used, who will run it, how it can be accessed or reviewed, or how it will be updated.

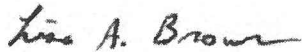
7. If the rules are not amended to exempt state instream rights, at a minimum, the rules should require that groundwater regulation reverts to OAR 690-009 where calls are not made or cannot be made under instream rights held by the Klamath Tribes.

The draft rules provide that if the Agreement terminates, groundwater regulation in the Off-Project Area will be in accordance with OAR 690-009. DRAFT OAR 690-25-0010(16). Unless the rules are amended to state that they do not govern control of wells for the benefit of state instream water rights, at a minimum, this language should be more broad. This section should be amended by adding the following sentence:

“Additionally, if in any stream reach, the Klamath Tribes do not make a call under an instream right or call threshold, or if there is no instream right held by the Klamath Tribes for that reach, groundwater regulation in that reach shall be in accordance with OAR 690-009.”

Thank you for the opportunity to comment on the draft Klamath groundwater regulation rules.

Sincerely,

A handwritten signature in black ink that reads "Lisa A. Brown". The signature is written in a cursive style.

Lisa A. Brown  
Staff Attorney

believe originated with past leadership, starting directly from our now former Governor that has been directing an environmental agenda aimed directly at the Klamath Basin. You have to think back to his first two terms in 2001, we had the complete water shutoff of the Lower Basin, the Reclamation Project and the development of the extremely onerous Upper Klamath Lake TMDL process which base -- which was based on what I consider bought and paid for best available science. His more recent third term saw the development of the Klamath Basin Adjudication. Just another re-run of bought and paid for best available science. And you have to remember also that the administrative law judge that put together the adjudication was an open participant in the closed door meetings in developing the KBRA and dam removal agreements, which had water rights and adjudication components in those agreements. We have a new Governor and a new Oregon Water Resource Department Director. Both promising to rebuild trust within state government and I think now is the time to actually make that happen if they are really, really serious in doing that. For the entire state and specifically for the Klamath Basin, an historic step would be to re-open the Upper Klamath Lake TMDL process in the Klamath Adjudication. For those that say this could not happen, I say I don't believe that to be the case. The Governor and the Oregon Water Resources Department have the ability to do those things. We are in a very deep crisis, not just in the Klamath Basin but throughout the entire state of Oregon. Again, now is the time for positive changes from our Governor's office and the Oregon Water Resources Department and I say let the good people of the Oregon Water Resources Department return to their historic position that advocating for the irrigators in the state of Oregon. And I thank you for your time.

**WOODCOCK:** Okay, thank you. Joe.

**WATKINS:** Thank you for allowing me to comment. Joe Watkins. I am a resident of Merrill Oregon. I have a lot of people I work with in the Upper Basin area. I would like to comment on this and I feel that there are a lot of bad decisions that have been made and we're just compounding bad decisions with another bad decision. I feel the adjudication was a bad decision to start with, the amount of water that was given to the Tribes is devastating to the agricultural community in the Upper Basin. All the water regulation that is going to go on in the Klamath Basin through all the agreements and everything has a possibility of affecting agriculture by a -- possibly up to 20 percent, which is a 300 million dollar industry in Klamath County. A \$60,000,000 hit to Klamath County is not sustainable for the agricultural community. These other regulations that are being put in place of tying the wells to the river flows to the surface flows, I feel was another bad decision that was made, not based on science but modeling and then these regulation being proposed are another addition to that. And I don't fully understand all of them, I just get a lot of questions from the people in the Upper Basin about these issues. I am mainly here tonight to learn about this, but I have these concerns. I think that's about it. Thank you.

**WOODCOCK:** Thank you. I have no more cards in front of me at this time. Last chance for anybody to fill out a card and to sign up for comments. Thank you for providing us with your comments. This hearing is adjourned. It is 6:40 p.m.