



Oregon
Kate Brown, Governor

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MEMORANDUM

TO: Water Resources Commission

FROM: Dwight French, Water Rights Services Administrator
Ivan Gall, Field Services Administrator

SUBJECT: Agenda Item D, February 25, 2016
Water Resources Commission Meeting

**Greater Harney Valley Groundwater and Malheur Lake Basin Program
Rulemaking Update**

I. Issue Statement

Last year, staff reported to the Water Resources Commission that available groundwater data and aquifer recharge estimates show that water is not available for new groundwater uses in parts of the Malheur Lake Basin, referred to by staff as the “Greater Harney Valley.” As a result, the Department has engaged with the local community in a rulemaking effort to establish options for new water uses, while a groundwater study is being conducted. During this agenda item, staff will provide an overview of the efforts to date.

II. Background

Recent preliminary data analyses by staff indicates declining groundwater levels over a broad portion of the Greater Harney Valley Area, and that no new permits can be issued without harming existing water users and appropriating water beyond the capacity of the resource. As a result, beginning in 2015, the Department stopped issuing new groundwater permits in the area, pending completion of a more detailed groundwater study.

In response, the Department reached out to the local community to build awareness of the situation, seek their input, and initiate collaborative efforts to address the long-term water needs for the area. The Department also started collecting data for a basin groundwater study, which is expected to be concluded near the end of 2020. The study will provide additional information about the aquifer system and whether there is additional opportunity for new groundwater development in some parts of the study area.

III. Discussion

As a result of work with the local community, the Department is working on updating the Division 512 Malheur Lake Basin Program rules to provide options for new uses while the groundwater study is being conducted. A rules advisory committee has met five times since July of 2015, and another one is being scheduled for early March of 2016. Members of the rules advisory committee are listed in Attachment 1. The Department recently extended the end of comment period to March 30, 2016, and rescheduled public hearings in Burns and Salem to take place on March 30, 2016. The extended comment period allows time for additional discussion of any remaining issues or concerns. Toward that end, a sixth rules advisory committee meeting in Burns will be scheduled for late early March. The Commission is scheduled to consider adoption of the rules at a special meeting on April 13, 2016. The public hearing draft of the proposed rules and basin map are attached (Attachment 2).

The draft rules would establish the Greater Harney Valley Groundwater Area of Concern in part of the Malheur Lake Basin, classifying groundwater in the Greater Harney Valley area for exempt uses only (i.e., exempt groundwater uses will not be limited), while allowing pending groundwater applications to be approved if they are able to meet certain criteria. Staff will brief the Commission on the proposed rules in more detail at the upcoming meeting.

The Department is also proposing to repeal OAR 690-512-0040, which required applicants to demonstrate that water was available for their new application. This section of the rules is obsolete. In addition, the Water Resources Commission in 1992 issued an order to withdraw two creeks from further appropriation. This withdrawal is proposed to be added to the basin program.

IV. Conclusion

During the month of March, the Department will continue to accept public comments on the rules and will hold rulemaking hearings in the basin and in Salem. The Commission will consider adopting the rules during a special Commission meeting in April by conference call.

Attachments:

Attachment 1	Rules Advisory Committee Participants
Attachment 2	Public Hearing Draft including map of affected area.

Dwight French
503-986-0819

Ivan Gall
503-986-0847

Participants in Malheur Lake Basin Rules Advisory Committee

Karen Moon – Harney County Watershed Council
Mark Owens – Landowner
Ken Bentz – Landowner
Lorissa Singhouse – Landowner
Matt Nonnenmacher – Clearwater Pump & Irrigation LLC
Kimberly Priestly – Waterwatch
Lisa Brown – Waterwatch
Shane Otley – Landowner/ Irrigator/Oregon Farm Bureau
Fred Otley – Landowner
Barbara Cannady - Landowner
Rusty Inglis – Oregon Farm Bureau
Mary Anne Nash – Oregon Farm Bureau
Chad Karges – US Fish & Wildlife Malheur NWR
Carla Burnside – US Fish & Wildlife Malheur NWR
Sam Kingrey- Down Right Drilling
Dalton Riley- Western Drilling
Dan Nichols – Harney County Court
Martha Pagel – Oregon Cattlemen’s Association
Jerome Rosa- Oregon Cattlemen’s Association
Scott Montgomery – All Points Engineering & Surveying, Inc., CWRE

OWRD Staff:
Ivan Gall
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JR. Johnson

DIVISION 512**MALHEUR LAKE BASIN PROGRAM [PROVISION]**

NOTE: The Malheur Lake Basin is delineated on the agency Map 12.6, dated January 1, 1966.

690-512-0010**Classifications**

(1) Except as provided in OAR 690-512-0020, the groundwater and surface water of the Malheur Lake Basin are classified for direct appropriation of, or storage and use of, water for domestic, livestock, irrigation, municipal, quasi-municipal, industrial, mining, agricultural, commercial, power development, forest management, public uses, road watering, dust abatement and wildlife refuge management.

(2) Definitions of classified uses. Except as specified in these rules, and unless the context requires otherwise, the definitions in OAR 690-300-0010 apply except that “public uses” are defined in OAR 690-077-0010(27). “Exempt groundwater uses” are those uses defined in ORS 537.545.

690-512-0020**Groundwater use in the Greater Harney Valley Groundwater Area of Concern**

(1) The Greater Harney Valley Groundwater Area of Concern (GHVGAC) is established to ensure that groundwater in the GHVGAC is appropriated within the capacity of the resource and that new appropriations of groundwater assure the maintenance of reasonably stable groundwater levels and prevent depletion of the groundwater resource. Current data, comprising substantial evidence, indicate that groundwater levels are declining in areas of the GHVGAC. Additional allocation of groundwater within this area may exacerbate these declines. A comparison between estimated annual recharge and previously allocated groundwater volumes indicates that groundwater is fully allocated in some areas of the basin. Subject to further study, the Department will not allocate additional groundwater permits unless the permit is issued consistent with OAR 690-512 rules. For the purpose of this rule, the GHVGAC is as described and shown in Exhibit 1.

(2) Except as provided in subsections (4), (5), (6), and (7) of this section, groundwater in the GHVGAC is classified only for exempt groundwater uses as specified in ORS 537.545.

(3) In processing applications to appropriate and use groundwater within the GHVGAC, the Department may not find that the proposed use will ensure the preservation of the public welfare, safety and health unless the use is classified and unless water is available for the proposed new use as described in subsections (4), (5), (6), and (7) of this section.

(4) Voluntary Cancellations for Groundwater Availability. Notwithstanding OAR 690-300-0010(57) and except for exempt groundwater uses, for the purposes of processing applications pursuant to ORS 537.621 and OAR 690-310-0130, an applicant who agrees to application of these rules to a completed pending application may request the Department find that groundwater is available for the proposed use(s) in the GHVGAC consistent with this subsection. In reviewing an application for a permit to appropriate groundwater, the Department may find that groundwater is available if:

(a) The proposed use does not have the potential for substantial interference as determined pursuant to OAR 690-009; and,

(b) The total rate and duty of the proposed groundwater use is offset by the contemporaneous and voluntary cancellation or partial cancellation of an existing primary groundwater certificate or primary permit within the GHVGAC as provided in subsection (c) of this section; and,

(c) The primary groundwater certificate or primary groundwater permit that is voluntarily cancelled or partially cancelled is not subject to forfeiture or cancellation for non-use and is equal or greater in rate, duty and acreage as compared to the rate, duty and acreage of the new appropriation sought; and,

(d) The application was pending and the groundwater right being cancelled was subject to transfer, permit amendment, or has a pending application for an extension of time that is subsequently approved, as of April 15, 2016; and the applicant has provided confirmed offset water to the Department by April 15, 2019.

(e) Notwithstanding subsection (2) of this section, if groundwater is available for a proposed new use consistent with this subsection and if the use is the type of use described in OAR 690-512-0010(1), the proposed use will be considered a classified use.

(5) Any primary permits or primary certificates that are voluntarily cancelled or partially cancelled within the GHVGAC that have not been specifically identified as offset for an application pending before the Department under section (4) will be made available for offset for pending applications under section (4) on the basis of priority determined by the tentative priority date.

(6) Groundwater Availability Where Voluntary Cancellation is not Sought. If an applicant does not elect to pursue processing of a pending groundwater application under subsection (4) of this section, and the well or wells associated with the pending application are located in the Northwest or South sub-areas of the GHVGAC, the applicant may request the Department to process a pending application pursuant to this subsection. These two sub-area locations are shown on Exhibit 1, and are designated based on limited groundwater level trend information. For the purposes of this subsection and processing applications pursuant to ORS 537.621 and OAR 690-310-0130, and notwithstanding OAR 690-300-0010(57), groundwater is available for appropriation to new proposed uses on pending applications in these sub-areas in the GHVGAC, if:

(a) The proposed use does not have the potential for substantial interference pursuant to OAR 690-009;

(b) There has not been a total of 7,600 acre feet of irrigation permits issued in the Northwest sub-area, and 1,300 acre feet of irrigation permits in the South sub-area. For the purposes of allocating water under this subsection, applications will be processed in the order they are received by the Department.

(c) Permits issued according to this subsection shall be conditioned to prohibit issuance of a water right certificate if the Department's Harney Basin Groundwater Study results clearly indicate that the groundwater use is not within the capacity of the resource, is over appropriated, or causes injury to senior water users.

(d) The application was pending as of April 15, 2016, and the applicant confirms to the Department in writing, within 6 months of April 15, 2016, that they wish for their permit to be issued under section (6) of these rules.

(e) If groundwater is available for a proposed new use consistent with this subsection and if the use is the type of use described in OAR 690-512-0010(1), the proposed use will be considered a classified use.

(7) Each permit issued according to subsections (4) and (6) must be conditioned as follows:

(a) Include a requirement for construction of a dedicated observation well at a location determined by the Department, to the same depth as the production well, within 6 months of permit issuance, or the permit may be cancelled. This 6 month deadline shall not be extended. Failure to construct a dedicated observation well within 6 months of permit issuance shall cause the watermaster to regulate off any future use under the permit.

(b) All groundwater pumping authorized by the permit is prohibited if March groundwater levels indicate a 10 feet or more decline as measured in the observation well, has occurred when compared to the first March measurement. Subsequent groundwater pumping may occur with Department approval during the year(s) a subsequent March groundwater level measurement indicates the groundwater level at the monitoring well has recovered to less than 10 feet of decline when compared to the first March measurement.

(c) Notwithstanding OAR 690-008-0001(8b and 8c), all permits issued in the GHVGAC must include the following condition: Any well authorized under this permit shall be located more than 1,320 feet from any existing senior exempt or permitted well(s) not owned by the permit holder. Any well authorized on this permit, when located between 1,320 feet and 2,640 feet of any senior exempt or permitted well not owned by the permit holder, shall immediately cease pumping groundwater if Department staff, during investigation of a complaint, determine 10 feet or more of measured groundwater level interference related to the authorized well use has occurred in the complainant's senior exempt or permitted well. Pumping groundwater at the wells authorized by this permit

may resume after the complaint by the senior well owner is withdrawn or after Department staff determine the groundwater level at the complainant's well(s) has fully recovered.

(8) The Department shall keep an accounting, and track the status of existing groundwater permits, certificates and groundwater applications pending within the GHVGAC as of April 15, 2016. This information shall be provided to any person upon request. Updated information shall also be kept and made available at the Watermaster's office in Burns.

(9) The Department shall report annually on the implementation of these rules to the Water Resources Commission early each calendar year beginning in 2017. The Commission may amend these rules to adjust the boundaries of the GHVGAC, or amend or repeal these rules. The Department's report to the Commission shall include at least the following information:

(a) New groundwater permits issued within the GHVGAC after April 15, 2016;

(b) An update on groundwater level data, and the groundwater study to assist the Department and Commission in understanding the groundwater system in the study area, and;

(c) Staff recommendations, if any, regarding whether this section of rules should be amended or repealed.

(10) The Department study referenced in 690-512-0020(1) shall be designed to collect substantial data on the groundwater flow system in the GHVGAC. The final report containing study findings shall be peer-reviewed. The study is planned to be completed by the end of the year 2020 with a rulemaking to implement the results of the study commencing in 2021.

(11) The Department shall plan and conduct the study in coordination with a local Groundwater Study Advisory committee to be jointly appointed by the Department and the Harney County Court. The committee shall include, but not be limited to: local irrigators, well drillers, irrigation/pump contractors, members of the scientific community, a representative of the Harney County Court and interested members of the public. The Department shall report quarterly to the Groundwater Study Advisory committee to provide updates on the study status, data analyses and preliminary findings.

Stat. Auth.: ORS 536.340(1)(a), 537.525(3)(5)(7)(8), 537.621(2), 537.777(1), 537.780(1)(1)(h)

Stats. Implemented:

Hist.: WRD 3-1985, f. & cert. ef. 3-28-85; WRD 23-1990, f. & cert. ef. 12-14-90;

Administrative Renumbering 1-1993, Renumbered from 690-080-0120; WRD 2-2009, f. 6-18-09, cert. ef. 7-1-09

ED. NOTE: Exhibits referenced are available from the agency.

690-512-0040

Water Availability

~~(1) Except as provided in section (3) of this rule, the Department shall not accept an application for permit, or issue a permit, for any use of surface water, or of groundwater the use of which has the potential to substantially interfere with surface water, in the Malheur Lake Basin unless the applicant shows, by a preponderance of evidence, that unappropriated water is available to supply the proposed use at the times and in the amounts requested. The evidence provided shall be prepared by a qualified hydrologist or other water resources specialist and shall include:~~

~~(a) Streamflow measurements of gage records from the source or, for use of groundwater, the stream in hydraulic connection with the source; or~~

~~(b) An estimate of water availability from the source or, for use of groundwater, the stream in hydraulic connection with the source which includes correlations with streamflow measurements or gage records on other, similar streams and considers current demands for water affecting the streamflows.~~

~~(2) The criteria used in determining if the use of groundwater has the potential to substantially interfere with surface water shall be those established in OAR chapter 690, division 9.~~

~~(3) This rule shall not apply to issuance of:~~

~~(a) Instream water rights;~~

~~(b) Permits for storage of water between March 1 and May 31; or~~

~~(c) Permits for use of water legally stored.~~

~~(d) Permits for Multipurpose Storage under OAR 690-512-0100.~~

~~Stat. Auth.: ORS 536.300 & 536.340~~

~~Stats. Implemented:~~

~~Hist.: WRD 3-1985, f. & cert. ef. 3-28-85; WRD 23-1990, f. & cert. ef. 12-14-90; Administrative Renumbering 1-1993, Renumbered from 690-080-0120; WRD 2-2009, f. 6-18-09, cert. ef. 7-1-09]~~

690-512-0090**Whitehorse and Willow Creeks**

Willow Creek and tributaries, and Whitehorse Creek and tributaries are withdrawn from future appropriations except as described in the order of the Water Resources Commission effective April 24, 1992.

Stat. Auth.: ORS 536.410**Stats. Implemented: ORS 536.410****Hist.:****690-512-0100****Home Creek Reservations**

(1) Reservations of water for economic development are established pursuant to ORS 537.249 and 537.356 economic benefits through both instream and out-of-stream uses of water. 4,550 acre-feet of unappropriated water in Home Creek and tributaries are reserved for multipurpose storage for future economic development as allowed under ORS 537.356 with a priority date of February 25, 2009.

(2) "Multipurpose reservoir", as used in OAR 690-512-0100 means a reservoir storing water to serve more than two potential beneficial uses including but not limited to irrigation, power generation, municipal water supply, recreation and flow augmentation for instream purposes.

(3) Reservations of water for future economic development allocate surface water for storage in multipurpose reservoirs.

(4) For the purposes of review of applications to store reserved water under OAR chapter 690, division 310, and subject to the provisions of section (6), the reserved quantities of water listed in OAR 690-512-0100(1) are available for appropriation.

(5) The determination of water availability under section (4) shall not substitute for consideration during the public interest review of site-specific information related to the capacity of the resource to support the proposed project, as required under OAR chapter 690, division 310.

(6) In addition to the requirements of ORS Chapter 537 and applicable rules, the Department will only issue an order approving an application for a permit to store water in the Home Creek basin reserved under any reservation if it first finds:

(a) The proposed reservoir and any water rights secondary with the storage right are consistent with the purpose and intent of the reservation following consultation with Harney County Court;

(b) The proposed reservoir and any water rights secondary to the storage right will protect instream values, including but not limited to instream flows and water quality based upon a written assessment of these values developed in consultation with Department of Fish and Wildlife and Department of Environmental Quality; and

(c) Whether minimum bypass flows are required.

(7) In addition to the requirements of ORS Chapter 537 and applicable rules, any final order approving an application for a permit to store water and any order for water rights secondary

with the storage right under the Home Creek Reservation shall contain the findings required in (6)(a)–(c) above, and will also contain conditions that:

- (a) Set the appropriate storage season,
- (b) Ensure no injury to senior water rights, including instream water rights,
- (c) Protect instream values; and
- (d) Set minimum bypass flows if identified under (6)(c) above.

(8) If the Department has not received applications for multipurpose reservoir permits for the full quantity of reserved water by July 1, 2014, the Department shall provide the Parties involved in the Home Creek Settlement Agreement with a progress report on development of the reservations. The report shall include information on the continued need for the reservations and the quantities of water reserved. The Department shall continue to provide progress reports at five year intervals while these rules are in effect unless the Department receives applications for multipurpose reservoir permits for the full quantity of reserved water.

(9) If the Department has not received applications for multipurpose reservoir permits for the full quantity of water reserved by July 1, 2029, applications for remaining quantities of unallocated water under OAR 690-0512-0100(1) may not be accepted after July 1, 2029, unless this deadline is extended through rulemaking by the Water Resources Commission.

Stat. Auth.: ORS 536 & 537

Stats. Implemented: ORS 536.310, 537.249, 537.356 & 537.358

Hist.: WRD 2-2009, f. 6-18-09, cert. ef. 7-1-09