



Oregon

Kate Brown, Governor

Water Resources Department

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MEMORANDUM

TO: Water Resources Commission

FROM: Thomas M. Byler, Director 

SUBJECT: Agenda Item A, April 13, 2016
Water Resources Commission Meeting

Request for Adoption of Rules, OAR 690, Division 512, Malheur Lake Basin Program and Groundwater in the Greater Harney Valley

I. Issue Statement

At the June 2015 Water Resources Commission meeting, staff reported that recent preliminary data analyses had shown that water is not available for new groundwater permits in parts of the Malheur Lake Basin, an area referred to by staff as the "Greater Harney Valley." As a result, as reported at the February 2016 Commission meeting, the Department began a rulemaking process to establish options for persons that have groundwater permit applications pending. During this agenda item, the Commission will consider adoption of these proposed rule amendments to Oregon Administrative Rules 690, Division 512.

II. Background

In 2015, initial groundwater data and aquifer recharge estimates by staff indicated that groundwater levels were declining over a broad portion of the Greater Harney Valley Area, and that as a result no new permits could be issued without harming existing water users or appropriating water beyond the capacity of the resource. Consequently, beginning in 2015, the Department stopped issuing new groundwater permits in the area pending completion of a more detailed groundwater study.

The basin groundwater study will provide additional information about the aquifer system and whether there is opportunity for new groundwater development in some parts of the study area. The Department has started collecting data for the basin groundwater study and received additional resources from the 2016 Legislature to assist in these efforts; however, the study is not expected to be concluded until the end of 2020.

In the meantime, the Department has been working with the local community to build awareness of the situation, seek input, and initiate efforts to address water needs for the area. As part of this effort, the Department began working with a Rules Advisory Committee to update the Division 512 Malheur Lake Basin Program rules to allow pending groundwater applications to be approved if certain criteria are met, as an interim option until the groundwater study is being completed. The Rules Advisory Committee (RAC) met six times. Members of the RAC are listed in Attachment 1.

III. Overview of the Rules

To broadly summarize, there are five key components to the proposed rules as outlined below:

1. Establishes the Greater Harney Valley Groundwater Area of Concern (GHVGAC) within a portion 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).
2. Allows pending (non-exempt) groundwater permit applications to be approved if they are able to meet certain criteria, including:
 - a. Offsetting new permits through voluntary cancellation of qualified existing groundwater rights; or
 - b. Conditioning permits for uses in the Northwest or South sub-areas of the GHVGAC.
3. Requires the Department to conduct a Groundwater Study in coordination with a local Groundwater Study Advisory Committee, jointly appointed by the Department and the Harney County Court.
4. Repeals OAR 690-512-0040, which required applicants to demonstrate that water was available for their new application. This section of the rules is obsolete. (Note: This item is housekeeping and is not related to the groundwater supply issues.)
5. Recognizes two creeks that were previously withdrawn from further appropriation. In 1992, the Water Resources Commission issued an order to withdraw two creeks within the Malheur Lake Basin from further appropriation. This withdrawal is proposed to be added to the basin program. Having withdrawal orders included in the basin programs provides additional transparency for applicants who may be interested in filing an application in these areas. (Note: This item is not related to the groundwater supply issues.)

IV. Summary of Changes to Public Hearing Draft as a Result of Public Comment

Staff briefed the Commission in February 2016 and provided a copy of the public hearing draft of the proposed rules. The public comment period was originally open from February 1 to March 1; however, the Department extended the end of comment period to March 30, 2016 based on feedback from the local community and the desire to hold an additional RAC meeting. Public hearings were held in Burns and Salem on March 30, 2016. Commissioner Corn conducted the public hearing in Burns, while staff conducted the hearing in Salem.

A total of 12 written comments were received during the comment period. In addition, one person provided oral testimony at the Salem hearing and nine persons provided oral testimony at the Burns hearing. A copy of the written comments and a transcription of the oral comments are included as Attachment 2. Department responses to public comments are included in Attachment 3.

There are six sections or subsections of the rules that are proposed for changes from the hearing draft as a result of either oral or written comments. A copy of the rules that show the changes made to the hearing draft is included in Attachment 4. The changes are summarized below; however,

more detailed explanations of the changes are included in Attachment 3. Attachment 5 shows the proposed final rules for consideration of adoption by the Commission, incorporating all of the changes outlined below.

1. *Cumulative Quantities Allowed for New Permits Issued in the Two Subareas OAR 690-512-0020(6)(b)* – The rules cap the number of acre-feet that could be authorized by new permits in two subareas. Several comments wanted the cap increased from 1,300 acre-feet to 4,500 acre-feet in the south subarea. Given that there has been little, if any, decline in the south subarea, the Department believes that increasing the cap from 1,300 to 1,660 is appropriate to make room for application G-18000 (filed on February 17, 2015), but does not recommend allowing for development opportunities for applicants who have yet to file applications.
2. *Condition for Obtaining a Final Certificate for Limited Permits OAR 690-512-0020(6)(c)* – Several comments were received related to better defining the circumstances that would cause the Department to not issue a certificate for a permit issued under section (6) of the rules and developing a transition opportunity for these permits if the study results are not favorable to the permit holder. These comments generally followed the discussion that occurred at the last RAC meeting. During final review of the proposed rules, the Department's legal counsel advised that we condition the permit to regulate off the use, if necessary, instead of not issuing a certificate. That change was made to the proposed final rules.
3. *Draw-Down Condition for New Permits OAR 690-512-0020(7)(b)* – The rules establish a drawdown condition for new permits, which would cause the permit to be regulated off if there was a drop in water levels from the first March measurement to subsequent March measurements. The hearing draft proposed a 10 feet drawdown condition. Some commenters wanted 25 feet, while others thought 10 feet is appropriate. This was discussed at the final RAC meeting as well. The Department proposes that the number be adjusted to 18 feet.
4. *Formation of RAC at the Conclusion of the Study to Consider Revisions OAR 690-512-0020(10)* – The Oregon Farm Bureau suggested that the language at the end of section (10) be changed to specify that a Rules Advisory Committee, made up from members of the Study Advisory Committee, be convened once the study is completed. The Department recommends that the language in (10) be replaced with a new (12) to address this.
5. *Ground Water Study Provisions OAR 690-512-0020(11)* – This section of the rules outlines the creation and duties of a Study Advisory Committee. The Department was able to be responsive to most of the suggestions related to this subsection. Some of the comments were related to who could be on the committee while other comments wanted land owners to be able to provide data for the study.

V. Changes to the Hearing Draft Suggested by the Department

There are eight sections or subsections of the rules that are in the proposed final rules as a result of staffs' continuing review of the rules. These changes are technical in nature and are explained below.

1. OAR 690-512-0010(1) – The Department changed the description of one of the classified uses from “agricultural” to “agricultural water use,” which is consistent with the definition of this use found at OAR 690-300-010(2).
2. OAR 690-512-0020(1) – For the purposes of clarity, “this area” was replaced by “the GHVGAC.”
3. OAR 690-512-0020(4) and (6) – Based on conversations at the final RAC meeting, the Department reviewed the list of pending applications that might be affected by this rulemaking (see Attachment 6). Staff determined that that the boundaries of the GHVGAC needed to be adjusted to address one application.

Application G-18000 was located just outside of the GHVGAC area when the boundaries were drawn. If this application was inside the GHVGAC boundary, it would be inside the south subarea. The groundwater review for this application shows that there is no water available, just like those applications within the GHVGAC. If it remains outside of the boundary, the applicant will not be able to take advantage of the rules. The Department recommends that this application be afforded the benefits like other pending applications in the area, so the Department has adjusted the boundary of the GHVGAC to include this application in the South Subarea.

4. OAR 690-512-0020(6)(b) – Rule language was adjusted to make it clear that the acre-foot limitations of this subsection apply to permits issued after the effective date of these rules on April 15, 2016.
5. OAR 690-512-0020(7)(b) – The rules include drawdown conditions that would require the permit holder to be regulated off. The Department modified the rules so that the decline condition could be triggered by a measurement from any authorized irrigation well in addition to the observation well. In addition, there are three other minor wording changes that do not impact the intent of the subsection and clarify the wording.
6. OAR 690-512-0020(7)(b) – In regards to the drawdown condition to protect other water rights, the Department added “certificated” to the existing language in three places in this subsection to make it clear that certificated groundwater rights should be protected along with permitted groundwater water rights and exempt groundwater uses.

7. OAR 690-512-0020(7)(c) – As also noted above, during final review of the proposed final rules, the Department of Justice suggested that the final sentence of this subsection be removed. This change does not affect how the Department will regulate the condition required in this subsection.
8. OAR 690-512-0020(8)(b) – The Departments recommends that “aquifer system” is a better technical term than “groundwater system.”
9. OAR 690-512-0020(10) – Changes were made to emphasize that the “peer review” that is intended for the groundwater study will be done by members of the scientific community.

VI. Conclusion

The proposed final rules for consideration by the Commission are included in Attachment 5. Work has been underway on these rules with the local community since July of 2015. Adoption of these rules is the first step in helping the community addresses their water needs. The Commission will continue to receive reports on activities underway in the basin, as the Department works with the community on place-based planning efforts and the basin groundwater study to help them identify longer-term solutions to their water challenges.

VII. Alternatives

The Commission may consider the following alternatives:

1. Adopt the proposed rules as shown in Attachment 5.
2. Adopt the proposed rules as modified by the Commission.
3. Not adopt the rules and provide the Department with further direction.

VIII. Director’s Recommendations

The Director recommends Alternative #1 to adopt the proposed rules.

Attachments:

Attachment 1	Rules Advisory Committee Participants
Attachment 2	Public Comments Received (written and oral)
Attachment 3	Response to Public Comments
Attachment 4	Proposed Final Rules showing changes from Hearing Draft
Attachment 5	Proposed Final Rules including map of affected area.
Attachment 6	Pending Groundwater Applications

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

Wayne Evans - Landowner

Lorissa Singhouse – Landowner

Matt Nonnenmacher – Clearwater Pump & Irrigation LLC

Kimberley Priestly – WaterWatch of Oregon

Lisa Brown – WaterWatch of Oregon

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

Dwight French

JR. Johnson

From: Allison Aldous [aaldous@TNC.ORG]
Sent: Tuesday, March 29, 2016 4:57 PM
To: ivan.k.gail@state.or.us; dwight.w.french@state.or.us
Cc: Leslie Bach
Subject: comments: Greater Harney Valley Groundwater and Malheur Lake Basin program rulemaking

Dear Ivan and Dwight,

I'm writing on behalf of The Nature Conservancy to comment on the Greater Harney Valley Groundwater and Malheur Lake Basin program rulemaking. (If you are not the correct people to contact regarding comments, please direct me to the correct person).

We have reviewed the rulemaking document and commend OWRD on the attention being paid to groundwater declines in the Greater Harney Valley. We are particularly interested in the health of the many freshwater ecosystems found there, including rivers, wetlands, springs, and lakes, as well as species, that depend on groundwater discharge for their water supply. The Nature Conservancy brings to the table an approach of using sound science to make difficult water resource decisions, and we have extensive experience in this field across Oregon as well as the nation. We have begun to engage in the Harney Valley on this issue with numerous stakeholders, including the High Desert Partnership and the Harney County Watershed Council, and plan to grow our engagement over the coming year.

Therefore our primary comment on the rulemaking is to urge you to include adequate representation from the conservation community in this process. Currently, in subsection (11) the Groundwater Study Advisory Committee does not include representation from this community whereas there is significant representation from the water user communities. We recommend the Groundwater Study Advisory Committee be appointed by Oregon Water Resources Departments and include members of the conservation community.

Please don't hesitate to contact me with any questions.

Best regards,
Allison

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Please consider the environment before printing this email.

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The Nature Conservancy
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The Nature Conservancy 
Protecting nature. Preserving life.

nature.org



HARNEY COUNTY COURT

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March 30, 2016

Oregon Water Resources Department Division 512

Malheur Lake Basin Public Hearing Comments

The Harney County Court expresses its concurrence with the comments submitted by the Harney County Watershed Council. The Council has been an integral part of the RAC process and is valued for their involvement, knowledge and concern pertaining to the watershed's quality and quantity of water resources in Harney County.

The RAC process has been appreciated by those involved. We value the opportunity to have engaged in a productive dialog with OWRD and the opportunity to attempt to make the best of a critical situation for the ag industry and the associated business infrastructures in Harney County. We look forward to continuing to be actively engaged with the Department during the course of the study.

The initial concern that 32 applications were legally pending and were denied due process after the public meeting in Burns is wrong and still of concern. The RAC process was initiated to help those applicants come to some resolution and for some may be helpful. It will not be beneficial to all and it will come to an additional and very expensive endeavor by those that may fit into the new rules. It is still my belief that those pending applications should be reviewed and given due process that was applicable prior to the declaration of the need for a groundwater study by the Water Resources Department.

In the statement of Need and Fiscal Impact Worksheet it is stated that "the Department does not anticipate a negative or economic impact resulting from implementation of the proposed modification to Division 512". Although this document, and that statement in particular, has been explained and justified from the legal perspective, the fact remains that this discussion has, and will have, a profound economic and social impact to Harney County residents.

With these concerns having been expressed, repeatedly, be assured that Harney County understands and supports the prudence of determining the availability and location of groundwater in the Harney Basin.

We will remain actively and positively engaged during the course of the study.

Thank you,

Dan Nichols, Harney County Commissioner

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From: Ben McCanna [<mailto:benmccanna@yahoo.com>]
Sent: Wednesday, March 30, 2016 11:47 AM
To: ENRIGHT Diana M
Subject: Water Rights Concerns/Comments

Dear Diana,

My name is Ben McCanna I am a property owner, I am a resident in your limited ground water level study area. I have seen a drop in my water well levels. In correlation with the large number of pivots in my area in the last decade. I have been living on my property for 17 years. My well number is 50399. The increasing number of new wells in the area have created water shortages. In my opinion they aren't concerned for others around them, they continue to drill new wells and install more pivots. If they continue on this path there will be no water to the residents that don't own ranches/farms. I went to the water meeting today, I heard concerns of springs drying up. I am concerned for the wildlife in the area not being able to sustain life. I am concerned for the water quality. If they continue to do these things than the water quality will change to undrinkable for animals and humans. Also unusable for vegetation. I have a shallow well now but I am concerned that that will not be the case in the future. I will perhaps have to dig deeper which is concerning because there is no well drillers that will do this. There is no guarantee that the quality will stay the same as well. I have great water now, I would like to keep it that way. I would like to know my rights as a property owner.. What are my water rights? We need to find the money for the study to continue or problems may arise. I would also like to find out who to contact to look into becoming a member of this advisory committee, that I heard comments about in the meeting. I would also like the minutes of the meeting if I may please. If you have any suggestions please contact me by email, mail or phone. My phone number is 541-589-0867 and my email is benmccanna@yahoo.com.

Thank you,
Ben McCanna

My address is
60012 McCanna Rd
Burns,OR 97720

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March 30, 2016

VIA E-MAIL

Mr. Tom Byler
Director
Oregon Water Resources Department
725 Summer St NE Ste A
Salem, OR 97301-1271

Re: Comments on Proposed Administrative Rules: Division 512 - Malheur Lake Basin Program (Harney County Groundwater Rules)

Dear Director Byler:

Thank you for the opportunity to provide comments on behalf of the Oregon Cattlemen's Association ("OCA") regarding proposed rules for addressing groundwater concerns in the Malheur Lake Basin. OCA Executive Director Jerome Rosa and I were pleased to represent OCA as members of the Rules Advisory Committee ("RAC") appointed by the Oregon Water Resources Department ("OWRD") to assist with the rulemaking process. As you well know, it was a long and at times difficult undertaking, but we wish to commend you and the OWRD staff who led the effort with a commitment to working collaboratively with the affected local communities and other stakeholders. Although there is more work to be done in response to several key issues – as described further below – we believe the proposed rules provide a reasonable approach for allowing some new groundwater development in the basin while OWRD gathers additional information through a comprehensive study. With the changes listed below, we think the final rules presented for adoption by the Oregon Water Resources Commission will reflect an appropriate balance of local needs and priorities with the Department and Commission's statewide responsibilities.

Overview/General Comments

OCA supports the general framework of the rules, which provide a pathway to allow issuance of new groundwater permits, under specific conditions, for those applications that are currently pending before OWRD, and to provide clear notice to future applicants that new applications will not be approved in certain areas until a groundwater study is completed, and

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further rulemaking undertaken. The rules offer a reasonable option for those who relied on OWRD's past practice of generally approving most new groundwater applications in the study area, while also protecting existing water right holders and the resource from further groundwater depletions. The RAC discussions reflected a genuine struggle with how to address and balance these potentially competing interests, but OCA commends the work of its local members and other local stakeholders to develop a list of consensus-based "priorities" presented to OWRD at the final RAC meeting on March 1. OCA supports the changes requested by the local consensus group, as follows:

Priority 1 – Relating to the Groundwater Study

Section 11 of the Hearing Draft describes the process by which OWRD will undertake a groundwater study in coordination with a local advisory group. OCA supports the following new wording for that section, as reflected in the list of priorities presented at the March 1 meeting:

(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 will work with the Advisory Committee and individual water users to encourage the collection of hydro-geological and water table data, and to utilize private data in the GHVCAC study. As part of the study process, the Department shall review and consider relevant data provided by or through the Groundwater Study Advisory Committee. The Department shall report quarterly to the Groundwater Study Advisory committee to provide updates on the study status, data analyses and preliminary findings. The Department will work with the local committee with regard to any actions and decisions that may result from the study.

Priority 2 – Relating to the "Draw Down" Condition to be Included on New Permits

Section (7) of the Hearing Draft describes requirements for measuring and monitoring ground water levels and draw down conditions to be included in all new permits issued under the rules. As currently written, the rule prescribes a flat 10-foot decline limit. OCA joins with the local consensus group in recommending a condition similar to the Department's "standard" draw down condition, as follows:

(7)(b) For permits issued for use of groundwater within the Northwest or South subareas and other areas of the GHVGAC: groundwater pumping authorized by the permit shall be discontinued or reduced, as specified by the Department, if March groundwater levels show any of the following: (A) annual water level decline of three or more feet per year for five consecutive years, or (B) a water level decline of fifteen or more feet in fewer than five consecutive years, or (C) a water level decline of twenty-five or more feet. The period of discontinued or reduced use shall continue until the water level rises above the decline level which triggered the action.

The logo consists of the letters 'S', 'W', and 'W' in a stylized, overlapping font. The 'S' is on the left, and the two 'W's are on the right, with the top 'W' slightly above the bottom 'W'.

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Priority 3 – Relating to the Conditions for Obtaining a Final Certificate for Limited Permits Issued in the Northwest and South Subareas.

For new permits issued under Section (6) of the Hearing Draft (to those with pending applications in the Northwest or South subareas), OCA supports wording changes as follows to clarify the findings necessary to support issuance of a final certificate:

(6)(c) Permits issued according to this subsection are conditioned to prohibit issuance of a water right certificate if the Department finds the Harney Basin Groundwater Study, when issued as a final, peer-reviewed report, demonstrates by site-specific substantial evidence that the groundwater use causes injury to senior water users, unless the permit holder provides offset in the manner described in subsection (4) within 5 year of the final, peer-reviewed report being issued; and

Priority 4 – Relating to Cumulative Quantities Allowed for New Permits

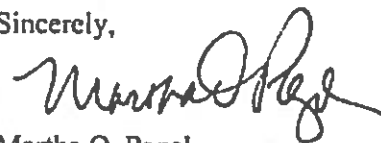
Section (6)(b) of the Hearing Draft specifies a cumulative total/volume of water that may be allowed for new permits issued in the Northwest and South subareas. We understand OWRD's proposal reflects the amount of water proposed under currently pending applications. OCA supports modifying the total proposed for the South area to allow for a reasonable amount of additional groundwater development because of the absence of known groundwater declines in that subarea, and technical analysis indicating groundwater development in the southern portion of the basin is not likely to have impacts on groundwater uses in other parts of the basin.

(6)(b) There has not been a total of 7,600 acre feet of irrigation permits issued in the Northwest sub-area, and 4,500 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;

Conclusion

OCA appreciates the opportunity to have participated in the rulemaking process, and we urge the Department to incorporate the above changes in developing its final recommendations for the Water Resources Commission.

Sincerely,

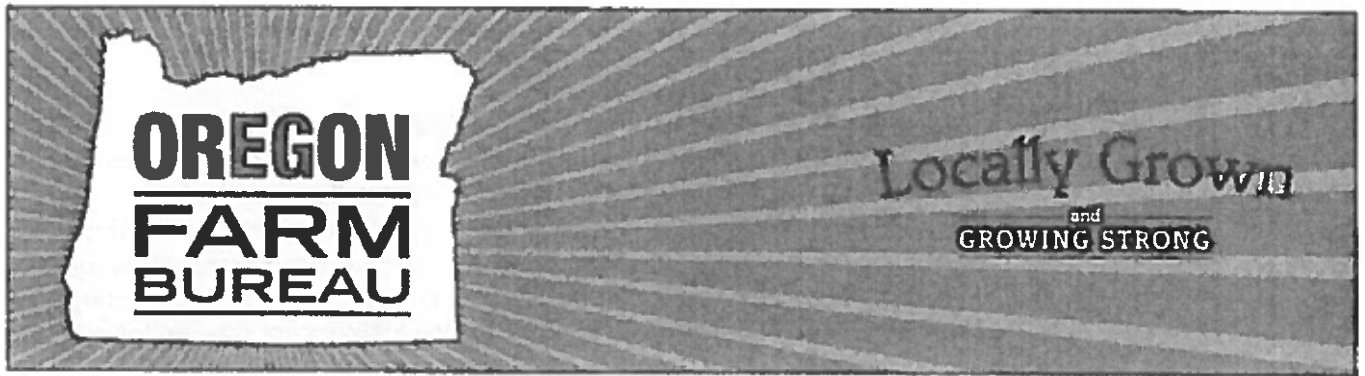


Martha O. Pagel

MOP:kdo

cc: Jerome Rosa, OCA Executive Director
Dwight French
Ivan Gall





March 30, 2015

Diana Enright
Oregon Water Resources Department
725 Summer St., NE
Salem, OR 97301
diana.m.enright@wrdd.state.or.us

VIA EMAIL

RE: *Comments on Malheur Lake Basin Program Rulemaking*

Dear Ms. Enright:

The Oregon Farm Bureau Federation ("OFB") and Harney County Farm Bureau submit the following comments regarding the Oregon Department of Water Resources Malheur Lake Basin Program Rulemaking. OFB and the Harney County Farm Bureau participated in the Rulemaking Advisory Committee (RAC) that helped the Department develop the draft rules, and submit the following comments on several outstanding issues that were discussed in the RAC.

By way of background, the OFB is a voluntary, grassroots, nonprofit organization representing Oregon's farmers and ranchers in the public and policymaking arenas. As Oregon's largest general farm organization, its primary goal is to promote educational improvement, economic opportunity, and social advancement for its members and the farming, ranching, and natural resources industry as a whole. Today, OFB represents over 7,000 member families professionally engaged in the industry and has a total membership of over 60,000 Oregon families. Harney County Farm Bureau is the voice for farmers and ranchers in Harney County. Several Harney County Farm Bureau members will be directly impacted by the Department's rulemaking, and have been tracking this rulemaking closely.

Groundwater Study Provisions

OFB and Harney County Farm Bureau appreciate the emphasis of the draft rules on completing the groundwater study, and the inclusion of strong local input into the study process. *See OAR*

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690-512-0020 (11). As you are aware, this rulemaking has been particularly difficult for the basin because of the Department's lack of data and information about the existing state of the groundwater resource in the basin. Development of this data and information is critical to ensuring local support of the Malhuer Lake Basin Program Rules, and ensuring that the decisions that the Department makes are based on sound science. For this reason, OFB and Harney County Farm Bureau spent considerable time and energy earlier this year lobbying for additional funding to ensure completion of the groundwater study within the basin, and lobbying for funding for the local watershed council to engage the community in a place-based planning effort that will facilitate greater local understanding of the groundwater resource.

As with all studies, we anticipate that the Department will interpret the data they collect and make assumptions about the groundwater resource based on that data. Having local involvement and input into these interpretations and assumptions is critical to the local term success of water supply regulation in the basin. We fully support the provisions of the rules that provide for local input into the study, and require the department to make regular reports to this group. We understand that a local group also proposed a provision that would require that the department review and consider data provided by or through the local group. We fully support these changes, and believe that they will help ensure that the study is as robust as possible.

Additionally, we would recommend that the local group be provided with the opportunity to review and suggest changes to the study prior to its finalization and publication by the Department. This will help ensure that local concerns are addressed and provide the community with the opportunity for direct input and assistance with the study.

We believe that our concerns can be addressed by making the following modifications to Section 11:

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. As part of the study process, the Department shall review and consider relevant data provided by or through the Groundwater Study Advisory Committee. The Department will work with the Advisory Committee and individual water users to encourage the collection of hydro-geological and water table data, and to utilize private data in the GHVCAC study. The Department shall report quarterly to the Groundwater Study Advisory committee to provide updates on the study status, data analyses and preliminary findings. Prior to publishing a final draft of the study, the Department must provide a draft of the study to the Groundwater Study Advisory committee for review and comment. The Department must respond to the comments made by the Groundwater Study Advisory Committee prior to publication of the study.

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Rulemaking Duration

Given that the Department does not have sufficient information to fully understand the groundwater resource at this time, OFB and Harney County Farm Bureau would like the rules to require that the Department initiate a new Rulemaking Advisory Committee (RAC) at the conclusion of the study to determine if the basin rules need additional revision in light of this study. At minimum, this RAC should include the members of the Groundwater Study Advisory Committee. Initiating a new RAC within the basin to evaluate whether revision is needed to the basin rules will ensure that the Department fully implements the findings of the study and that basin has the ability to provide input and recommendations on the state of the groundwater resource in light of the study.

To resolve these concerns, we suggest the following modifications:

(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.~~ Once the study is complete, the Department shall convene a local Rules Advisory Committee to determine if the basin rules should be revised. The Rules Advisory Committee must include the Groundwater Study Advisory Committee.

Protection of Senior Water Rights in Areas Experiencing a Decline

OFB and Harney County Farm Bureau believe that the Department must prioritize protection of senior water rights in areas experiencing a decline in this rulemaking. We believe that the current draft of the rules adequately protects senior water rights by ensuring that new wells cannot be constructed within $\frac{1}{4}$ mile of existing wells, and requiring the junior well to cease pumping if a 10 foot decline is experienced between $\frac{1}{4}$ and $\frac{1}{2}$ mile of an existing senior water right. See OAR 690-512-0020 (7)(c). Given that we know that significant portions of the basin are experiencing groundwater declines, we do not think it's appropriate to require a senior user to "chase the acquirer" or alter their well prior to restricting the use of a new, junior user who came online after there were known declines in the basin.

We understand that the Department May receive proposals that seek to alter the drawdown/decline conditions contained in OAR 690-512-0020(7)(c). *We do not think such an alteration is appropriate for an area with a documented decline.* As such, we would encourage the Commission to limit any changes in the 10 foot decline requirement to the sub areas of the basin that have not experienced as dramatic a decline as the areas just North and East of Malhuer Lake.

We also understand that there may be proposals to increase the amount of new permits that can be issued in the South Subarea, and to alter the standards proposed by the Department for users in the South Subarea that elect not to use the offset program. As long as these changes are

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limited to the South Subarea – where there are not the same documented declines – we do not object to those changes.

Use of Monetary Trading System

Finally, OFB has concerns about the use of a trading system to “offset” development of new water rights. One of the key functions of Oregon water law is the concept of first in time, first in right. Historically, the Department has applied this concept to the processing of new water rights applications, ensuring that the people that applied for the water rights first would be the first to have the option to develop their rights. Allowing a trading system to offset the development of new water rights allows those with the most resources to pay the most for an existing permit, and jump ahead of others who may have been waiting longer to develop their water right. As such, we recommend that the Commission require the Department create an offset program which honors the priority of the users waiting in line for rights, and does not allow those with the most resources to jump to the head of the line.

Thank you for the opportunity to submit comments on the Malheur Lake Basin Program Rulemaking. If you have any questions or concerns, please do not hesitate to contact me.

Respectfully,



Mary Anne Nash
Oregon Farm Bureau
1320 Capitol St. NE, Suite 200
Salem, Oregon 97301
(503) 399-1701 x. 306
maryanne@oregonfb.org

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March 30, 2016

To: Oregon Water Resources Department
Rule-coordinator@wrdd.state.or.us

RE: Division 512
Malheur Lake Basin Program

To whom it may concern:

We have a situation in completing our water rights permit that forced us to apply for new water rights for a small portion of our alfalfa (46.49 acres); no fault of our own as it was because of the prior owner's failure to update well records and other issues.

For reference, the original Application is G-14377, Permit G-16916 (Priority date Sept 13, 1996). The new Application is G-17940 (Priority date Sept 23, 2014). Applicant names are Gerrit Jager, Patricia Jager, John Simmons and Karen Simmons.

We have been irrigating for 11 years on the permit with a priority date of September 13, 1996, and we, along with our neighbors who are on the same permit, have been working diligently to bring this to a close ever since we purchased the property in 2005.

In the meantime, many new Irrigation wells and Irrigation equipment have been put in around us with priority dates much newer than our original permit. Now because of the issues with the permit, we were forced to apply for new rights (priority date September 23, 2014), and as of July 3, 2015, we were notified that the application has been placed on administrative hold. This water means we survive or fail, and if we fail, we may be forced to sell our land due to financial hardship.

The well on Jager's property and the well on our property are both good, strong wells that have little draw down during the summer irrigation season.

In our opinion, these new rules do not make any allowances for anyone who has situations such as ours. The rules cover the area like a blanket with no regard to individual issues and/or situations. There will be financial hardships for many people if these new applications are not looked at individually.

Sincerely,


John D. Simmons


Karen R. Jackson-Simmons

PO Box 3025
Princeton OR 97721
541-495-2262

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

March 30, 2016

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

Re: Division 512 – Malheur Lake Basin Program Rulemaking
Sent Via: Email to rule-coordinator@wrdd.state.or.us

Dear Ms. Enright:

Thank you for the opportunity to comment on the hearing draft rules for revision of the Division 512 – Malheur Lake Basin Program.

WaterWatch participated in the Rules Advisory Committee (RAC) for the development of these rules, in which there were a lot of ideas explored and a lot of good discussion. WaterWatch supports the Department's effort to create some tools to allow limited issuance of groundwater permits while it completes a groundwater study in cooperation with the U.S. Geological Survey, but would emphasize that these tools must be appropriately constrained to avoid exasperating the over-allocation of groundwater that has already occurred in the Greater Harney Valley Groundwater Area of Concern.

Background: Existing data indicates the area's groundwater is already significantly over-appropriated

As documented in a June 18, 2015 presentation by the Water Resources Department's Ivan Gall to the Oregon Water Resources Commission, the Department has issued over 600 primary groundwater permits for the irrigation of approximately 95,000 acres in Harney County.¹ The presentation details significant groundwater declines across the area using state observation well data. After accounting for discharge to streams, the

¹ Presentation available here – June, 2015, Item A:
http://apps.wrdd.state.or.us/apps/misc/wrdd_notice_view/Default.aspx?notice_id=50

Department estimates that across Harney Basin, there is an annual volume of 170,800 acre-feet of “Unaccounted GW Discharge,” but reports groundwater permits issued for 287,500 acre-feet. In other words, after accounting for discharge to streams, the groundwater is estimated to have already been over-allocated by 116,700 acre-feet. The presentation reports that of the 287,500 acre-feet of issued groundwater permits, 201,250 acre-feet have been developed—meaning that across Harney Basin, there is 86,250 acre-feet of groundwater permits that have been issued but not yet developed that would further drop groundwater levels if/when developed.

Since the close of the RAC process, WaterWatch has become aware that groundwater levels in the highly groundwater developed area of Weaver Springs (northwest of Malheur Lake) are now likely below the level of the bottom Malheur Lake. This likely has serious implications for the health of the lake and the natural resources it supports—including on the National Wildlife Refuge—as water from the lake is likely recharging the groundwater that is then pumped. Relatedly, recent Water Resources Department groundwater reviews for some pending permits confirm that the proposed uses will have impact the lake. In light of this information, WaterWatch has added recommended language (to Sections 4(a) and 6(a) below to address impacts to the lake from any additional over-allocation of the groundwater.

Comments on the rules

Overview

Due to several factors including declining well levels in the area and the extent of undeveloped groundwater permits, on new applications the Department has been unable to make a finding that groundwater is available for the proposed use (which is necessary before a permit may be issued). The basic premise of the proposed rules is that while the Department completes a groundwater study, for a certain set of permit applications if certain standards set forth in the rules are met, the Department will find that water is available for the use—even if it can’t actually make the finding based on existing data—and (if other permitting standards are met), may issue the groundwater permit.

This approach obviously risks making things worse with regard to the over-appropriation of the groundwater, and the problem is further exasperated if the standards are not carefully designed. For example, it is almost certain that any new permits issued using the Section 4 “Voluntary Cancellation for Groundwater Availability” provision in the rules will trade “wet water” in the new permit, for “paper water” in the cancelled permit that may have never been developed. This would result in a further net deficit to the area’s groundwater. Our comments below offer suggestions for retaining and strengthening some provisions of the hearing draft rules and adding others in order to constrain this problem. We stress that decreasing any of the safeguards in the proposed rules calls into question the foundation of the rules’ approach.

Additionally, it has also come to light that there has been unauthorized groundwater water use in the area. While apparently steps have been and are being taken to address the

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problem, we urge the Department and Commission to ensure that there is no ongoing unauthorized use, which undercuts the rulemaking exercise and the permitting scheme in general. We have also suggested a modification to the drawdown condition to account for any wells have that been active without the benefit of a permit.

Finally, we offer amended language for Section 11 to reflect that the groundwater study will be done in cooperation with the U.S. Geological Survey (consistent with the funding package from the Oregon legislature), and to ensure that the study is conducted in a scientifically defensible and transparent manner.

Comments on specific proposed rules

1. Section 4 “Voluntary Cancellation for Groundwater Availability.”

a) Section 4 creates a system where, for certain pending groundwater permit applications, the Department would make a finding that water is available for the use is an equal or greater amount of water is voluntarily cancelled from a primary permit or certificate. There is no requirement that the cancelled water has ever been used. Therefore, this likely sets up a system where issuance of new permits for wet water are traded for cancellation of undeveloped water that may never have been developed. This differs, for example, from the Deschutes groundwater mitigation program where the water transferred instream in exchange for a new groundwater permit must be wet (*i.e.* actually developed and used) water.

The universe of groundwater applications that that will be pending as of April 15, 2016 and could take advantage of this program is currently unknown. There are approximately 42 pending as of the end of March, totaling 15,529 acres or primary irrigation (or 46,587 acre-feet at 3 acre-feet per acre), and an additional 1,405 supplemental acres (4,215 acre-feet at 3 acre-feet per acre). Not all of these would be eligible to use Section 4 due to other issues (such as a finding of the potential for substantial interference with surface water), and it’s likely that a good portion of applicants will choose not to or will be unable to utilize Section 4—but nonetheless the numbers give a sense of the potential for additional over-allocation of the groundwater.

WaterWatch recommends a cap on the amount of the additional groundwater development that could occur pursuant to Section 4. Specifically, WaterWatch requests that the following new subsection of Section 4 be added and inserted as 4(e) (with the hearing draft 4(e) becoming 4(f)).

Proposed New Section 4(e):

(e) There has not been a total of 10,000 acre-feet of irrigation permits issued outside of the Northwest and South sub-areas pursuant to Section 4. For purposes of allocating water under this subsection, the Department shall use the date on which the applicant provides confirmation of offset water to the Department pursuant to 4(d). The Department shall devise a mechanism to inform applicants if the cap of

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10,000 may be reached and to coordinate potential voluntary cancellations to ensure that cancellations do not exceed the cap.

b) Section 4(a) states that the prohibition against permit issuance where the potential for substantial interference is found pursuant to OAR 690-009 is still applicable. In light of the over-allocation of the groundwater and recent groundwater reviews that indicate significant impacts to Malheur Lake, unaccompanied by any finding of the potential for substantial interference, WaterWatch proposes that 4(a) be amended as follows.

Proposed Amended Section 4(a) (addition shown in bold/underline):

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

2. Section 6 “Groundwater Availability Where Voluntary Cancellation is not Sought.”

Section 2 allows the Department to find water available for a up to 8,900 acre-feet of new permits in two identified areas, with 2(c) intended to limit certification of the permits if the completed groundwater study shows that the use is not within the capacity of the resource.

a) Section 6(a)

First, Section 6(a) should amended consistent with the proposal for Section 4(a) above:

Proposed Amended Section 6(a) (addition shown in bold/underline):

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

b) Section 6(c)

Second, Section 6(c) needs to be amended in order to fulfill its intended purpose and to better track existing permit issuance standards. The hearing draft language is intended to prohibits certificate issuance if certain findings are made based on results of the groundwater study, but does not require that any findings ever be made prior to certificate issuance and does not address extensions of time. These shortcomings render the hearing draft language ineffective at fulfilling its intended result (prohibiting certificate issuance or ongoing use if the use is not within the capacity of the resource).

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In addition, the hearing draft language should be amended to better reflect existing permitting standards instead of creating a new inconsistent standard. The hearing draft language requires that the 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.” First, “clearly indicate” appears to be a new, undefined standard for a finding that is being inserted into these rules. To make the rules more clear and workable, this should be avoided. Second, existing permitting statutes require the Department to make an affirmative finding that a proposed use is within the capacity of the resource—there is no reason for the rules to reverse this standard which will likely lead to complications in implementing the rules down the road. To better meet the intent of the sub-section and remedy these problems, WaterWatch proposes the following language.

Proposed Amended Section 6(c) (additions shown in bold/underline, deletions shown in strike-through):

(c) Permits issued according to this subsection shall be conditioned to prohibit issuance of a water right certificate or any additional extensions of time if, based on the the Department’s Harney Basin Groundwater Study, the Department cannot make a finding that there is water available for the groundwater use, results clearly indicate that the groundwater use is not within the capacity of the resource, is not over-appropriated, and will not causes injury to senior water users. The Department shall make the findings described in this subsection for each permit issued under Section 6 within one-year of completing the Harney Basin Groundwater Study. The Department shall not issue a certificate for any permit issued pursuant to Section 6 until it makes the findings described in this sub-section.

c) Section 6(b)

WaterWatch does not support increasing the amount of water that can be permitted pursuant to Section 6.

3. Section 7 -- Permit Conditions

a) WaterWatch supports Section 7(a), requiring the permittee to install a dedicated observation well for any permit issued.

b) The drawdown condition at Section 7(b) is appropriate (with one modification described in (b) below) given the context of the permits that may be issued pursuant to these rules. Recalling that the system is already over-allocated, and that permits issued under Section 4 are almost certainly going to result in actual pumping of additional groundwater in exchange for cancelling undeveloped water that may never have been pumped, a 10 foot drawdown limit is a critical safeguard. This safeguard offers support to the Department’s premise that for such permit applications it can find that water is available, when in fact existing data instead supports a finding that water is not available (indeed for many of the pending applications, the Department’s groundwater reviews

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already make findings that water is not available for the use and that the use is not within the capacity of the resource). Increasing the allowable drawdown beyond 10 feet undercuts the rules' allowance of finding groundwater available by allowing deeper drawdowns and further over-appropriation of the resource.

c) Where pumping has already been occurring from an unpermitted well (see for example, Section 5 below), the starting well level for purpose of the drawdown condition should not be measured after permit issuance but should be the Department's best estimate of the well level when pumping actually began. For wells pumped soon after the well was installed, the well level could come from the well log. Otherwise, where drawdowns have occurred, the condition rewards those who have pumped in the absence of a permit.

d) WaterWatch supports Section (7)(c) as a safeguard for existing groundwater users from additional over-allocation of the groundwater.

4. Section 11 – Groundwater study

Completing a scientifically robust and defensible Harney Basin Groundwater Study is critical. WaterWatch supports efforts to communicate and discuss the design and findings of the study as it is implemented, and to share and receive relevant information with those interested. WaterWatch proposes the following amendment to Section 11 to make clear that the Department will conduct the study in cooperation with the USGS (consistent with study funding); and to maintain the level of transparency and scientific integrity needed in this state agency effort. Further, WaterWatch would emphasize that any amended rule language needs to clearly maintain the ability of the Department to act in accordance with existing standards regarding the results of the groundwater study.

Proposed Amended Section 11 (additions shown in bold/underline, deletions shown in strike-through):

(11) The Department shall plan and conduct the study in cooperation with the U.S. Geological Survey. In implementing the study, the Department shall coordinate 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, instream interests, and interested members of the public. Such coordination shall include but not be limited to the Department shall reporting quarterly to the Groundwater Study Advisory committee to provide updates on the study status, data analyses and preliminary findings. Meetings of the Groundwater Study Advisory committee shall be open to the public and Department presentations to the committee shall be made publicly available.

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5. Enforcement Need

WaterWatch requests that the Department and Commission ensure that illegal use is not occurring in places of use for pending applications, or elsewhere in the area. It appears that the area has historically experienced unauthorized groundwater use and that some unauthorized may be continuing to occur.

One of the local proposals made during the RAC process requested, in part, that the Department focus on enforcing against illegal water use. The Department responded by saying, in essence, that it had looked into the issue and did not find that illegal use was a significant issue. However, the issue of illegal use remained a part of the discussion at the RAC, including comments that indicated there was ongoing unauthorized use of groundwater and an assertion that this had been condoned by the Department for 25 to 30 years.

Any unauthorized use raises obvious concerns, including the extent to which the Department's estimates of over-appropriation of groundwater, which were based on *permitted* uses, are underestimating the extent of the problem. WaterWatch implores the Commission and the Department to ensure that there is no unauthorized water use occurring on any permit application, or in any other places in the Malheur Lakes Basin. Illegal use undercuts the proposed rules, and calls into question the purpose of the rule exercise and the permitting system itself.

Conclusion

Thank you again for the opportunity to comment. We look forward to continuing to work with the Department and others on this important issue.

Sincerely,

/s/ Lisa A. Brown

Lisa A. Brown

cc (by email):
Dwight French
Ivan Gall

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GHRGAC Proposed Rule Changes

March 30, 2016

Oregon Water Resources Commission

To: Commission Members

Following are our comments concerning the Greater Harney Valley Groundwater Area of Concern (GHVGAC) proposed rule (690-512-0020) that we feel will provide better and fairer administration of groundwater resources in the GHVGAC, help implement a more comprehensive Study of groundwater resources, and benefit the OWRD working relationships in the Basin.

Summary: The majority of local irrigators, well drillers, irrigation system contractors, and private water resource specialists living in the area and working in the area have a fundamental disagreement with the Oregon Water Resources Department (OWRD) concerning groundwater resources in the Greater Harney Valley. OWRD drew a very large boundary around the Harney Valley that included areas with water table declines, large and small areas that do not have any water table declines, and a number of areas where there is very little data about water table levels under the belief that it is all one aquifer. The local belief of very knowledgeable groundwater experts is that there is at least three distinctly separate large aquifers and a number of small aquifers that are separate and distinct. Locally we just do not believe the boundary represents one big bath tub.

We believe landowners throughout the Basin would be better served to have a distinct boundary around the areas with declining water tables with an intensive study of those areas to better understand the hydro-geological structures and ground water resource capacities and changes. We could support the larger boundary as a longer term Study area but ground water applications should be allowed to be submitted and proceed on a temporary permit basis if they meet existing review criteria. Allowing applications to go forward could also function as a place holder and help OWRD learn more about the ground water resources in those areas as a part of the broader Study because OWRD has only limited data in some of those areas.

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In other areas there is quite a bit of water level data but no data indicating any water level declines.

It is vital that the final GHVGAC rule provide an expedient way forward for pending applications. The pending applications should not, and cannot, be held hostage, or in limbo, by the unexpected shut down of the whole basin, especially when there is not data in many areas to support the action. We support the final rule allowing pending applications to proceed with a few priority changes written below.

We know of a few landowners in areas where there is no water table problems, that have put their planned groundwater applications on hold long before OWRD's moratorium because of logistical, financial, or family reasons. In some cases the groundwater use was a landowner's retirement, in other cases it was a young couple's future business, and in other cases it was landowners being conservative to make sure they had adequate savings to make the many investments to do the water development right. In any of the cases, their investment in land that in many cases has tremendous groundwater potential and planned investments in groundwater development has been taken away without warning and without substantial evidence of groundwater problems.

The GHVGAC Study is planned to be completed in five years and it must be implemented with full involvement of a local advisory committee to be accurate and comprehensive. Further, if the data is insufficient and not clear on the capacities and function of the aquifer or if distinctly separate aquifers are found then the OWRD needs to be ready to extend the Study duration to better understand the groundwater resources in the area. It appears the Final Rule language with our recommended changes specified below will help the Study to be inclusive and comprehensive.

Local people want a better understanding of areas that have water table declines which, if the Study is done right, should help find and provide creative and innovative ways to implement both protections for senior water right holders but also find ways to solve specific problems in areas that have water table declines (well construction, mixing aquifers, and Harney County Place-Based Initiative etc.). It is wrong and not consistent with the law to regulate and curtail groundwater use in areas that do not have substantial evidence of water table declines. Local people believe that the Greater

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Harney Valley Study is important, but more important to local people is how the Study is implemented and how inclusive OWRD is with local water specialists that have tremendous knowledge about groundwater aquifers in the area.

We used the following principles in our evaluation of the proposed rule and in our development of proposed changes to the final draft of the Rule: Our comments and proposed Rule changes directly reflect principles:

- (1) The final rule should foster a positive working relationship among groundwater users and also with OWRD; and**
- (2) The rule must be a science based and data driven rule and process; and**
- (3) The rule should meet the “substantial evidence” burden of “537.780 Powers of Water Resources Commission; rules; limitations on authority” on both the site-specific level and the broader application of the rule; and**
- (4) The rule should be administered in a flexible and adaptive way as substantial evidence or data is collected where possible, especially where individuals are injured; and**
- (5) The rule should consider economic costs and benefits of rule implementation on both the local economy and individual groundwater user; and**
- (6) The rule should encourage private irrigators to drill test wells, collect well drilling samples, and monitor static and pumping water table levels, as a part of the GHV Study and consultation with the GHVGAC Local Advisory Committee.**

We appreciate many changes in the Rule implemented through the RAC process, but other changes are necessary to make the Rule successful in groundwater administration by OWRD in the future. The Rule and the GHVGWS must establish an understandable and fair process for groundwater users and provide a technically defensible and accurate representation of the groundwater resource, supply, and capacity. We support and submit the following proposed changes in the Rule which are the priority changes proposed by a large technical group supported by our family's comments. Although, there are other minor changes in wording and substance, the following changes in the rule will better meet the above principles and establish a process that is fair and successful:

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[Small print represents the existing proposed rule by the Department, red text are our proposed changes, and italics text are explanations why our proposed changes are necessary.]*

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, indicates 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 2.

(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,

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(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) (a) 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.

The modification of the north boundary of the South sub-area would be beneficial to more accurately represent a site-specific groundwater area that we believe should be included in the South sub-area because there is no indication that water tables are declining in the outlined area. Further, there is a known hydro-geological area and aquifer boundary defined on the north by the Black Butte Ridge or Black Butte. Pending applications in this area should be allowed to proceed based on site-specific evaluations meeting the substantial evidence of 537.780 Powers of Water Resources Commission; rules; limitations on authority – particularly section (2) (a) and (b) of the law “the Commission may not” “adopt any rule restricting groundwater use in an area unless the rule is based on substantial evidence”.

(b) 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;

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(B) There has not been a total of 7,600 acre feet of irrigation permits issued in the Northwest sub-area, and 4,500 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;

The cap of 4,500 feet represents a reasonable level of development relative to pending applications and a level of groundwater development that has been in planning process prior to the proposed rule making process. This level of development is consistent with the OWRD water table data and known hydro-geological structures. Language in the rule provides for comprehensive evaluation of hydro-geological and water table and flow data by OWRD but site specific data needs to be applied on any pending permits or new applications. Applications should be able to proceed with development or partial development up to the 4,500 acre-feet cap with assurance that the applications will protect a priority date or place holder subject to the Greater Harney Valley Groundwater Study results.

(C) Permits issued according to this subsection are conditioned to prohibit issuance of a water right certificate if the Department finds the Harney Basin Groundwater Study, when issued as a final, peer-reviewed report, demonstrates by site-specific substantial evidence that the groundwater use causes injury to senior water users, unless the permit holder provides offset in the manner described in subsection (4) within 1 year of the final, peer- reviewed report being issued; and

We propose removing results clearly indicate that the groundwater use is not within the capacity of the resource, is over appropriated," because we believe that a broad water budget and/or model will cause a denial of certification with no site-specific substantial evidence for denial. In the event that site-specific substantial evidence shows injury to senior water users which may limit pending applications or permits from being certified; or may effectively change the boundary of the South or Northwest sub-areas; then pending applications should be allowed to go forward under section (4) similar to pending applications in areas indicated to have water table problems. It is not fair for applications that were in process prior to the OWRD announcement that they would deny all new applications, to not to be able to proceed through the process directed by section (A), (B), (C) and

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(D). Applications above the 4500 and 7600 acre-feet caps should receive a priority date and placeholder on their application subject to the GHVGAC Study.

(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 subsection (6) of these rules.

(b) 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) Permits issued according to subsections (4) and (6) must be conditioned as follows:

(a) All permits issued within the GHVGAC shall 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 water master to regulate off any future use under the permit.

(b) For permits issued for use of groundwater within the Northwest or South subareas and other areas of the GHVGAC: groundwater pumping authorized by the permit shall be discontinued or reduced, as specified by the Department, if March groundwater levels show any of the following: (A) annual water level decline of three or more feet per year for five consecutive years, or (B) a water level decline of fifteen or more feet in fewer than five consecutive years, or (C) a water level decline of twenty-five or more feet. The period of discontinued or reduced use shall continue until the water level rises above the decline level which triggered the action.

This sections basically sanctions existing OWRD policy to provide consistency and clarity to groundwater users which will also help develop a more cooperative/collaborative approach by the Department to work with groundwater users to solve problems consistent with the above principles in the above letter. The importance of this section cannot be overstated – groundwater users need time to make capital and water use changes. They also need practical language that effectively encourages the OWRD and groundwater users to work together to adjust water use, implement conservation measures, implement well specific studies, and implement

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capital allocations such as new crop seedings or well reconstruction in some cases as water table declines occur. Section (7) (b) above is proposed to replace OWRD's draft (7) (b) which applies a rigid 10 foot decline. As an example of administrative problems with a rigid 10 foot decline condition, some aquifers have natural fluctuations of ten feet especially during prolonged drought periods so it becomes an administrative problem for OWRD without a drought index of some kind. In addition, new observation wells may be incorrectly located in a hydro-geological structure or aquifer that produces a decline not consistent with pumping draw downs and static levels.

(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 Bureau.

(9) The Department shall report annually on the implementation of these rules to the Water Resources Commission every 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 will work with the Advisory Committee and individual water users to encourage the collection of hydro-geological and water table data, and to utilize private data in the GHVGAC study. As part of the study, the Department shall review and consider relevant data provided to it

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through the Groundwater Study Advisory Committee. The Department shall report quarterly to the Groundwater Study Advisory committee to provide updates on the study status, data analyses and preliminary findings.

The changes in this section are critical to establishing a positive relationship between OWRD, water users, and the public and to begin to build back the trust that has been lost due to many factors. In addition this section will allow and encourage private investments in monitoring wells and hydro-geological data to better define aquifers and aquifer structures and help OWRD do a more comprehensive groundwater study.

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

Stat. 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

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

In summary our comments and proposed Rule changes directly reflect six principles that will help OWRD do their job and encourage all parties to work together. With our proposed changes we will move closer to creating a new working relationship among groundwater users and the Department whereby groundwater users go to the Department and other water users to solve problems before they become big problems. Our proposed language changes are also vital parts to the Harney County Watershed Council's Place Based Plan and Project that should help implement both conservation and aquifer recharge projects throughout the Greater Harney Valley area. We do not know what the results of the Study will be but we are sure new rules following the study will need to better recognize the unique attributes of several different aquifers, implement additional studies, and develop new rules accordingly.

Sincerely,


Fred I. Otley, President

Otley Bros Inc

40926 S Diamond LN

Diamond, OR 97722

(541) 493-2702

(541) 589-2143

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3/30/16

Major concerns

Sub section 11

(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 will work with the Advisory Committee and individual water users to encourage the collection of hydro-geological and water table data, and to utilize private data in the GHVCAC study. As part of the study process, the Department shall review and consider relevant data provided by or through the Groundwater Study Advisory Committee. The Department shall report quarterly to the Groundwater Study Advisory committee to provide updates on the study status, data analyses and preliminary findings. The Department will collaborate with the local committee with regard to any actions and decisions that may result from the study.

Sub section 7 (b)

(b) For permits issued in the GHVGAC: groundwater pumping authorized by the permit shall be discontinued or reduced, as specified by the Department, if March groundwater levels show any of the following: (A) annual water level decline of three or more feet per year for five consecutive years, or (B) a water level decline of fifteen or more feet in fewer than five consecutive years, or (C) a water level decline of twenty-five or more feet. The period of discontinued or reduced use shall continue until the water level rises above the decline level which triggered the action.

Sub Section 6 (c)

(C) Permits issued according to this subsection are conditioned to prohibit issuance of a water right certificate if the Department finds the Harney Basin Groundwater Study, when issued as a final, peer-reviewed report, demonstrates by site-specific substantial evidence that the groundwater use causes injury to senior water users, unless the permit holder provides offset in the manner described in subsection (4) within 5 year of the final, peer- reviewed report being issued; and

Sub Section 6 (b)

B) There has not been a total of 7,600 acre feet of irrigation permits issued in the Northwest sub-area, and 4,500 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;

Mark Owens Local Irrigator Former RAC member



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

From: Charles Yriarte [<mailto:charlesyriarte@yahoo.com>]

Sent: Monday, February 29, 2016 12:45 PM

To: rule-coordinator

Cc: charlesyriarte@yahoo.com

Subject: Malheur Lake Basin Ground Water Concerns

I am Charles Yriarte and my parents Louis and Doris Yriarte own a ranch in the Double O valley. The Hughet Spring on this property has never lost flow during their time here. In August of 2014 while I was cleaning around the Hughet spring, I noticed air bubbles coming up from where the spring water flows in from under ground. This lasted about 30 minutes and the spring dropped an inch and a half. Then in January of this year the spring dropped again approximately 6 inches. I assume no wells were pumping water at this time of the year? I assume the natural springs in Harney County and else where have the oldest water rights and should not be compromised. In addition, our live stock wells in the desert have dropped. Since 2014, static water levels dropped from 15 feet to 28 feet in one well and the other dropped from 45 feet to 100 feet. I believe the State needs to begin monitoring the spring flows as well as static ground water levels in wells. I am not sure the Hughet spring will produce enough water to satisfy all users and if the current drop in water tables and spring flows continue it will have a devastating economic effect on people and the ecosystem. I know you do not have a lot of back ground data, but I believe we are already in a serious water crisis and some restrictions need to be placed on current irrigation wells not just a moratorium on drilling new irrigation wells so we do not pass the point of no return. Using Google Earth, I counted over two hundred irrigation wells in Harney and Lake County (Hampton area). If you estimate 1,000 gals a minute for each, a lot of water is being pumped from the aquifer and not going back into the ground to help recharge it. It is my understanding that even though a moratorium on new wells is in effect new wells are still being drilled legally by transferring water rights from other land ownership(s). In my opinion, if this is true, it needs to be stopped! Observing the Hughet spring drop in the summer of 2014 I feel no pumping should occur from wells drilled from 2010 and later. Monitor every year for two to three years for ground water level recovery. If no there is no rise in the static ground water levels, then go back and do not allow pumping from wells drilled before 2010. We cannot afford to be in the same position such as those in Idaho, California and Umatilla County. I feel it is better to fall on the safe side of recovery and if the static ground water levels begin to recover then and only then, on a case by case basis allow more pumping according to senior water rights. I have no problem with irrigation wells and agriculture. If all irrigation wells could be pumped without compromising the aquifer great, but this is not the case today in the Malheur Lake Basin and action needs to be taken to resolve this issue immediately.

Sincerely,

Charles L. Yriarte

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**Harney County
Watershed Council**

450 N Buena Vista #4
Burns, OR 97720

Hcwatershed.com

Phone: 541-573-8199
Fax: 541-573-8370

Karen Moon@oregonstate.edu



March 28, 2016

Oregon Water Resources Commissioners
725 Summer St NE # A,
Salem, OR 97301

Commissioners

The Harney County Watershed Council appreciates the opportunity to participate with the Rules Advisory Committee regarding basin rules for the Malheur Lakes Basin. The Council would like to add these comments regarding the proposed rules.

In regard to Sub-section 6 (c) Groundwater Availability were voluntary cancellation is not sought.
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.

The Council would propose that these changes be made to the paragraph:

(C) Permits issued according to this subsection are conditioned to prohibit issuance of a water right certificate if the Department finds the Harney Basin Groundwater Study, when issued as a final, peer-reviewed report, demonstrates by site-specific substantial evidence that the groundwater use causes injury to senior water users, unless the permit holder provides offset in the manner described in subsection (4) within 5 year of the final, peer- reviewed report being issued.

In regard to Sub-section 7 (b)

(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.

The Council would propose that a drawdown of 15 feet be imposed rather than 10 feet of decline. The paragraph to read:

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With regard to Sub-section 11

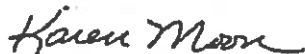
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The Council is please with the award for a pilot Place Based Planning Project and is looking forward to working together with the Department and Harney County citizens to plan for future water needs in the Harney Basin.

Sincerely,



Karen Moon
Coordinator

Mission and Purpose of the Harney County Watershed Council:

The Council recognizes that local ecological and economic prosperity is dependent upon the current and future availability and quality of water, therefore the Harney County Watershed Council is committed to this three-part goal:

- A. Determine the health of individual watersheds or watershed segments
- B. Retain the health of high quality watersheds and,
- C. Restore and enhance those watersheds, or portions thereof that can be improved.

The Harney County Watershed Council is a 501 (C) (3) non-profit corporation.

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Comments from Hearing on March 30, 2016 held in Burns, OR on Division 512

Mark J Owens, Crane Oregon, RAC member Harney County Watershed council

"Want to thank the state for coming in and setting up a RAC and working with us through this situation, we appreciate that, we know that this is the first time its been done by the state to do that. We had some successful meetings, we did see a breakdown in the process, but that was corrected Tom Byler came and headed up another RAC meeting which gave us great confidence on our last RAC meeting number 6. That the commission will take those comments at that point. We know no new rules have not been issued since that time and will wait till after today to make those new rules and give those to the commission.

Four major areas of concerns, section 11 we want a local technical input on the study and collaborative process after the study is completed to see what mitigate effects we can do for the county. We believe that there is a blended water resource in the county and we understand the study you are going to do will define what that limited resource is, once we get that definition of that limited resource is we would like to work with the state to figure out how best to use that limited resource. Currently with water state law that being able to use water allocation only on the acreage we would like to talk about that in the future once we have that limited resource defined.

One area of concern I have is the size and scope of the study I believe the geography area is large compared to other studies that have been done. We believe that the study completed in a timely fashion but I have concerns that after five year we will have some more questions than answers. So if that occurs we would like to have some way to continue to develop water in Harney County.

One of the major areas of concern have is that this defiantly an economic impact on the county. Agricultural is one last areas that we have been growing in Harney County, so the technical study is vital for us, it is the life blood of our economic as it is today as you know. We do want to protect the senior water right user at all costs any of the comment here are not directed towards the ten foot drawdowns on neighboring wells we want leave those alone as we believe in the protection of senior water right user.

Subsection 7, talks about the drawdown of 10 foot on all new wells, if a 10 foot drawdown is based on a march to march reading if that was exceeded that permit would be cancelled. We do not believe that is true and correct figure we would like to go back to 25 foot . We believe a 25 foot is in water law, and was in the last permits issued in the county, and if that was good enough for that day to protect the senior water right user, why is it still not good enough to day to protect the senior water right user. I believe its not fair that Harney County out of 39 pending applications should have to play for a different set of rules than the rest of the state has to. So once again if 25 foot was good enough to protect the senior water right user in the past, then it should be good enough for protecting the senior water right user in the future. It is 25 foot above what critical water lost would be if you get to 50-55 foot then we know it is critical area so we believe there is plenty of protect the senior water right user.

Subsection 6 C, this one allows for a time limited permit in the North and South subbasin those are the area we believe that the State does not have enough evidence to show that there actually is a decline in that area. So the way the permits would be issued to allow them to go ahead and issue the permit until the study is completed, if the study shows that there is not sufficient water to meet that need then we would like to give those permits 5 years to use the rules that are established. So they do not have to bear the initial cost of the gamble that the study will come back in their favor in buying a permit right now. And if the study shows that there is not adequate water then allowing them to use the rules that you will adopt April 13th. By while allowing them to have to buy a permit now and this study comes back in our favor is an extra economic burden to them. So we would like them to be able to develop in those limited areas and if the study does show that the water is not available then we can exercise these new rules.

The other one would be subsection 6 B, the only correction there in the south area is 1700 AF would be permitted, we would like to increase that number we did 4500 AF. There was some pending applications, withdrawn applications and some being reinstated we just want to make sure enough AF available for those applications.”

Wayne Evans, Rylie Oregon, RAC committee

“I have to reiterate some of Marks comments too, as I was also on the RAC committee.

I have some major concerns on the economics concerns in this county; I don't think that people really realize how big of an economic impact this is going to have. It just doesn't affect the farmer, it just doesn't affect me, it affects the well driller, it affects the pump and irrigation people, it affects the fertilizer people, it affects the seed people, it affects the fuel people, the equipment dealer and it affect everyone down the main street in Harney County you better realize that. But as far as the rules we submitted to the RAC committee I hope they have taken into consideration, we spent a lot of time working on that we had a lot of meeting we had a lot of people involved. The 39 time honored permits, I am not sure what's going to happen there. But if those time honored permits are given to these people with a five year test going on I don't think many are going to develop those, I wouldn't. I'm not going to spend 5 hundred thousand dollars for 5 years and find out the water table is declining and we have to shut them off. So what I have been forced to do is to go out and buy my water rights or buy land that had extra water rights on them so I can perfect mine. I am as concerned as anyone in here about some of our senior water rights and some of our junior water rights, I am worried about that. My concern is that these test wells. If everyone involved in this area if they have any data, any thing they have taken, I think it should be considered. I have data on everyone of my wells. I test the static on my wells every year, I have 15 wells. Not one single one of my wells have gone down in 20 years I've been here. But that might not be the case in some areas of this county but it is in my area. I don't believe my area is at the far end of the spectrum as anything to do with some of the other areas in the county, but we are all in the same boat. MY concern is that I want, I am hoping that the major concerns that the RAC come up with will be studied, discussed, and hopefully approved by the commission.”

Charles L Yriarte, Yriarte Ranches

"My concern is not irrigation wells, we don't have any, all of our land is feed by springs, I just want to make sure that the springs are taken into account here as a data observation tool. The reason why I say this is in August of 2014, air bubble started to come out of Hewitt springs and the spring drop 1.5 inches. In January 2015 it dropped another 3 inches and there is not pumping, so something is going on other than the drought. I make sure as they are the most senior water rights in the valley is those springs and if we lose those springs we are economically broke. So I just want to make sure this committee will take a look and monitor those to see, I know there is old data, and I know that was performed many years ago and they combined both springs. So I think is it very appropriate to monitor those. I just want to make sure this is apart of the process. I have stock wells and I know they have dropped from 15-55 ft in the murphy place. The drought is part of this, but there may be other parts to it, so if you could please monitor those springs I would greatly appreciate it. I think we have a good start here. I think agriculture is important to this county, but we have to maintain it. I appreciate you being here and taking time to listen to us. Thank you very much."

Dan Nichols, county commission and a member of the RAC

"Harney County court expresses its occurrence with the comments submitted by the Harney county watershed council. The council has been an integral part of the RAC process and is valued for it involvement, knowledge and concern pertaining to the watershed to its quality and its quantity of water resources in Harney County. The direct process has been appreciated by those involved; we value the opportunity to have been engaged in a productive dialogue with the Department and the opportunity to attempt to make the best of a critical situation for the ag industry and associated businesses, infrastructure in Harney County. We look forward to continue to be actively engaged with the Department during the course of the study. The initial concern of the 32 applicants were legally pending and were denied due process after the public hearing meeting in Burns is wrong and is still a concern. The RAC process was initiated to help those and to come to some conclusion and for some it may be helpful, but it may not be beneficial to all and it will come at an additional very expensive endeavor for those that may fit into the new rule. It is still my believe that those pending applications should be reviewed and given due process that was applicable prior to the declaration of the need to do a groundwater study that the Water Resources Department. Also in the statement of need and fiscal impact worksheet it is stated that the Department does not anticipate a negative economic impact resulting from implementation of the proposed modifications of Division 512. Although this document and that statement in particular has been explain and justified from a legal perspective , but the fact remains that this decision, has and will have a profound economic and social impact on Harney County residents. With these concerns having been expressed and repeatedly expressed, be assured that Harney County understands and supports the prudence of determining the availability and location of the groundwater in Harney County Basin, we will remain active and positively engaged during the course of the study."

Fred Otley,

"I am not going to read from my letter directly, I want to thank you for being here. Its been a long process and a very important process. You know as I drove in and I looked across the basin, and how important water is, I look up at the mountain everyday , water is the life blood of this area and it's a combination of things as we want problems fixed and we want them fixed by involving the people in the area that are fixing them. We also want the untapped potential where it is still there available to private people . The state is responsible for administrating the water, it's a water right when we use it when we have the certificate to use it. I look at different friends that have taken different positions on this and its easy to react out of fear. The one I am thinking about is in the area where there is, one bad well and short ways away he has more water than, ¼ miles away more water than he needs. I don't want development that's going to hurt the one well, the one well is bad and has been for 30 years, it could have been put in wrong, there is issues, but it is in the middle of a very complex area in terms of the aquifers there, yes I put a s at the end of aquifer because this is where we have had a fundamental disagreement with the Department. I understand their approach to try to solve the problem we have declining water levels, but looking back, I still believe this the best way to do this is to draw circle around the problem areas and implement a study then broaden out instead of starting in a broad big boundary, in that we have areas that with little data, we have areas where we have no problems with water declines and we have two large areas that have substantial declines and their complex issues too but they are different. So what we need is the most important part of the new rule is subsection 11. I complement the Department working with us to get that section in there a local advisory committee made up of the most knowledgeable people and the broader public that allows us to work with the Department and get the data necessary to truly understand what's going on in our hydrogeological structures that define what water is there and what the problems are, map out where the water is coming from and going. It is not a clear picture in all areas. We know there is an area where there is a line there where we have a river of water where you can have 4 pivots on one well and then a ¼ mile away you have very marginal wells that are in a completely different elevation. It needs to be understood more and we need to address and the Department is, the issue in problem areas, but it is wrong at the same time. It is wrong to look at someone that is 15 miles from the nearest irrigation well and 40 miles from the nearest declining water table to get to loose their retirement , young families investments and waiting to do something till their family situation is right or whatever it doesn't matter it is their private business. We have all sorts of variable situations, but the impact of this if done wrong will cost Harney county residents multi millions and millions of dollars. If done right, there is a lot of untapped potential still in terms of ground water. Done right maybe we could fix areas that do have problems, we know we have well construction problems, and mixing aquifers and different things that we want fixed. What I think the different committees I on here are trying to brain storm ideas how to deal with this. One of the objectives is to have the language to have positive working relationship with the Department and the Commission so we can go forward right so we are not at odds with each other. In the rules they are not right completely, there are some things I would like to change, and in my comments there are four priority changes we have been working locally on, but section 11 allows us to have a local advisory committee that lets us work with the Department to do it right, we do have a little language we want to add so that its more than the Department comes and reports to us the people in

Harney County, it allows for a mechanism for people to get information before the Department brings information back us. One of the things I want to mention here is that is not in my comments is I hear things about where a new application in the outside areas, are told there is not water there but if you do test wells and prove that water is there..I don't know if this is true but , I hope this is not true .. you have to drill test wells and here is the location you have to drill your test wells and if water is there then here is where you have to drill your production well I hope that is not true, that's not right, but that's a private business decision, the monitoring wells should be cooperatively determined the location and work together to that, share information, so that is an important thing. As far as the study goes with the advisory committee in place the study will be a lot better study, and we are going to find a lot of answers out there. I want to caution everyone that in three to five years we will not be near an end point in understanding the complex aquifers out here across the valley. I think in five years we will have a new place to start from and I really expect the study hopefully then can be repackaged and more targeted to continue on a longer term bases. I know a lot of people agree with me on that. We discussed a lot of things in the meetings and we discussed 6 principles.

1. we want a positive relationships;
2. The rule must be science based and data driven rule;
3. rules should meet substantial evidence burden of the law on the site specific level and on a broader level, the law says the Department can not limit or curtail groundwater use with out substantial evidence that there is an impairment in capacity, interference and all the other criteria;
4. we need to move forward in a flexible and adaptive way as substantial evidence data is gathered, because we are going to find out we are in a different place than we think we are;
5. economic costs and benefits need to be considered as we go along;
6. this one is important at lest to me the rule process as we go forward need to encourage private people, private business to gather their own data, to drill additional test wells so we know more about the hydrogeological structures we are dealing with , what aquifer we are dealing with and wells set up monitoring systems in cooperation with the Department but separate, there is nothing wrong with being separate. The advisory committee give us a chance to come back together

I would have liked to have 45 hundred AF numbers there are some small applications out there that the door will open back up if we do this right. I would rather have a cap that meets those people that can't get the 3 phase power out there right now. I remind those people that they have 5 years and the Department has been real good about extensions, but you need to get your foot in the door because your family is going to need that. There is other stuff in here, so my question back is so can I hand this in to you today (Commissioner Corn says Yes) I appreciate the Department coming here again and again and showing yes we heard you in very specific terms.

We would like to see some language changed such as rigid 10 foot water level decline and then your shut down. Existing policy is better, we could compromise a little bit on the total from 25 ft to back to 18 ft (17.5) is halfway between 25 and 10, that one change.

On an existing pending applications you need to go forward you need to have an observation well completed in 6 months and no exceptions You can't get a well driller on site for 6 months, I am a little nervous about that one. I have talked to three well drillers already and I can't get a commitment from any of them if this rule passes because one they have to work with the Department to drill it the way you want on the location you want. I want to thank you."

Steven Doverspike Hotchkins Company and 5 generation in Harney County

"I have read through the stuff and I am not one of the 32 affected people dealing with water wells but I am dealing with the Department on drought wells and its been a tough process and we continue to go forward on stuff. But what makes me think that, yes there is a need for regulations, but as Fred says we need to go to those problem areas first and walk our way out. We have had USGS earthquake monitors across our private property and they said, they could tell with there monitors where certain rivers and aquifers are that I know has no pivot on, because it is all on our property. I think there are multiple aquifers in this country and they all need to be defined. I lived in Oklahoma for two years I was in charge of, I was the assistant manager of JBS fiber cattle feeding, and we had 16 wells that ran 5 pivots. That country is a little bit different it has one big aquifer, we had to drill 1,000 feet to get water. So I do not want to see Harney County be that way they you have to 15 wells to run 4 pivots. I do care about our community, I do care about the economical growth that we need in this community. I just think it should be addressed scientifically much like the USDA station, OSU station in Section 5 does. I think they should be brought into this process, I think even retired people from that place would be a great committee member. Another thing I have personally seen, 10 years ago, we had a spring that had water right for meadows that were declining, we also had water rights for the house. That spring got so bad that we did not have water for the house. We drilled a well, got house water, but we took extra steps and cut an addition 160 acres of juniper right above the spring, within three years of that we had tripled the water production out of that spring that was previously there known to my grandfather to have been there 15 years. That spring now runs year round and runs three different ways out of the irrigation channels instead of one. I really encourage State to takes the advisory committee's comments in hand, take the courts comments in hand, and will proactively seek a working relationship with the community and hopefully we can take our problem areas and get those fixed, but also allow potential development if we do find areas that do allow it, Thank you"

Erin Maupin, Maupin Ranch

" My husband Jeff and I have a pending application in for irrigation well. A little bit about where were are, we are at the every edge of the NW subbasin, we are surrounded by federal land, we have about 800 acres, we are 4.5 miles from the nearest irrigation well, we are another 4.5 miles from the closest ephemeral channel, 7 miles from the closest intermittent stream, we are 40 miles from the closest wells with drawdown issues that I know of. My concern is that the Water Resources Department has taken a blanket approach to this issue, there are pockets. I think especially these 30 applications that are in limbo should be taken on a case-by-case basis, and perhaps common sense plays a little bit of a role in whether to issue these permits. Another issue I have is from what I understand is that we could go ahead and drill our irrigation well and we have a test hole you can monitor. My question is why do we

need a test hole, because from other wells we have we have to monitor it, and all that could be done in the irrigation well, like reporting SWL every spring, we even run camera down it to look at it. I don't understand why the expense of another well is there. Another question or concern is that we can go ahead a drill and our permit will be on a hold until the study is over and we then will be shut down. I don't think we can afford to put hundreds of thousands of dollars in irrigation equipment and then in 5 years be shut down and if we were all rich that would not be a very good investment with our money anyway. Like Fred said, 6 months to drill a well is not feasible, especially around here. We wanted a stock well drilled this summer and it took 8 months before we could even get a well driller out there. There are some people, that it was over a year and then other they still don't have their stock well drilled yet. We are not rich people, we are family farmers, we can afford to dump a bunch of money into this. Taking a blanket approach, about ten years ago we owned an irrigation well on Buchanan road and a bunch of us in the area contacted the Department to ask them to intervene to protect senior water right users, that was never done to my knowledge. The senior water right users drilled for supplemental water wells have gone dry. We know there is problems, for a decade at least we have been saying where those problems are but you don't just throw the baby out with the bath water. In the Rylie area, there is a lot of undeveloped ground there that has plenty of water, I just feel we need to take this as a case-by case basis, thank you"

Pete Runnels

"Question that I have is the funding for the study, last I heard under half has been secured in this last short session and the other half should be in the next session. Should is not good enough, we need the study to be completed timely. Thank you"

Tom Shaffer

"I just wanted to talk about this blanket approach; it is a problem to think we are going to solve the county water problem in a single step is absolutely ridiculous. To say we have one aquifer is the most ridiculous thing I have ever heard. We need to do this on a case-by-case basis; we need to use common sense along with science, thank you"

Comments from Hearing in Salem March 30, 2016 at Salem, OR on Division 512

MaryAnn Nash Farm Bureau

We are Submitting formal written comments so this is a quick summary of our written comments, emphasizing a couple of major changes we would like to see at this point . Just so you know we were part of the Rules Advisory committee so I don't see that this comments are new to the Department. Our first concern is in section 11 of the proposed rules that talks about the study conducted we would like to see the language clarified that to allow for the Department review and consider data provided by the local groundwater study advisory committee. And then that change has been discussed in recent RAC meetings. A new change we have and encourage the Department to make is that we request that prior to publishing a final draft of that study the Department has to provide a draft of the study to the groundwater study advisory committee for review and comment and the Department needs to respond to any comments from the groundwater study advisory committee prior to its final publication of the study. We think this will allow the local committee a chance to review and provide some formal input into the study, in addition to the more informal formal discussion of this study is proceeding and allow for an increase in buy in and involvement in the study process.

The next big change from the draft rules is section 11 what happens after the study. the current draft says the study will be completed in 2020 and a rulemaking to implement the results of the study will commence in 2021. We would like it to change to Once the study is complete, the Department shall convene a local RAC to determine if the basin rules should be revised. The RAC must include the Groundwater Study Advisory committee. This will allow continuity between the group that was reviewing the study information and the group that reviews if rules need to be changed and will allow local input into the process into what extent the rules need to be changed instead of leaving that authority to the Department.

The other comments that we have are more concerned changes that are being proposed in Burns today. I know there is some talk about changes in drawdown levels and also changing some standards around if you could increase the number of permits that will be issued or the amount of water of water they can develop, and to alter the standards proposed by the department for users in off set program. We are fine with so long as these changes are limited to the South Subarea where there are not the same documented declines.

Concerned about the off set program, they way it is structured the people who have the most money will be in front of the line. Wee encourage the Department to create an offset program which honors the priority of the users waiting in line for rights, and does not allow those with the most resources to jump to the head of the line.

Department Response to Public Comments

Both Written and Oral

Written Comments:

Comments were received from:

Oregon Cattlemen's Association (OCA)
Fred Otley (Otley)
Mark Owens (Owens)
Wayne Evans (Evans)
Harney County Watershed Council (HCWC)
Oregon Farm Bureau (OFB)
WaterWatch (WW)
The Nature Conservancy (TNC)
Harney County Court (Court)
Charles Yriarte (Yriarte)
John Simmons and Karen Jackson-Simmons (Simmons)
Ben McCanna (McCanna)

**1. Cumulative Quantities Allowed for New Permits Issued in the Two Subareas (OCA)
(Otley)(Owens)(Evans)(WW)**

Four commenters suggested increasing the number of acre-feet that could be permitted in the south subarea from 1,300 to 4,500 acre-feet to allow for additional development because of the absence of known groundwater declines in this subarea. One commenter (WaterWatch) suggested keeping the cap the same.

Rule in question: 690-512-0020(6)(b)

Department Response: In the subarea option, the Department's intent has been to allow pending applications to be permitted with conditions that would prohibit issuance of a certificate if the study showed results that were unfavorable to the permit holders. (See 690-512-0020(6)(c)). The Northwest and South Subareas were created during the RAC process to allow an extra measure of flexibility in these areas due to the fact there was little if any specific decline data in these townships (areas of the GHVGAC). The Department does not believe that creating extra development opportunities for applicants who have yet to file applications is prudent at this time; the groundwater study results may identify areas with additional development opportunity. However, the Department believes that increasing the cap in the south subarea from 1,300 to 1,660 is appropriate to make room for application G-18000 which was filed on February 17, 2015.

The Department has increased the acre-feet cap in the South subarea from 1,300 acre-feet to 1,660 acre-feet.

Suggested modification to OAR 690-512-0020(6)(b):

(b) ~~There~~ Since April 15, 2016, there has not been a total of 7,600 acre feet of irrigation permits issued in the Northwest sub-area, and ~~4,300~~ 1,660 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.

2. Condition for Obtaining a Final Certificate for Limited Permits Issued in the Two Subareas (OCA)(Owens)(Evans)(HCWC)(WW)(Otley)

The OCA, Owens, Evans, and the HCWC recommend changing the condition language such that only a finding of injury will result in denial of certificate issuance, and in the event of a certificate issuance being denied by the Department, provide the permit holder up to an additional 5 years to provide offset credits in order to obtain a permanent water right and allow issuance of a certificate. Otley suggested removing the language “results clearly indicate that the groundwater use is not within the capacity of the resource, is over appropriated,” stating that a broad water budget and/or model will cause denial of certification with no site-specific substantial evidence for denial. This suggestion is much the same as the OCA, Owens, Evans, and HCWC, as it leaves only an injury finding as cause for denial of a certificate. These parties also suggest including language that site-specific, substantial evidence support the finding of injury.

WW provided several comments on subsection 6(c) of the draft rules. They suggested that extensions should not be allowed if the Harney Basin groundwater study cannot make findings that water is available, within the capacity of the resource, that the groundwater is not over-appropriated, and will not cause injury to senior users. WW suggests that the findings for permits issued under Section 6 be made within one year of study completion, and that the Department shall not issue a certificate for any permit issued pursuant to Section 6 until it makes these findings. WW suggested removing “results clearly indicate” from the rules as drafted as that may be a new, undefined standard.

Department Response: As written in the draft rules, the condition prohibits issuance of a 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. This condition will be contained in each permit (not providing offset) issued in the subareas under Section 6. If the groundwater study finds that permits issued without offset in the subareas are part of the same aquifer system, and are hydraulically connected to areas with long-term groundwater level declines, it would not be prudent to add new consumptive uses to that aquifer system that will, in the short or long-term, contribute to groundwater level declines. The standard protection for senior users, and basic water availability standard for new allocation, includes evaluating three issues: no injury, use is within the capacity of the resource, and the resource is not over-appropriated. Because each permit issued under Section 6 will require construction of a dedicated observation well at the site, site-specific data will be collected during the study. As such, that additional text is appropriate.

WW’s suggestions for clarifying language are helpful and don’t create any new major limitations on the existing applications.

The Department believes that providing a reasonable period of time to permit holders (not providing offset) in the two subareas, for finding offset water, is appropriate.

Suggested modification to OAR 690-512-0020(6)(c):

(c) Permits issued according to this subsection shall be conditioned to prohibit use of water if, based on the Department's Harney Basin Groundwater Study results clearly indicate groundwater study, the Department cannot make a finding that the groundwater use is within the capacity of the resource, is not over appropriated, or causes will not cause injury to senior water users. The permit holder will have three years from the date the study is published to provide offset water in the manner described in subsection (4) within three years of the final report being issued before being regulated off. The Department shall make the findings described in this subsection for each permit issued under Section 6 within one year of completing the Harney Basin groundwater study. The Department's findings described in this subsection shall include site-specific substantial evidence.

3. Draw-Down Condition for New Permits (OCA)(Otle)(Owens)(Evans)(WW)

The OCA, Otle, Owens, and Evans all favor language from a standard Department drawdown condition in permits issued around Oregon, some of which allow up to 25 feet of decline (as measured from March groundwater levels) prior to regulation of the groundwater use, and includes a provision that groundwater use may resume if groundwater levels recover. Other aspects of the standard decline condition target groundwater level changes of different amounts over different periods of time. These commenters suggest that a 10-foot decline, in the current draft of the rules, may not allow adequate time for recovery of capital investments, and as such, none of the pending applicants would take advantage of any of the flexibility offered by these rules.

WW supports the 10-foot decline condition proposed in the draft rules, and indicates that if groundwater use has already begun at an unpermitted well, then the Department should estimate the original groundwater level at the time pumping began to establish the reference level against which groundwater level declines would be judged, such that the unpermitted use would not be rewarded.

Department Response: A decline condition of 10 feet is more protective of existing senior groundwater users than allowing for 25 feet of decline. Limited geological and well log data, along with groundwater level data, suggest that the saturated aquifer thickness is adequate to allow for some groundwater level decline to occur without substantial interference between wells. Each permit issued under these rules will require installation of an observation well, which will provide timely and accurate groundwater level data at each site, in addition to other measurements made on the production wells. The presence of a dedicated observation well at each site will allow for timely regulation of the permitted groundwater use, if necessary. The Department proposes only one decline condition, an intermediate decline value of 18 feet, be contained within a condition on each permit issued under these rules. The Department added clarifying language such that the 18-foot decline applies to March groundwater levels as measured in the observation well and production wells authorized by the permit. The Department added this language to address the possibility that some production wells may be completed to a different depth than the

observation well. However, the overall goal is to have the observation well completion interval at the same elevation as the production wells.

With regard to establishing a reference level for users who have pumped without a permit, the Department does not support this change as it would be impractical to implement. Suggested modification to OAR 690-512-0020(7)(b):

(b) All groundwater pumping authorized by ~~the~~ this permit is prohibited if March groundwater levels indicate ~~10-18~~ feet or more of decline has occurred, as measured in the observation well, has been or any production well authorized by this permit, when compared to the first March measurement for that well following permit issuance. 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~~ observation well has recovered to less than ~~1018~~ feet of decline when compared to the first March measurement.

4. Formation of RAC at the Conclusion of the Study to Consider Revisions (OFB)

The OFB suggested that the Department's groundwater study referenced in 690-512-0020(11), should require the Department to initiate a new Rulemaking Advisory Committee (RAC) at the conclusion of the study to determine if the basin rules need additional revision. At a minimum, the RAC should include members of the Groundwater Study Advisory Committee.

Department's Response: The Department agrees that it is reasonable that a RAC be convened after the study is concluded and has adjusted the final proposed rules accordingly. The Department will invite members of the Groundwater Study Advisory Committee to serve on the RAC.

A new subsection has been added to the final proposed rules as follows:

(12) Within 1 year after the Harney Basin groundwater study discussed in subsection 11 has been published by the Department, the Department will convene a Rules Advisory Committee to explore whether there is a need for updates or changes to these rules. Members of the Groundwater Study Advisory Committee will be invited to participate on the Rules Advisory Committee.

5. Ground Water Study Provisions (OCA)(Otle)(Owens)(Evans)(HCWC)(OFB)(WW)(TNC)

Several commenters had suggestions or concerns under the general category of the groundwater study. The comments of the OCA, Owens, Evans, Otle, HCWC and OFB were closely aligned in suggesting minor changes to subsection 11 of the draft rules, with the intent of involving individuals from the community during the groundwater study, that the study should evaluate and consider data collected by locals, and that the Department will collaborate with the community regarding actions or decisions that may result from the study.

TNC and WW urged adequate representation on the Study Advisory Committee (SAC) from the conservation community.

OFB suggested that prior to publication of the groundwater study report, the Department should provide a draft of the study report to the local SAC for review and comment, and that the Department must respond to the SAC comments prior to publication of the study.

Department Response: The Department agrees that significant involvement of the local community, including conservation and instream interests, during the groundwater study will improve the quality of the study and improve acceptance of study results. The Department has worked with local and conservation groups during previous basin studies and has found this collaborative approach to work well. A SAC also provides the Department the opportunity to conduct significant outreach and education regarding hydrogeological concepts, principles, and groundwater use impacts. The Department will provide the draft study report to the SAC for their review and comments. However, conclusions and study results shall only be modified based on scientific evidence, with the modifications being acceptable to other technical peer reviewers of the report.

Suggested modification to OAR 690-512-0020(11) of the draft rules:

(11) The Department shall plan and conduct the study in coordination with a local Groundwater Study Advisory ~~committee~~ Committee (SAC) to be jointly appointed by the Department and the Harney County Court. The committee shall may 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, conservation and instream interests, and interested members of the public. The Department will work with the SAC and individual water users to encourage the collection and use of hydrogeologic data. As part of the study process, the Department shall review and consider relevant data provided by or through the Groundwater SAC. The Department shall report quarterly to the Groundwater Study Advisory committee-SAC to provide updates on the study status, data analyses and preliminary findings, and shall collaborate with the SAC with regard to actions and decisions that may result from the study. The Department shall provide the SAC a draft of the groundwater study report for review and comment prior to publishing the final report. The final groundwater study report shall be peer-reviewed.

6. Limitations on new groundwater use in this area (Otley)

Otley submitted testimony that the local belief is that there are at least three distinctly separate large aquifers and a number of small aquifers that are separate and distinct.

Department's Response: As previously reported to the Commission, no data exists today to support the conceptual model of multiple, separate, distinct aquifers in the basin. Based on the data available today, and the Department's experts' experience and studies in other basins, the Department's current conceptual model is that the basin is composed of one aquifer system, with recharge occurring in the uplands, and groundwater flowing downgradient generally towards Malheur and Harney Lakes. A preliminary review of groundwater level data, measured in over 150 wells in March 2016, supports this conceptual model. The Department recognizes that the aquifer system is highly variable given the complex nature of the geology in the basin. Groundwater use within the GHVGAC, even in areas distant from those with groundwater level declines, will eventually contribute to the current groundwater level declines within the GHVGAC unless there are separate and distinct aquifers. If the Department were to continue to issue permits as it has done in the past, without data to support a finding of distinctly separate aquifers, these declines would be exacerbated.

No changes to the rules.

7. Due process for applications pending prior to the Department's announcement regarding groundwater concerns in the basin (Court)

The Court commented that "pending applications should be reviewed and given due process that was applicable prior to the declaration of the need for a groundwater study by the Water Resources Department."

Department Response: It is the Department's duty to evaluate whether or not groundwater is available within the resource for each new application. The Department will re-review an application, when appropriate, before a final order is issued if the understanding of the resource has changed. Some applicants think that the Department should make its groundwater findings based on the information and understanding of the resource at the time the application is filed and shouldn't be able to update those understandings or findings while the application is pending.

No changes to the rules.

8. Concerns about Creation of a System for Offsets (OFB)

The OFB is concerned that the trading system to "offset" the development of a new water right allows those with the most resources to pay the most for an existing permit, and jump to the head of the line.

Department's Response: This issue was discussed at length during the RAC meetings. The majority of the RAC was in favor of the system that is reflected in the rules. This system will likely allow those with more monetary resources to obtain offset water. The rules include a provision that awards voluntary cancellations of permits and certificates to offset the next application in line according to its tentative priority date.

No changes to the rules.

9. Concerns about declining spring flows. (Yriarte)

Mr. Yriarte's family has water rights to springs in the Double O Valley, which is within the GHVGAC. Mr. Yriarte indicated that the spring levels have dropped, as have groundwater levels in their stock wells. Mr. Yriarte suggests that the springs be monitored, and also proposed a reduction in groundwater use back to 2010 priority dates, and earlier if needed, to allow the groundwater levels time to recover.

Department's Response: One component of the groundwater study will be an inventory of springs in the basin, where spring discharge will be measured or estimated, and water quality samples will be collected. The Department has had preliminary conversations with the US Geological Survey (USGS) and Portland State University (PSU) regarding these tasks. The USGS is working with US Fish and Wildlife to study and monitor springs on refuge property. The Department will make sure that Mr. Yriarte's springs are part of the

groundwater study. One primary focus of the groundwater study will be collection of significant groundwater level data which, when coupled with groundwater use data, will be used to evaluate aquifer capacity, helping us understand the annual sustainable yield of the aquifer system. The Department does not have sufficient information to support groundwater curtailment at this time.

No changes to the rules.

10. Limitation of the amount of acre-feet that can be permitted using the offset provision. (WW)

WW suggested that the rules be changed to limit the amount of offset water outside of the subareas to 10,000 acre-feet.

Rule in question: 690-512-0020(4)(e)

Department Response: This concept was not brought up until the written comment period so there was no discussion of the concept during any of the six RAC meetings. A new major limitation on existing applications at this point in the rule process is not supported by the Department.

No changes to the rules.

11. Recommends Not Issuing any New Permits that would Potentially Drawdown Malheur Lake (WW)

WW suggested that the rules be changed to disqualify applications from using either the offset provisions (690-512-0020(4)(a)) or the subarea provisions (690-512-0020(6)(a)) if there is the potential to drawdown Malheur Lake.

Department Response: The hearing draft of the rules requires that applications are not eligible to use the offset or subarea provisions if there is the potential for substantial interference as determined pursuant to OAR 690-009. The potential for substantial interference with surface water (OAR 690-009) is a defined standard whereas the proposed new standard is not a defined standard.

No changes to the rules.

12. Other Issues or Suggestions that are outside the scope of this rulemaking

Simmons and McCanna had questions about their particular situation but did not have suggestions or comments on the rules. The Department is following up with these two commenters separately.

WaterWatch raised concerns about illegal use which is a subject that is not appropriate for addressing in a basin program rulemaking. The Department will follow up with WaterWatch separately on this issue.

Review of Oral Comments:

A total of 10 people provided oral comments at the hearing. Six of these commenters also provided written materials. Four of the oral commenters did not provide written materials. Most of the comments made during the two hearings are captured either in their own written comments or in the written comments of others. Only comments that identify issues related to the rulemaking that are not addressed above are summarized below. See attachment 2 for a full summary of oral comments.

1. Wayne Evans stated his concerns about the economic impact to the county as a result of these rules. He listed several different types of agriculture related business that will be affected by the rules.

Department Response: The rules will allow some number of additional permits to be issued. Without the rules, no additional permits would be issued. The rules will be updated, as appropriate, when the study is concluded. Having groundwater declines in some areas of the basin is and will have a negative economic impact of the basin. However, the rules, by themselves, provide a positive economic impact to the GHVGAC because they allow for some number of permits to be issued that would not be issued if the rules were not adopted and implemented.

No changes to the rules.

2. Fred Otley made an additional point in his oral comments that was not in his written comments. He is concerned about a potential scheduling problem related to the requirement that new permit holders have to have an observation well drilled within six months with no exceptions. It might be a problem to schedule a well driller within this six month timeframe.

Department Response: The Department is sympathetic to this issue and will work with applicants who are about to have a permit issued. We will confirm that applicants understand the time requirements of the permit and that they want the permit to be issued. If they are having a problem with scheduling a well driller we can hold up permit issuance until they are ready.

No changes to the rules.

3. Pete Runnels had a concern about the study funding and wants the study completed in a timely manner.

Department Response: No changes to the rules.

4. Tom Shaffer and Erin Maupin indicated that they do not agree with the approach that the Department is taking.

Department Response: No changes to the rules.

Proposed Final Rules showing changes from hearing draft

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 water use, 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~~ the GHVGAC 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~~ **Since April 15, 2016, there** has not been a total of 7,600 acre feet of irrigation permits issued in the Northwest sub-area, and 1,300 ~~660~~ **660** 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~~ **use** of a water right certificate if, **based on** the Department's Harney Basin ~~Groundwater Study results clearly indicate~~ **groundwater study, the Department cannot make a finding** that the groundwater use is ~~not~~ within the capacity of the resource, is **not** over appropriated, or ~~causes~~ **will not cause** injury to senior water users. **The permit holder may provide offset water in the manner described in subsection (4) within three years of the final report being issued. The Department shall make the findings described in this subsection for each permit issued under Section 6 within one year of completing the Harney Basin groundwater study. The Department's findings described in this subsection shall include site-specific substantial evidence.**

(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~~ **this** permit is prohibited if March groundwater levels indicate a ~~+1018~~ **1018** feet or more **of decline has occurred,** as measured in the observation well; ~~has occurred~~ **or any authorized irrigation well,** 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~~ **observation** well has recovered to less than ~~+1018~~ **1018** 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 or certified 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 or certified 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.~~ permitted or certified well.

(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 aquifer 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 scientifically 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~~ Committee (SAC) to be jointly appointed by the Department and the Harney County Court. The committee ~~shall~~ may 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, conservation and instream interests, and interested members of the public. The Department will work with the SAC and individual water users to encourage the collection and use of hydrogeologic data. As part of the study process, the Department shall review and consider relevant data provided by or through the Groundwater SAC. The Department shall report quarterly to the Groundwater Study Advisory

~~committee~~SAC to provide updates on the study status, data analyses and preliminary findings, and shall collaborate with the SAC with regard to actions and decisions that may result from the study. The Department shall provide the SAC a draft of the groundwater study report for review and comment prior to publishing the final report. The final groundwater study report shall be peer-reviewed.

(12) Within 1 year after the Groundwater Study discussed in subsection 11 has been published by the Department, the Department will convene a Rules Advisory Committee to explore whether there is a need for updates or changes to these rules. Members of the Groundwater Study Advisory Committee will be invited to participate on the Rules Advisory Committee.

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

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 water use, 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 the GHVGAC 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) Since April 15, 2016, there has not been a total of 7,600 acre feet of irrigation permits issued in the Northwest sub-area, and 1,660 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 use of water if, based on the Department's Harney Basin groundwater study, the Department cannot make a finding that the groundwater use is within the capacity of the resource, is not over appropriated, or will not cause injury to senior water users. The permit holder may provide offset water in the manner described in subsection (4) within three years of the final report being issued. The Department shall make the findings described in this subsection for each permit issued under Section 6 within one year of completing the Harney Basin groundwater study. The Department's findings described in this subsection shall include site-specific substantial evidence.

(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 this permit is prohibited if March groundwater levels indicate 18 feet or more of decline has occurred, as measured in the observation well or any authorized irrigation well, 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 observation well has recovered to less than 18 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, permitted or certificated 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, permitted or certificated 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, permitted or certificated well..

(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 aquifer 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 scientifically peer-reviewed. The study is planned to be completed by the end of the year 2020.

(11) The Department shall plan and conduct the study in coordination with a local Groundwater Study Advisory Committee (SAC) to be jointly appointed by the Department and the Harney County Court. The committee may 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, conservation and instream interests, and interested members of the public. The Department will work with the SAC and individual water users to encourage the collection and use of hydrogeologic data. As part of the study process, the Department shall review and consider relevant data provided by or through the Groundwater SAC. The Department shall report quarterly to the Groundwater SAC to provide updates on the study status, data analyses and preliminary findings, and shall collaborate with the SAC with regard to actions and decisions that may result from the study. The Department shall provide the SAC a draft of the groundwater study report for review and comment prior to publishing the final report. The final groundwater study report shall be peer-reviewed.

(12) Within 1 year after the Groundwater Study discussed in subsection 11 has been published by the Department, the Department will convene a Rules Advisory Committee to explore whether there is a need for updates or changes to these rules. Members of the Groundwater Study Advisory Committee will be invited to participate on the Rules Advisory Committee.

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.

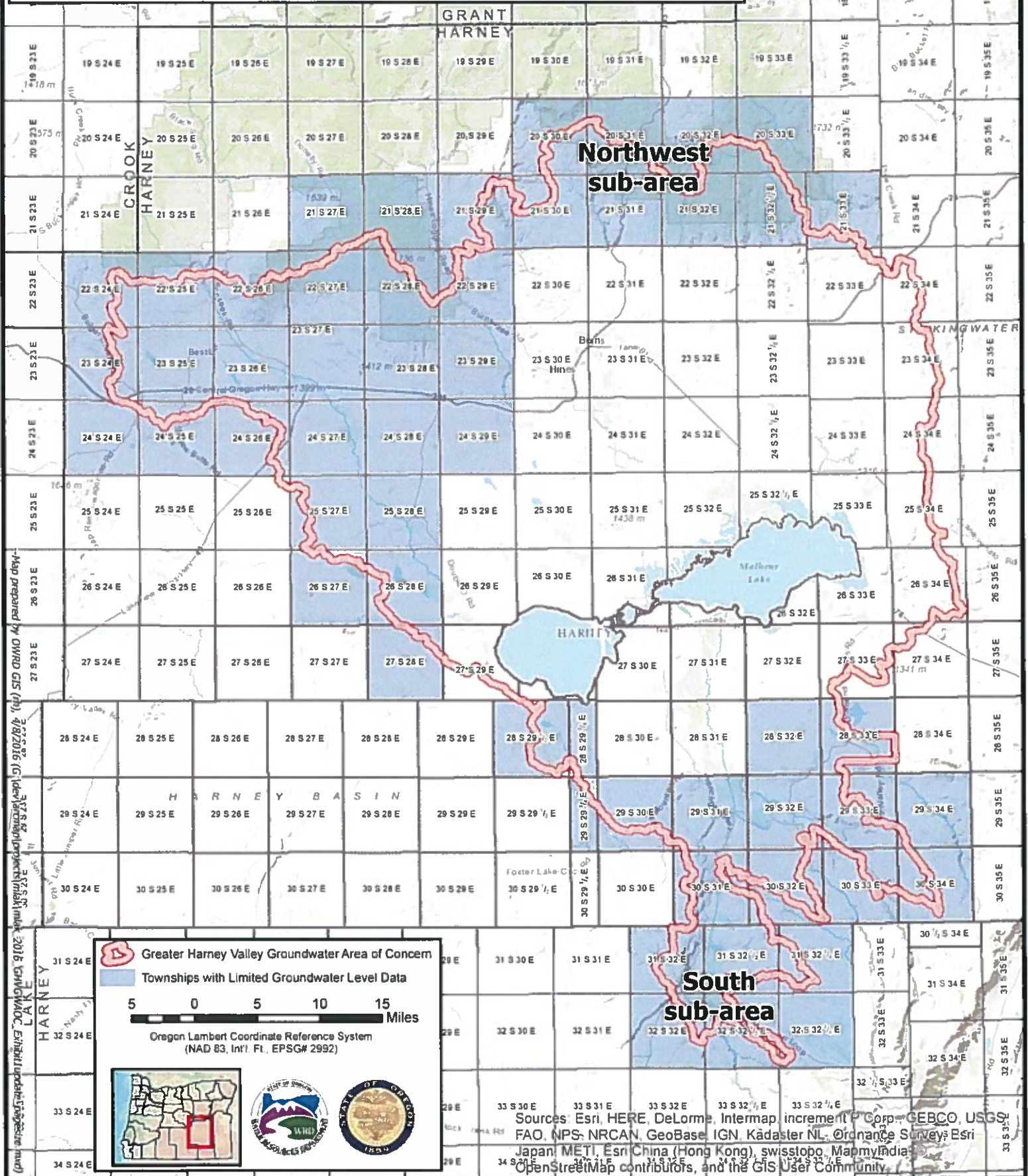
Stat. Auth.: ORS 536 & 537

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

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

Proposed under OAR 690-512-0020

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



Groundwater applications pending in GHVGAC as of April 6, 2016

	Application #	Applicant	Priority Date
1	G-17592	Golden Rule Farms	10/26/2012
2	G-17799	Thorenfeldt, Bo	3/19/2014
3	G-17834	Root, Andy	4/11/2014
4	G-17859	Scott, Kent and Darla	11/5/2014
5	G-17873	Jones Ranch	6/6/2014
6	G-17874	Arntz, David and Deborah	6/10/2014
7	G-17881	DCR Hay Co	6/26/2014
8	G-17896	Travis, Mike	7/15/2014
9	G-17902	Rattlesnake Creek Land and Cattle Co LLC	8/8/2014
10	G-17906	Dunbar, William	8/14/2014
11	G-17908	Koehn, Cameron and Rachel	8/8/2014
12	G-17910	Gilmour, James and Sue	8/25/2014
13	G-17913	Evans, Wayne/ Dry Mountain Ranch LLC	8/29/2014
14	G-17915	Campbell, Denis and Doug/ Haywire Farms	9/2/2014
15	G-17916	Singhose Land and Cattle Co LLC	9/2/2014
16	G-17926	Evans, Wayne/ Dry Mountain Ranch LLC	9/16/2014
17	G-17930	Maupin, Erin and Jeffrey	9/24/2014
18	G-17934	Nichols, Dan	10/3/2014
19	G-17935	Nichols, Dan	10/3/2014
20	G-17936	Evans, Wayne	10/6/2014
21	G-17940	Jager, Gerrit and Patricia	9/23/2014
22	G-17941	Bradach, Chad	10/10/2014
23	G-17946	Reitz, Darold	10/20/2014
24	G-17947	Stashin, Matthew	10/20/2014
25	G-17957	Singhose Land and Cattle Co LLC	11/4/2014
26	G-17961	Gilmour, James and Sue	11/13/2014
27	G-17970	Mace, Jamie and Shawn	12/3/2014
28	G-17972	Peila, Chance and Dana	12/5/2014
29	G-17973	Van De Stroet, Jesse	12/5/2014
30	G-17977	Ensz, John	12/23/2014
31	G-17991	Harney Ranches LLC/ Vetter, Tom	2/5/2015
32	G-18000	Otley, Larry and Susan/ Riddle Ranch Inc	2/17/2015
33	G-18018	Totland, Ronald	3/23/2015
34	G-18024	Titus, Todd	3/19/2015
35	G-18030	Potter, Jacob	4/6/2015
36	G-18049	Gilmour, James and Sue	4/13/2015
37	G-18093	Stalcup, Karena	5/26/2015
38	G-18129	Otley Brothers Inc	8/11/2015

Note: Shaded applications are located within the sub-areas.