Oregon
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MEMORANDUM

TO: Water Resources Commission

FROM: Thomas M. Byler, Director

SUBJECT: Agenda Item A, April 12, 2019
Water Resources Commission Meeting

Request for Adoption of Rules Relating to Groundwater Use Regulation to Protect Senior Surface Water Rights in the Upper Klamath Basin (Oregon Administrative Rules Chapter 690, Division 025)

I. Introduction

The Oregon Water Resources Department (Department) is requesting the Oregon Water Resources Commission (Commission) to consider adoption of rules that conjunctively manage groundwater and surface water in the Upper Klamath Basin. The proposed rules describe the process the Department will use to regulate junior groundwater rights when a call is made by a senior surface water right holder.

II. Background

A. The Klamath Adjudication and the Final Determinations of the Director

The Klamath Basin Adjudication is the legal process in which water rights which vested before adoption of Oregon's water code in 1909 are established through proceedings that began with the Department and are now pending in the Klamath County Circuit Court. The Klamath Basin Adjudication began in 1975 with the Department conducting the initial processes of providing notice for the filing of claims, evaluating claims, accepting contests to claims, and hearing contested cases to resolve contests. On March 7, 2013, the Department issued its Findings of Fact and Final Order of Determination and referred the case to the Klamath County Circuit Court. On February 28, 2014, the Department issued its Amended and Corrected Findings of Fact and Final Order of Determination (ACFFOD) and subsequently filed it with the court. Upon issuance of the ACFFOD, and while the matter is pending in the Klamath Circuit Court, the Department is directed by ORS 539.170 to distribute water in accordance with the priority dates established in the ACFFOD.

B. The Upper Klamath Basin Comprehensive Agreement

On April 18, 2014, a group of parties to the Klamath Adjudication, and others with interests in the Upper Klamath Basin, entered into the Upper Klamath Basin Comprehensive Agreement (UKBCA). The UKBCA sought to: (i) support the economic development interests of the Klamath Tribes; (ii) provide a stable, sustainable basis for the continuation of agriculture in the Upper Klamath Basin; (iii) manage and restore riparian corridors along streams that flow into Upper Klamath Lake in order to achieve proper

functioning conditions permanently; and (iv) resolve controversies regarding certain water right claims and contests in the Klamath Adjudication.

Among its terms, the UKBCA described the parties' agreement on a proposed method to determine the circumstances under which groundwater wells would be regulated in response to a valid call on surface water including determined claims for instream flows. The UKBCA specified that the use of groundwater with a point of appropriation that is no more than 500 feet from a Gaining Reach (a defined term) would be regulated off when a valid senior surface water right call was made. With regard to groundwater rights with a point of appropriation that was greater than 500 feet from a Gaining Reach, the UKBCA specified a process for determining whether regulation of those rights would provide "effective and timely" relief for the surface water right. The agreement also specified that the Department would prepare rules containing the provisions of the UKBCA and bring them to the Commission for review and adoption.

In late 2014 and early 2015, Department staff and a rule advisory committee prepared draft rules following the provisions agreed to by the parties to the UKBCA. In early 2015, the Commission adopted the proposed rules as OAR Chapter 690, Division 025. Division 025 included a term stating that if the UKBCA was terminated, the Division 025 rules would no longer apply, and groundwater regulation would occur under statewide rules (OAR Chapter 690, Division 009).

C. The Negative Notice and the Effect on Division 25 Rules

For three irrigation seasons, between 2015 and 2017, wells in the Upper Klamath Basin were regulated under the Division 025 rules. The Department's regulation of groundwater according to the terms of the Division 025 rules resulted in 50 wells being subject to regulation. In response to the regulation during that period, 16 lawsuits were filed, including those challenging surface water regulation and groundwater regulation. In 2017, consolidated cases for several landowners went to trial in Marion County Circuit Court where the Department prevailed. The landowners appealed to the Oregon Court of Appeals where the matter remains pending.

On December 28, 2017, the Secretary of the Interior published a "Negative Notice" terminating the UKBCA, upon a finding that all of its conditions could not be achieved. Consequently, the Division 025 rules terminated, and regulation of wells during 2018 was pursuant to the Division 009 rules. Under the Division 009 rules, 140 wells were subject to regulation. In response to the regulation of groundwater rights in 2018, 13 petitions for judicial review challenging the Department's regulatory orders were filed.

D. Next Steps

During the winter of 2018, the Department commenced a two-step process that is intended to assist with the public's understanding of basin hydrology and result in a long-term approach for surface water-groundwater management in the Upper Klamath Basin. The first step was development of this request that the Commission adopt interim Division 025 rules repealing the terminated rules and replacing them with rules which, when administered, will result in the regulation of seven wells in the Upper Klamath Basin during the 2019 and 2020 irrigation seasons.

The second step, beginning this summer, will include public meetings, small group meetings, and open house events to discuss and accept public input on surface water and groundwater management options in the area. Following public outreach, the Department, with assistance from a rules advisory committee, will develop proposed permanent rules specific to surface water and groundwater management.

III. Overview of the Rules

To address the first step in the two-step process, the Department is requesting the Commission to adopt interim Division 025 rules repealing the terminated rules and replacing them with rules, which when administered, will result in regulating wells that are within 500 feet of a surface water sources. The proposed rules would operate in lieu of OAR Chapter 690 Division 009.

As discussed, the proposed rules are intended as a short-term approach that will allow the Department to continue regulation in the Upper Klamath Basin while developing long-term water management solutions. The approach codified in the proposed rules is supported by peer-reviewed scientific and technical studies of the Upper Klamath Basin's geology and hydrogeology, and also represents an exercise of the Department's discretion to determine when regulation will result in an actual remedy to senior surface water uses. Based on the science and the Department's discretion, the proposed rules reflect that regulation of groundwater rights using wells within 500 feet of a surface water source will benefit senior surface water rights within the 2019 and 2020 irrigation seasons. Please refer to Attachment A: Authority and Supporting Evidence for the Commission's Action.

In seeking long-term water management strategies beyond adoption of the current rules, the Department acknowledges the importance of ongoing scientific study. The Department's efforts will include seeking input from the regulated community, from senior surface water users, and from the communities in the Upper Klamath Basin. In addition, the Department will continue to examine the best available scientific and technical work. The information and input the Department considers will aid it in developing policies that assure that water is used within the capacity of the resource, that regulation of water according to the existing rights of record continues, that adequate and safe supplies of groundwater can be assured, and that groundwater use will not impair surface water rights.

If adopted, these proposed rules will be in effect until March 1, 2021, when the Department will request the Commission to adopt more comprehensive rules that reflect a long-term approach for water management in the area. The Department intends to pursue significant engagement and outreach with the water user community and stakeholders in the basin to develop the comprehensive, permanent rules.

An overview of the proposed rules is as follows:

- *The Department is proposing to repeal OAR 690-025-0010.* As noted above, this rule was adopted to govern groundwater regulation in the Klamath Basin, while the UKBCA was in effect. When the UKBCA was terminated, this rule is no longer in effect.

- *The Department is proposing to adopt OAR 690-025-0020.* This proposed rule defines terms used in OAR Chapter 690, Division 025, including sections -0025 and -0040. For example, the "Upper Klamath Basin" is defined the area above and around Upper Klamath Lake that encompasses all water sources that are tributary to Upper Klamath Lake, including groundwater, the Wood River, Williamson River and Sprague River and their tributaries and the Klamath Marsh and its tributaries. Please refer to Attachment B: Map of Upper Klamath Basin Proposed Rules Boundary.

- *The Department is proposing to adopt OAR 690-025-0025.* This proposed rule provides that the Department may manage surface water and groundwater uses to protect senior holders of water rights and authorizes regulation of groundwater and surface water in accordance with the user's

water rights and determined claims pursuant to these rules, instead of pursuant to OAR Chapter 690, Division 009.

- *The Department is proposing to adopt OAR 690-025-0040.* This proposed rule provides the Department's findings that within the Upper Klamath Basin, a joint study by the Department and the U.S. Geological Survey determined that groundwater and surface water are hydraulically connected, such that wells that withdraw groundwater in the Upper Klamath Basin reduce groundwater discharge and surface water flow within the Upper Klamath Basin. These findings are based upon the best available information used in the course of applying generally accepted hydrogeologic methodologies. The rules reflect the Department's finding that regulation of wells within 500 feet of surface water will result in relief to holders of surface water rights within the 2019 and 2020 irrigation seasons. The rules further specify that the Department shall determine the distance between each well and the source of surface water rights, and that the Department may regulate these wells when a valid call is made by a holder of a senior right or determined claim. The rules specify an effective date and that they do not set a precedent that precludes different or additional regulation as may be established in future rulemakings.

To review the Department's proposed final rules please refer to Attachment C: Final Proposed Division 025 Rules.

IV. Overview of the Rulemaking Process

The Department's rulemaking process involved several steps including:

- *Rulemaking Advisory Committee (RAC)* - In January 2019, a RAC was appointed and draft rules were provided to RAC participants. RAC meetings open to the public were held on January 15, 2019, and January 28, 2019, at the Oregon Institute of Technology. To review a list of RAC participants please refer to Attachment D: Division 025 Rulemaking Advisory Committee Participants.

- *Secretary of State, Notice of Proposed Rulemaking* – The Department filed a Notice of Proposed Rulemaking on January 29, 2019, and official notice was provided to stakeholders in accordance with rulemaking procedures on February 1, 2019. Please refer to Attachment E: Secretary of State, Notice of Proposed Rulemaking.

- *Groundwater Advisory Committee (GWAC)* – The GWAC consists of nine members appointed by the Commission to provide advice on the development of rules, among other responsibilities. ORS 536.090. OAR Chapter 690, Division 235. The Division 25 interim rules were presented to the Committee on February 19, 2019. Please refer to Attachment F: Groundwater Advisory Committee, for a list of members and their rulemaking recommendation.

- *Public Hearing(s)* - During this rulemaking process the Department held two public hearings for interested stakeholders to share testimony. More specifically, nine individuals testified at the first public hearing held during the Water Resources Commission Meeting of February 21, 2019. At the second public hearing, held on February 26, 2019, at the Oregon Institute of Technology and facilitated by Department staff, fourteen individuals testified. Please refer to Attachment G and H for the respective public hearing transcripts.

- *Public Comment(s)* – During this rulemaking process the Department collected written comments from interested stakeholders to share testimony. Overall, twenty-eight written comments were

received by close of business on March 4, 2019. To review written comments received, please refer to Attachment I.

- *Secretary of State, Notice of Proposed Rulemaking, Amended Fiscal Impact* – The Department amended the fiscal impact portion of the Notice of Proposed Rulemaking on March 28, 2019, and official notice was provided to stakeholders in accordance with rulemaking procedures on March 28, 2019, and March 29, 2019. The amended section addressed inaccuracies related to how the decrease in regulation of groundwater users will affect senior water right users. The proposed rules will result in fewer groundwater users being regulated off than in the past four irrigation seasons which may result in an increased fiscal impact to senior surface water users. Please refer to Attachment J: Secretary of State, Amended Notice of Proposed Rulemaking.

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

As noted above, the official record of public comment received during this rulemaking process is included in this Staff Report; please refer to Attachments G and H for transcripts of public hearings and Attachment I for the respective public comment submissions. The record reflects the following individuals participated in this aspect of the Department's rulemaking process:

Name	Organization Representing
Bruce Topham	Flying T. Ranch
Erika Norris, speaking for Virginia Topham	Flying T. Ranch
Lisa Brown	WaterWatch of Oregon
Kevin Newman	Sprague River Water Resource Foundation
Roger Nicholson	Fort Klamath Critical Habitat Landowners
Hannah SeCoy, speaking for Susan Topham	
Davis Mosby	Bar-Y Ranch
Tom Mallams	Oregon Cattlemen's Association and Irrigator
Brandon Topham	
Nathan Jackson	Oregon Cattlemen's Association
Don Gentry	Klamath Tribes
Brad Parrish	Klamath Tribes
Conrad Fisher	Water Climate Trust
Paul Wilson	Klamath Tribes
Del Fox	Irrigator
Steve Hartsell	Rancher
Hollie Cannon	Wood River District Improvement Company
Bill Gallagher	Rancher
Margaret Jacobs	Irrigator
Jerry Jones	Irrigator
Eric Duarte	Irrigator, Sprague River Resources Foundation
Willa Powless	Klamath Tribes
Mark Johnson	Klamath Water Users Association
Lee Traynham	Wood River District Improvement Company
Mike LaGrande	Wood River District Improvement Company
Anthony and Mary Booker	
Michael Harding	

Steve and Suzanne Cornell	
Steve Cornell	
Ann SeCoy	
Joan Amaral Sees	
Leland Hunter	
Rob Wallace	
Bodie Shaw	Bureau of Indian Affairs
Nora Koenig	
Troy Brooks	
Shane Smith	
Rex Cozzalio	
Jacqui Krizo	
Jerome Rosa	Oregon Cattlemen's Association
Mary Anne Cooper and Jon Moxley	Oregon Farm Bureau

In reviewing the official record of public hearing testimony and written comments submitted, three themes emerged for Department consideration: (1) Scope of Departmental Authority; (2) Rulemaking Process and Outcomes, and (3) Model approach v. site-specific well testing to determine hydraulic connection between groundwater and surface water. Examples of sentiments pulled from official comments are included below. The Department's response to these themes are addressed throughout this Staff Report. The Department's response to individual comment is included in Attachment K.

Theme 1: Scope of Departmental Authority

- "Consideration of the Tribe's proposed changes is warranted and necessary to ensure the Department remains in compliance with its statutory obligations." – Brad Parrish, Klamath Tribes

- "We do not think the Department can regulate an entire agriculture community off on the basis of a hydraulic model without site-specific data nor without giving ranchers due process." - Eric Duarte, Sprague River Resource Foundation, Inc.

- "The proposed Division 25 rules, however, include unnecessary factual findings for the purposes of the proposed rules that OCA believes OWRD may attempt to use to prevent groundwater users from challenging future groundwater regulation by OWRD." – Jerome Rosa, Oregon Cattlemen's Association

- "The Department's proposed Division 25 rules appear to evidence a wholesale change to how it's approaching ground/surface water regulation during this interim period, and the rules seem designed to limit the opportunities to challenge the Department's science during this interim." – Mary Anne Cooper and John Moxley, Oregon Farm Bureau

- "Instream rights enjoy the same protections under the water code as any other surface water right and the agency's failure to afford these senior instream rights the protections due is alarming. The agency does not get to pick and choose which types of rights it regulates to protect." – Lisa Brown, WaterWatch of Oregon

Theme 2: Rulemaking Process and Outcomes

- "Because of the investment the WRDIC has put into the wells, based on OWRD conditions in the permit and the original Division 25, WRDIC has no option but to pursue the use of these wells either through the OWRD rule making process or through court. We would much rather reach a reasonable solution through the rule making process." – Lee Traynham, Wood River District Improvement Company

- "After reviewing the above-referenced proposed rules we conclude that the proposed interim rules are a reasonable compromise and should be adopted by the Commission immediately." - Anthony and Mary Booker

- "Over allocation of groundwater resources through development of unsustainable OAR's including interim OAR's is not acceptable and should not be abetted by the Department." – Brad Parrish, Klamath Tribes

- "However, if the Commission is not inclined to adopt the attached revisions, Sprague River nevertheless supports the Department's overall approach of backing off regulation to provide a two-year period for the parties to try to resolve the difficult legal, factual and scientific disputes relating to groundwater regulation in the basin." - Eric Duarte, Sprague River Resource Foundation, Inc.

- "While we disagree with the department's use of its ground/surface water models in the basin and the findings the draft rule codifies, we do support limiting enforcement to 500 feet in the immediate term while water users work with OWRD to find better agreement on the science in the basin." – Mary Anne Cooper and John Moxley, Oregon Farm Bureau

Theme 3: Model approach v. site-specific well testing

- "...respect has not been demonstrated by changing the scientific assumptions that OWRD must use in calculating the amount of water that ranchers use in making hay." – Ann SeCoy

- "Even though these rules are temporary, they set a dangerous precedent for how water is managed in the west by codifying the fallacy into law that all surface water and groundwater is connected." – Susan Topham

- "These statements from the majority of the RAC members prompted them to request that each well be tested individually to conclude if a well is definitely interfering with a surface water source prior to regulating-off that particular well." – Joan Amaral Sees

- "In the Upper Klamath Basin, groundwater and surface water are extensively interconnected and groundwater resources are a significant source of flows for surface streams and rivers...Further depletion of groundwater will impact these surface flows by over allocating available water resources." – Brad Parrish, Klamath Tribes

- "Given the extensive data collection and analysis that went into the robust USGS-OWRD groundwater study of the Klamath Basin, the statement in the proposed rules regarding

the connection between surface water and groundwater is certainly not an overstatement or overreach." – Lisa Brown, WaterWatch of Oregon

After consideration of public comments received the Department made edits to the proposed rules. Please refer to Attachment C for the Department's Proposed Final Rules.

VI. Conclusion

The proposed final rules for consideration by the Commission are included in Attachment C. As noted, step two will include significant engagement and outreach with the water user community and stakeholders in the basin to develop comprehensive, permanent rules around water management. The Commission will receive reports on these activities through 2021, at which time, the Department will ask the Commission to consider adoption of rules that will govern long-term management in the basin.

VII. Alternatives

The Commission may consider the following alternatives:

1. Adopt the proposed rules as shown in Attachment C.
2. Adopt the proposed rules as modified by the Commission.
3. Not adopt the proposed rules, which will result in the Department regulating groundwater use in the Klamath Basin in accordance with OAR Chapter 690, Division 009.
4. Not adopt the proposed rules and provide the Department with further direction.

VIII. Director's Recommendations

The Director respectfully recommends Alternative No. 1, to adopt the proposed rules as shown in Attachment C.

Attachments:

- Attachment A: Authority and Supporting Evidence for the Commission's Action
- Attachment B: Map of Upper Klamath Basin Proposed Rules Boundary
- Attachment C: Final Proposed Division 025 Rules
- Attachment D: Division 025 Rulemaking Advisory Committee Participants
- Attachment E: Secretary of State, Notice of Proposed Rulemaking
- Attachment F: Groundwater Advisory Committee
- Attachment G: February 21, 2019 Public Hearing Transcript
- Attachment H: February 26, 2019 Public Hearing Transcript
- Attachment I: March 4, 2019 Written Comments Received
- Attachment J: Secretary of State, Amended Notice of Proposed Rulemaking
- Attachment K: Department Response to Division 025 Public Comment

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Attachment A: Authority and Supporting Evidence for the Commission's Action

Water Resources Commission Meeting – April 12, 2019

A. The Commission's Authority to Conjunctively Manage Groundwater and Surface Water

Basic principles that govern the allocation, management and control of groundwater are contained in the Groundwater Act of 1955, ORS 537.505 to 537.795 and 537.992. With regard to conjunctive management of groundwater and surface water and the regulation of groundwater, ORS 537.525(9) authorizes the Commission to control the use of groundwater whenever there is "impairment of or interference with existing rights to appropriate surface water." The statute contemplates either "voluntary joint action" among the Commission and the groundwater users "whenever possible," but by the commission "under the police power of the state *** when such voluntary joint action is not taken or is ineffective."

In this case, the Department has determined that the groundwater use from pumping and flowing wells is impairing or interfering with existing rights to appropriate surface water in the Upper Klamath Basin. Voluntary joint action, namely the Division 025 rules adopted in line with the water users agreement in the UKBCA, failed. The Commission has authority, under its "police powers", to impose controls upon the groundwater use that is interfering with existing rights to appropriate surface water.

B. Groundwater Use Will Impair Surface Water Sources in the Upper Klamath Basin

As provided in ORS 537.780(2)(b) the Commission may not make any determination that groundwater use will impair a surface water source unless the determination is based on substantial evidence. The Department has determined, according to groundwater studies that have been scientifically peer reviewed, and according to generally accepted hydrogeological principles, that groundwater use in the Upper Klamath Basin impairs groundwater-fed surface water sources in the Upper Klamath Basin.

In addition, ORS 537.780(2)(a) states that any rule restricting groundwater use in an area must be based on substantial evidence in the record to justify the restriction. As demonstrated by the science provided by the Department, the decision to regulate groundwater wells to benefit senior surface water rights is supported by substantial evidence.

The bases for these determinations are described more particularly as follows.

1. Generalized Geology and Hydrology of the Upper Klamath Basin

As described in *Ground-Water Hydrology of the Upper Klamath Basin, Oregon and California* (Gannett et al., 2007) and references therein, the geology of the Upper Klamath Basin is largely characterized by rugged uplands and broad, flat valleys that developed as part of the basin-and-range geologic province (Orr and Orr, 2012; Newcomb and Heart, 1958). Most of the Upper Klamath Basin is underlain by rocks that range in age from approximately 7 million years to 2 million years old and are either extrusive volcanic deposits (lava flows and tuffs) associated with local eruptive centers or sedimentary deposits (with particles ranging in size from clay to gravels) associated with ancient river and lake environments (Sherrod and Pickthorn, 1992). The sediments deposited in the river and lake environments form relatively thick and discrete deposits up to several hundred feet thick which bury the older volcanic layers. These sediments, in turn, can be covered by younger lavas and other volcanic deposits that form the rocky uplands surrounding the valleys (Sherrod and Pickthorn, 1992; Leonard and Harris, 1974; Gannett et al., 2012). In the northern and western parts of the Upper Klamath Basin the underlying

geology is associated with volcanism of the Cascade Range and the rocks are mostly younger there than the rest of the basin (2 million years to recent). Thick sedimentary sequences are far less-common in the Cascades province and the areas are dominated by young volcanic rocks including lava flows and ash-fall deposits (Sherrod and Smith, 2000). The most recent volcanic deposits are the wide-spread ash and pumice layers produced by the eruption of Mt. Mazama approximately 7,700 years ago which formed Crater Lake (Bacon, 2008). These deposits blanket a large portion of the Upper Williamson Subbasin and the northern part of the Wood River Subbasin and produced large, flat valleys as the ash covered the underlying topography (Sherrod and Smith, 2000; Bacon, 2008). The youngest sediments are associated with present-day lakes and marshes mainly around Upper Klamath Lake, Klamath Marsh, and Sycan Marsh.

Both the volcanic and sedimentary rocks described above, which form the major geologic units in the Upper Klamath Basin, host aquifers that are used for both domestic and irrigation purposes (Gannett et al., 2007; Illian, 1970). The volcanic rocks, being older, more brittle, and more fractured, transmit water more readily to wells and generally host higher-yielding aquifers (Gannett et al., 2007; Gannett et al., 2012) that produce more water for pumping wells. The younger volcanic rocks that form the uplands bordering the valleys are also transmissive and readily accept recharge from rain and melting snow. The recharge occurring in the higher-elevation portions of the basin are the beginnings of the groundwater component of the larger hydrologic cycle. The contrast in the elevation between the uplands, where significant recharge occurs, and valley bottoms sets up a groundwater flow system where groundwater moves vertically-downward and laterally from recharge areas down towards the valley centers (Leonard and Harris 1974; Freeze and Cherry 1979; Fetter, 2001). Gannett et al., (2007) compiled groundwater level data from approximately 1,000 wells throughout the Upper Klamath Basin and developed a regional map of the groundwater elevation data (Figure 21 in Gannett et al., 2007). Similar diagrams of the groundwater flow systems can be found in Leonard and Harris (1974), Newcomb and Heart (1958), and Illian (1970). These data, which have been added to and mapped over the decades by groundwater scientists, clearly and consistently show that groundwater flows from the uplands (recharge areas) down towards the valley bottoms which are the regional discharge areas in the river and spring systems in the Wood, Williamson, and Sprague River basins. Significant contributions of groundwater to springs and rivers throughout the Upper Klamath Basin are most easily observed in the summer after the basin has gone months with no significant rain, and the snowpack has long-since melted away, leaving groundwater as the main component of streamflow.

In the valley floors, fine-grained sedimentary deposits (which are less transmissive) overlie the more transmissive volcanic units. These overlying sedimentary deposits add resistance to groundwater movement between the volcanic units and the land surface, creating confined aquifer conditions (Leonard and Harris, 1974) in parts of the Upper Klamath Basin. The converging groundwater beneath the valleys, combined with the resistance added by the overlying sediments, increase pressure in the deeper portions of the aquifer system. Groundwater flows from areas of higher pressure (deep aquifer) to areas of lower pressure (land surface) and this pressure produces flowing artesian wells, and also drives natural groundwater discharge to the surface at springs, seeps, and along stream bottoms. Even with fine-grained sedimentary deposits overlying the more transmissive aquifer system, the pressure is great enough to drive water up through the sedimentary layers to the surface (Freeze and Cherry, 1979; Fetter 2001). The studies and research conducted in the basin to date have found no evidence of extensive volcanic or sedimentary units that are impermeable to flow. Thus, the geologic units are all permeable to some degree, and groundwater is moving through, both laterally and vertically, all parts of the groundwater flow system in the Upper Klamath Basin.

Many artesian flowing wells are located in the Sprague River and Wood River Subbasins (Leonard and Harris, 1974). There are also numerous faults in the Upper Klamath Basin, related to the Basin-and-Range geologic structure described above, and these faults can act similar to a flowing artesian well, where the fault forms a preferential conduit for vertical groundwater movement from the deep pressured systems up to the surface

(Leonard and Harris, 1974; Gannett et al., 2007). In many cases, the fault locations are matched on the surface by large spring complexes or significant gains to streams (Figure 7 in Gannett et al., 2007).

Overall, the Klamath Basin exemplifies a well-connected regional aquifer system where groundwater makes up a considerable part of the hydrologic cycle of springs, streams and rivers. Gannett et al. (2007) with all the assembled data from historical reports, stream discharge measurements, seepage runs, and spring flows within the Upper Klamath Basin, estimated that approximately 1.8 million acre-feet of groundwater discharges annually to springs, streams, and rivers. (To put this volume of water in context, this is greater than the water contained in all 13 reservoirs at full capacity in the Federal Willamette Valley Project.) This groundwater connection and discharge to surface water means that there are summer flows in numerous springs, Spring Creek, the Wood River, and the Sprague River, which are all supported and fed solely by groundwater discharge in the late season so that they flow even after the snow pack is gone and even when there is little summer precipitation.

2. Stream Depletion from Pumping and Flowing Wells in the Upper Klamath Basin

Some of the earliest work on the impacts of groundwater pumping on the hydrologic cycle was published by Theis (1940). Theis' work on the subject, which was summarized and expanded upon by Barlow and Leake (2012 - attached), identified that water is provided to a well through two means: a) reduction in aquifer storage, and b) capture. A *reduction in aquifer storage* is the removal of water from the aquifer resulting in an overall reduction in the volume of water contained in the aquifer. A change in aquifer storage is observed as a water level (or pressure) change in a well completed in the aquifer. Measured groundwater levels that show declining trends year after year, independent of precipitation (recharge) trends are a sign that groundwater use exceeds annual recharge and a reduction in aquifer storage is occurring. Where groundwater levels are stable over time (years), then recharge to the aquifer system is adequate to meet consumptive needs of the pumping or flowing wells. However, since there can be no "free lunch," if the water being pumped is not reducing the storage of water in the aquifer, it must be coming from an alternate source.

Capture occurs when the water level/pressure reduction caused by pumping (or allowing an artesian well to flow) creates artificial hydraulic gradients in the aquifer. The hydraulic gradient is what drives water through the aquifer system and a change in the natural hydraulic gradient as described above causes groundwater to be drawn toward the well instead of flowing along its natural flowpath. As more groundwater flows to the pumping well, natural groundwater flow out of the aquifer is reduced, and this process is defined as *captured discharge* (groundwater that would otherwise discharge to surface water has been captured by the pumping well). In some cases, surface water can be drawn into the aquifer from another source, like a stream, river, or lake, and the process is defined as *induced recharge*. Induced recharge occurs when the natural hydraulic gradient that drives groundwater to discharge to a surface water source is reversed (by groundwater pumping) and the surface water is artificially drawn into the aquifer and towards the well. A reduction in storage and both types of capture can act simultaneously within an aquifer. When a well is pumped, the initial reduction in aquifer storage creates artificial hydraulic gradients, which in turn leads to capture. As capture (either captured discharge or induced recharge) increases, the contribution of water pumped by the well from aquifer storage diminishes. The relative contribution of both mechanisms changes over time but both sources, because of *Conservation of Mass*, must sum to 100% to equal the pumping rate of the well (Barlow and Leake, 2012).

All of the geologic, hydrogeologic, and hydrologic data collected and analyzed as part of the Upper Klamath Basin studies and model development demonstrate the strong connection between the groundwater system and the many springs, streams, rivers, and Upper Klamath Lake. The Department has, over the decades, issued 784 groundwater rights for consumptive uses like irrigation, municipal, stockwater, and commercial/industrial in the Upper Klamath Basin. As these pumping or flowing wells are used for consumptive purposes, they capture

groundwater through either captured discharge or induced recharge, as discussed above. The studies and data collected to date, along with basis hydrologic principles, show that groundwater pumped by water wells in the Upper Klamath Basin is connected to, and has an effect on, surface water. Equations and groundwater flow models (e.g., Gannett et al., 2012) can be used to estimate the amount and timing of impacts to the surface water system from pumping and flowing wells. Uncertainty with respect to timing and magnitude of impact exists when using these tools, but there is no uncertainty that aquifer systems in the basin are hydraulically connected to surface water and that groundwater use results in stream depletion in the Upper Klamath Basin.

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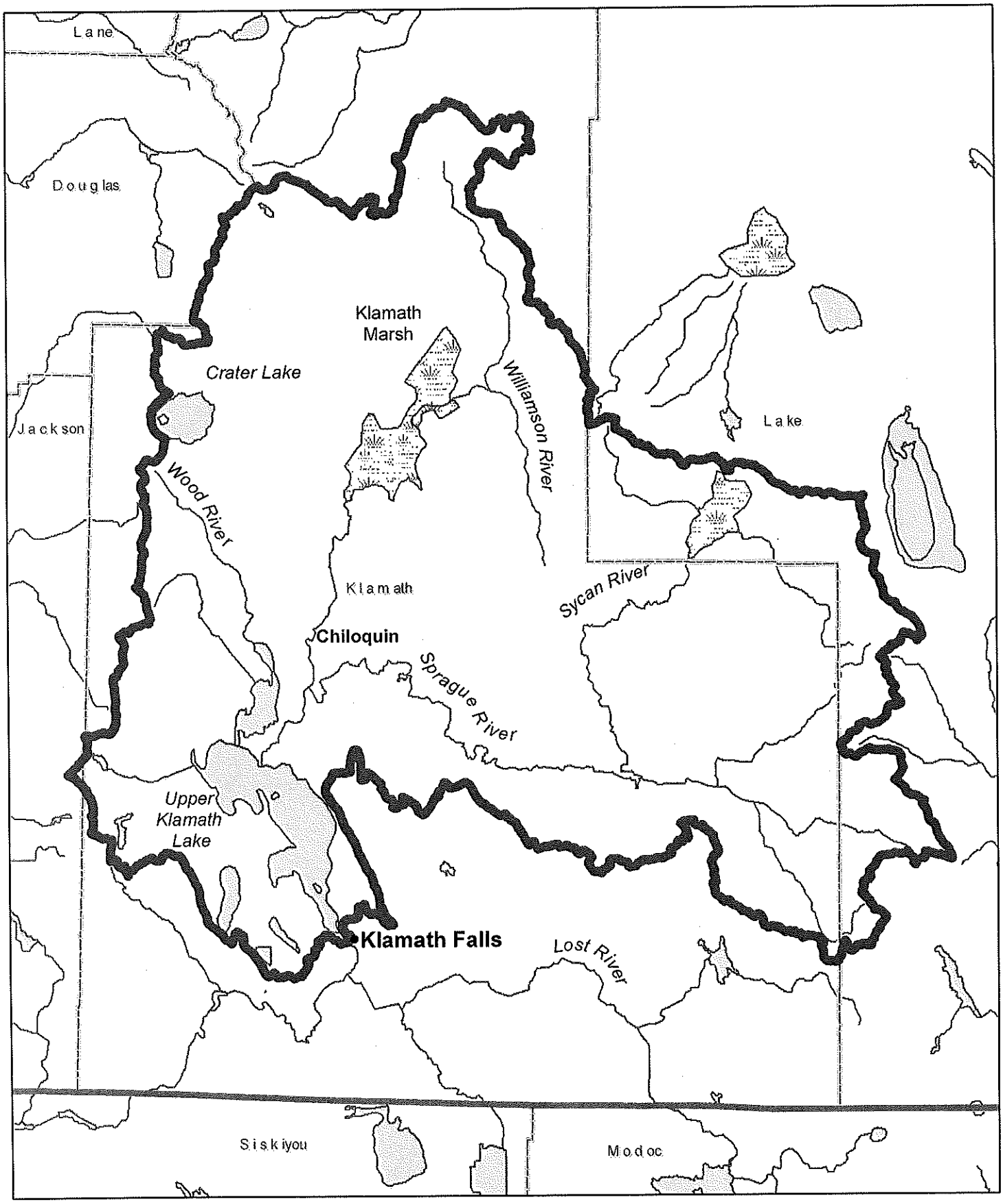
UPPER KLAMATH BASIN

Upper Klamath Basin Proposed Rules Boundary

Oregon Water Resources Department
725 Summer St NE, Salem OR 97301
(503)986-0900



Date: 3/26/2019

Attachment C: Final Proposed Division 025 Rules

Water Resources Commission Meeting – April 12, 2019

Repeal of [exiting] 690-025-0010

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

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

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

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

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

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

~~(f) "Scenic Waterways Act" means ORS 390.805 to 380.925.~~

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

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

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

~~(a) applications for the use of groundwater;~~

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

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

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

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

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

~~(5) As a local rule, OAR 690-025-0010 both works in conjunction with and supersedes some parts of OAR 690-009. OAR 690-009 provides a two-step process for control of well use that affects surface water supplies. First, the Department must determine that well use has the potential for substantial interference with a surface water~~

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

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

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

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

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

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

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

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

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

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

~~For example, if a senior user makes a valid call on July 15th based on a water right or Call Threshold, as applicable, of 100 cfs, and the Watermaster determines the flow (measured at the appropriate location) is 93 cfs, then the shortfall is 7 cfs. This equates to a 7% shortfall, which under this provision has the result~~

~~that wells between one-quarter mile and one-half mile of a Gaining Reach shall be controlled to satisfy the call. (In this scenario wells less than one-quarter mile from a Gaining Reach would also be controlled, pursuant to sections (7) and (9)).~~

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

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

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

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

~~For example, if a senior user makes a valid call on July 15th based on a water right or Call Threshold, as applicable, of 100 cfs, and the Watermaster determines the flow (measured at the appropriate location) is 87 cfs, then the shortfall is 13 cfs. This equates to a 13% shortfall, which under this provision has the result that wells between one-half mile and one mile of a Gaining Reach shall be controlled to satisfy the call. (In this scenario wells less than one-half mile from a Gaining Reach would also be controlled, pursuant to sections (7), (9), and (10)(a)).~~

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

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

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

~~(a) wells located between one-quarter and one-half mile of a Gaining Reach that are continuously cased and continuously sealed to a minimum depth of 500 feet below land surface will be regulated as if they are located between one-half mile and one mile of a Gaining Reach; and~~

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

*Corrections show deleted text in ~~strikethrough~~, Secretary of State noticed language in underline, and additional edits in **bold and double-underline***

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

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

~~(a) the Department shall control a well located within one mile of a spring or stream if use of the well would result in depletion of the flow of a Gaining Reach at a rate greater than 25 percent of the rate of appropriation within 30 days of pumping.~~

~~(b) the Department shall control wells located within a one-mile radius of a particular spring if the combined use of these wells would result in depletion of the spring flow rate in an amount that is greater than 20 percent within 30 days of pumping.~~

~~(c) the Department shall make the determinations described in subsections (14)(a) and (14)(b) based on the best available information, which could include employing at least one of the methods set forth in OAR 690-009-0040(4)(d). Prior to making such a determination, the Department shall notify the water right holder(s) subject to the call and the party or parties making the call, and provide them with an opportunity to submit additional information to the Department.~~

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

~~(a) If a replacement or additional well under an existing registration, permit, or certificate is located at a distance greater than one mile from a surface water source, the well may not be regulated without a critical groundwater area determination.~~

~~(b) If a riparian restoration action results in movement of the nearest edge of a surface water body to a well to an extent that would change how a well is regulated based on the distance measurement criteria in sections (6) through (14), then for the purposes of sections (6) through (14), the distance prior to the restoration action will continue to apply for that well.~~

*Corrections show deleted text in ~~strikethrough~~, Secretary of State noticed language in underline, and additional edits in **bold and double-underline***

~~(c) A replacement or additional well under an existing registration, permit, or certificate shall be evaluated for the purposes of sections (6) through (14) based on the distance criterion applicable to the original well; except that for the purpose of the stream relief calculation described in section (13), the replacement or additional well's measured distance, according to the applicable criterion, shall be used.~~

~~(d) The Department may determine, based on the best available information, whether a natural change in stream location has caused a material change in the distance of a well to a Gaining Reach or stream. If the Department determines that a material change has occurred, then for the purposes of sections (6) through (14), the new distance shall apply. If the Department determines that there is a material change, the Department shall notify affected persons.~~

~~(e) The Department may modify the location of a Gaining Reach for the purposes of OAR 690-025-0010 based on the best available information. The Department shall notify affected persons of a proposed modification and of the Department's decision on the proposed modification.~~

~~(16) If the Settlement Agreement terminates, groundwater regulation in the Off-Project Area will be in accordance with OAR 690-009.~~
~~Statutory/Other Authority: ORS537.505 – 537.795, 540.045~~
~~Statutes/Other Implemented: ORS 537.505 – 537.795, 540.045~~

Proposed Edits to [new] 690-025-0020

Definitions
Notwithstanding OAR 690-008-001, the following definitions apply, unless the context requires otherwise:

(1) "Determined claim" means a claim for surface water as provided in the **Amended and Corrected** Findings of Fact and order of Determination issued on ~~March 7, 2013 and Amended on~~ February 28, 2014**, and** subject to regulation pursuant to ORS 539.170.

(2) "Existing rights of record" means authorized groundwater uses, determined claims, groundwater registrations, and surface water rights.

(3) "Groundwater registration" means an unadjudicated claim to use groundwater as provided in ORS 537.605 that is registered with the Oregon Water Resources Department.

(4) "Groundwater reservoir" or "aquifer" means a body of groundwater having boundaries which may be ascertained or reasonably inferred that yields quantities of water to wells or surface water sufficient for appropriation under an existing right of record.

(5) "Groundwater use authorization" means use of water authorized by a permit, certificate or groundwater registration.

(6) "Hydraulically connected" means water can move between or among groundwater reservoirs and surface water.

(7) "Upper Klamath Basin" means the area above and around Upper Klamath Lake that encompasses all water sources that are tributary to Upper Klamath Lake, including groundwater, the Wood River, Williamson River and Sprague River and their tributaries and the Klamath Marsh and its tributaries.

(8) "Surface water right" means certificated and permitted water rights, and determined claims, the source of which is surface water, including springs, streams, and rivers.

(9) "Well" or "wells" means a well as defined in ORS 537.515(9) that is located in the Upper Klamath Basin and is used to beneficially withdraw water for authorized groundwater uses including domestic, stock, irrigation, industrial, municipal, and aquifer storage and recovery uses.

Statutory/Other Authority: ORS 536.027, ORS 537.525
Statutes/Other Implemented: ORS 539.170, ORS 540.045, ORS 537.525

*Corrections show deleted text in ~~strikethrough~~, Secretary of State noticed language in underline, and additional edits in **bold and double-underline***

Proposed Edits to [new] 690-025-0025

Distribution of Water between Existing Rights of Record

(1) Whenever **there is** impairment of, or interference with, existing water rights to appropriate surface water ~~exists or impends,~~ the Oregon Water Resources Department may regulate the distribution of water among the various users of water from any natural surface or groundwater reservoir in accordance with the users' existing rights of record as authorized by ORS 537.525, ORS 539.170 and ORS 540.045.

(2) These rules, OAR 690-0025-0020 to OAR 690-0025-0040 govern the control of wells in the Upper Klamath Basin that produce from a groundwater reservoir that is hydraulically connected to surface water and subject to regulation in the course of distribution of water in accordance with the users' existing rights of record.

(3) These rules operate in lieu of OAR Chapter, 690 Division 09, and in conjunction with OAR Chapter 690 Division 250, except that these rules govern distribution of groundwater and surface water in the Upper Klamath Basin in lieu of OAR 690-250-0120(2).

Statutory/Other Authority: ORS 536.027, ORS 537.525
Statutes/Other Implemented: ORS 539.170, ORS 540.045, ORS 537.525

Proposed Edits to [new] 690-025-0040

Regulation of Hydraulically Connected Wells

(1) In the **Upper** Klamath Basin, **a joint study of groundwater hydrology by the Department and the U.S. Geological Survey has established that** groundwater and surface water are hydraulically connected.

(2) **Based on the data and results of the joint groundwater hydrology study, w**~~W~~ells that withdraw groundwater in the **Upper** Klamath Basin reduce groundwater discharge and surface water flow.

~~(3) Notwithstanding that groundwater is hydraulically connected to surface water in the Klamath Basin, the Department has determined that in the Upper Klamath Basin, regulation of wells that are located a horizontal distance equal to or less than 500 feet from a source of surface water rights will result in effective and timely relief to those surface water rights.~~

~~(4)~~**(3)** The determinations in subsections (1) and (2) are based on the best available information, including but not limited to, water well reports, basin and hydrologic studies, topographic maps, hydrogeologic reports, groundwater and surface water elevation data, groundwater flow models, model simulation results for the **Upper** Klamath Basin, and any other information that is used in the course of applying generally accepted hydrogeologic methodologies.

(4) The Department has determined that regulating permitted wells that are located a horizontal distance equal to or less than 500 feet from a source of surface water rights will result in relief to surface water rights within the current season of use.

(5) Before regulating an authorized groundwater use **pursuant to subsection (4)**, the Department shall determine the horizontal distance between each well and the source or sources of surface water rights.

(6) The Department may regulate wells that are located a horizontal distance equal to or less than 500 feet from a source of surface water rights whenever a valid call for surface water is made and the Department is regulating in accordance with the users' existing rights of record. Under this rule, the Department will not regulate wells located a horizontal distance greater than 500 feet from a source of surface water.

(7) Groundwater regulation in the Upper Klamath Basin before March 1, 2021, will occur pursuant to OAR 690-0025-0020 to OAR 690-0025-0040. After March 1, 2021, OAR 690-0025-0020 to OAR 690-0025-0040 will no longer be in effect and groundwater regulation in the Upper Klamath Basin will occur under OAR 690-009, unless the Commission adopts new rules **prior to March 1, 2021,** governing groundwater regulation **for senior surface water rights** in the Upper Klamath Basin.

(8) Notwithstanding present conformance of these rules with ORS 537.780(2)(a), these rules do not establish a precedent that precludes different or additional ~~regulation~~ **determinations** of **what wells may be regulated so as to provide relief to surface water rights within the current season of use** ~~groundwater as may be established in future rulemakings~~ consistent with the authorities of the Water Resources Commission.

*Corrections show deleted text in ~~strikethrough~~, Secretary of State noticed language in underline, and additional edits in **bold and double-underline***

Statutory/Other Authority: ORS 536.027, ORS 537.525
Statutes/Other Implemented: ORS 539.170, ORS 540.045, ORS 537.525

Attachment D: Division 025 Rulemaking Advisory Committee Participants

Water Resources Commission Meeting – April 12, 2019

RAC Participant	Participant Affiliation
Bruce Topham	Sprague Basin Groundwater user
Chrysten Lambert	Trout Unlimited
Dave Mosby	Marsh Groundwater user
Brad Parrish	Klamath Tribes
Donnie Boyd	Klamath County Commissioner
Jeff Nettleton	Bureau of Reclamation
Joan Sees	Sprague Basin Groundwater user
Lisa Brown	WaterWatch of Oregon
Mark Johnson	Klamath Water Users Association
Mark Cobb	Mayor, City of Chiloquin
Mark Willrett	City of Klamath Falls
Roger Nicholson	Wood River Groundwater user
Troy Brooks	Sprague Basin Groundwater user
Melissa Olson	The Nature Conservancy
Tom Mallams	Oregon Cattlemen's Association
Ken Masten	Groundwater Advisory Committee
Lyndon Kerns	Oregon Farm Bureau

OFFICE OF THE SECRETARY OF STATE
DENNIS RICHARDSON
SECRETARY OF STATE

LESLIE CUMMINGS
DEPUTY SECRETARY OF STATE

ARCHIVES DIVISION
MARY BETH HERKERT
DIRECTOR
800 SUMMER STREET NE
SALEM, OR 97310
503-373-0701

NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 690
WATER RESOURCES DEPARTMENT

FILED
01/29/2019 5:51 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Local rules governing control of well use in the Upper Klamath Basin

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 03/04/2019 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

CONTACT: Racquel Rancier
503-986-0828
racquel.r.rancier@oregon.gov

725 Summer Street NE Ste. A
Salem,OR 97301

Filed By:
Racquel Rancier
Rules Coordinator

HEARING(S)

Auxilary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 02/21/2019
TIME: 3:30 PM
OFFICER: Meg Reeves
ADDRESS: Oregon Water Resources Dept.
725 Summer Street NE, Suite A
Room 124
Salem, OR 97301
SPECIAL INSTRUCTIONS:
Hearing during Water Resources Commission meeting. To submit testimony, please sign up to testify no later than 3:45 PM.

DATE: 02/26/2019
TIME: 1:00 PM - 3:00 PM
OFFICER: Ivan Gall
ADDRESS: Oregon Institute of Technology
3201 Campus Drive
Mt. Scott Room
Klamath Falls, OR 97601

NEED FOR THE RULE(S):

In the Klamath Basin, significant amounts of groundwater discharges to surface water, such as springs, streams, and rivers. Pumping wells capture some of this water, reducing the amount of surface water. Surface water sources provide water to holders of surface water rights and determined claims. Surface water and groundwater are managed based on a system of prior appropriation where junior water right holders (those with newer water rights) are shutoff to meet the call of a senior water right holder (older water rights) in times of insufficient supply to meet all rights. Similarly, junior groundwater rights can be regulated off to provide water to senior water rights, including surface water rights where there is evidence of hydraulic connection. In the 2000s through present, significant data were collected in the basin and several reports documented hydraulic connection between surface water and groundwater in the basin. As regulation of surface water rights began in the basin in 2013, efforts to find a compromise to regulation began to include groundwater. As a result, the 2014 Upper Klamath Basin Comprehensive Agreement (UKBCA), negotiated by a broad group of stakeholders and governmental entities, addressed water management in the Off-Project area of the Klamath

Basin, including groundwater regulation. Provisions of the UKBCA addressing the control of groundwater use were incorporated into OAR 690-0025-0010 rules, with the provision that if the agreement was terminated, the rules would no longer be effective. In December 2017, the agreement was terminated, making the OAR 690-0025-0010 rules no longer in effect. As a result, this rulemaking is needed to repeal the rules OAR 690-025-0010 that are no longer in effect following termination of the UKBCA. Regulation under the existing OAR 690-009 statewide rule has resulted in litigation, prompting these proposed basin specific interim rules. As a result, this rulemaking proposes to adopt OAR 690-025-0020, -0025, and -0040 to establish procedures for the control of groundwater uses to protect senior surface water rights in the Upper Klamath basin, while further engagement is conducted in the area to develop a longer term approach for water management in the area. These proposed rules are intended to be in effect until March 1, 2021 when more comprehensive rules are expected to be adopted after significant engagement and outreach with individuals in the basin.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

Ground-Water Hydrology of the Upper Klamath Basin, Oregon and California, and associated reference material.
https://pubs.usgs.gov/sir/2007/5050/

Groundwater Simulation and Management Models for the Upper Klamath Basin, Oregon and California, and associated reference material.
https://pubs.usgs.gov/sir/2012/5062/

Streamflow Depletion by Wells – Understanding and Managing the Effects of Groundwater Pumping on Streamflow.
https://pubs.er.usgs.gov/publication/cir1376

FISCAL AND ECONOMIC IMPACT:

Currently, regulation of wells in the Klamath Basin occurs under statewide rules in OAR 690-009, because 690-025-0010 is no longer effective. In the Upper Klamath Basin during 2018, under 690-009, there were 140 wells subject to regulation. During 2015-17, under 690-025-0010, there were 40 wells subject to regulation. Adopting the proposed 690-025-0020, -0025, and -0040 rules would provide that 7 wells will be subject to regulation instead of 140 under OAR 690-009. Costs to regulated well users, in the form of less revenue to individual farmers, ranchers, or small businesses, may result from water curtailment on irrigated acreage. However, the cost to the junior regulated users is offset by the benefit of the regulated water supplying senior water right holders in the basin. The potential magnitude of these additional costs and benefits to regulated well users can't be quantified, because it depends on each specific entity, the amount of water supply available in a water year (a function of rain and snow amounts), whether that entity was able to shift water use to other sources or areas, and whether or not a call is made by a senior water right holder.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) The primary state agency affected by the proposed rules is the Water Resources Department, which is charged with regulating the distribution of water among the various users of surface water and groundwater in accordance with the users' existing rights of record based on a system of priority. The proposed rules do not expand the Department's regulatory authority and are not expected to increase water distribution costs for the Department. The rules are likely

to reduce the Department's water distribution and enforcement costs while they are in effect, as the rules will result in fewer wells being regulated than under the OAR 690-009 rules. Klamath County has estimated there are 115,000 irrigated acres (both surface water and groundwater) in the Upper Klamath Basin. For the 2018-19 tax year, the Klamath County Assessor's office reduced the taxable rate for acres that had water regulated off to 50%, thus reducing the property tax liability for the impacted acres. The City of Chiloquin has invested in acquiring land and intends on drilling a new municipal well. Bly has also acquired grant funding to construct a new municipal well. No other economic effect on state agencies, local governments, or the general public is expected from the proposed rules as compared to the current regulatory framework, except where the local government or member of the public is a holder of a groundwater right that is currently being regulated. In those instances, where the rules result in them not being regulated, they will have the benefit of their water use and the positive economic impacts associated with that water use. This reduction in groundwater regulation may have a negative economic impact on senior water right holders that currently benefit from the regulation of the wells, including the Klamath Tribes and irrigators that are part of the Bureau of Reclamation's Klamath Project to the extent that it reduces the amount of water available to them.

The Department cannot estimate the specific economic impacts because it will depend on each specific entity, the amount of water available in a water year, whether that entity was able to shift water use to other sources or areas, and whether or not a call is made by a senior water right holder.

(2a) Many of the affected wells are owned by individuals or small businesses, the majority of which are agricultural operations. However, the senior surface water right holders stand to benefit from the regulation of wells under the existing rules. These include the Klamath Tribes who call on instream determined claims, and irrigation districts which are part of the Bureau of Reclamation's Klamath Project, which are individual farmers and ranchers and small agricultural businesses. The Department estimates that approximately 1,700 small businesses could be affected by the proposed rules, including well users and surface water users. The proposed rules apply to seven wells at this time.

(2b) The proposed rules do not impose additional reporting, record keeping, or other administrative activities on small businesses affected by the proposed rules as compared to existing regulation under OAR 690-009. The cost to comply with these rules, as with the current OAR 690-009 rule, depends on whether or not a water user is regulated and to what extent that impacts their business operations. The Department cannot estimate that cost of compliance, which will be operator specific, because it will vary depending on water conditions in any given year, whether the business can shift operations to other areas or water sources, and if the senior users call on the water.

(2c) The proposed rules do not impose additional costs of professional services, equipment, supplies, labor and increased administration activities on small businesses affected by the proposed rules as compared to existing regulation under OAR 690-009.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

Two rule advisory committee meetings were convened in Klamath Falls, the first on January 15, 2019 and the second on January 28, 2019. The committee included representatives of groups and entities that either are, or represent, small businesses in the basin. These groups included the Oregon Cattlemen's Association, the Klamath Water Users Association, the Oregon Farm Bureau, and individual farmers and ranchers that own wells.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

RULES PROPOSED:

690-025-0010, 690-025-0020, 690-025-0025, 690-025-0040

REPEAL: 690-025-0010

RULE SUMMARY: These rules were adopted to govern groundwater regulation in the Klamath basin. However, they were only in effect while the Settlement Agreement was in effect. The Settlement Agreement was terminated, therefore, these rules are no longer in effect. This rulemaking repeals these rules that are no longer in effect.

CHANGES TO RULE:

~~690-025-0010~~
~~Untitled~~
~~(1) The following definitions apply solely to OAR 690-025-0010:¶~~
~~(a) "Call Threshold" means the instream flow threshold associated with a Primary or Secondary SIF Measurement Location, to which the Klamath Tribes and the United States Bureau of Indian Affairs may call for regulation of junior water rights under the terms of the Settlement Agreement. The terms "Primary SIF Measurement Location" and "Secondary SIF Measurement Location" have the meanings given in Section 15 of the Settlement Agreement.¶~~
~~(b) "Gaining Reach" means a reach of a perennial stream where streamflow is increasing as a result of groundwater discharge to the stream, as shown in the Upper Basin Wells and Gaining Reaches Map (included as Attachment A to these rules), except that the Department may modify the location of a Gaining Reach for the purposes of OAR 690-025-0010 based on the best available information.¶~~
~~(c) "Irrigation Season" means the period from March 1 to October 31 of every year.¶~~
~~(d) "Off-Project Area" means the area by that name shown in the WUP Regions Map (included as Attachment B to these rules).¶~~
~~(e) "Rate" means the amount of water as expressed in cubic feet per second (cfs).¶~~
~~(f) "Scenic Waterways Act" means ORS 390.805 to 380.925.¶~~
~~(g) "Settlement Agreement" means the Upper Klamath Basin Comprehensive Agreement that took effect April 18, 2014.¶~~
~~(2) OAR 690-025-0010 implements Sections 3.11.3 through 3.11.9 of the Settlement Agreement, which address control of well use in the Off-Project Area when such use affects surface water supplies in the Klamath Basin.¶~~
~~(3) OAR 690-025-0010 only governs the Department's control of well use in the Off-Project Area when the Department determines such use has the potential to cause substantial interference with surface water. OAR 690-025-0010 does not govern:¶~~
~~(a) Applications for the use of groundwater;¶~~
~~(b) Control of well use as a result of interference with another well;¶~~
~~(c) Control of well use in any other part of the Klamath Basin or the state;¶~~
~~(d) Control of well use pursuant to the Scenic Waterways Act or the Department's rules implementing the Scenic Waterways Act, or the enforcement of water permit conditions pertaining to the Scenic Waterways Act; or¶~~
~~(e) Use of wells in the Off-Project Area outside the Irrigation Season.¶~~
~~(4) OAR 690-009 also governs the Department's control of well use that affects surface water supplies. 690-009 applies statewide, but 690-009-0030 authorizes the Oregon Water Resources Commission to adopt local rules governing control of well use when such use has the potential to cause substantial interference with surface water. OAR 690-025-0010 is a local rule adopted pursuant to this authority and to existing statutes governing the control of groundwater.¶~~
~~(5) As a local rule, OAR 690-025-0010 both works in conjunction with and supersedes some parts of OAR 690-009. OAR 690-009 provides a two-step process for control of well use that affects surface water supplies. First, the Department must determine that well use has the potential for substantial interference with a surface water source. OAR 690-009-0040 provides the process for making this determination. OAR 690-025-0010 does not modify this step. Second, if the well is greater than 500 feet from a surface water source, the Department must~~

determine that control of the well would provide relief to the surface water supply in an effective and timely manner. OAR 690-025-0010 supersedes this step with respect to the control of well use in the Off-Project Area during the Irrigation Season by providing a detailed process for evaluating whether control of a well in the Off-Project Area will provide relief to the surface water supply in an effective and timely manner. Specifically, 690-025-0010 supersedes 690-009-0050(2). The following sections provide the process for making the effective and timely determination.¶

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

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

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

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

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

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

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

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

(C) The first valid call based on a specific senior water right or Call Threshold (as applicable) is made on or before August 31. If the first valid call based on a specific senior water right or Call Threshold (as applicable) is made after August 31, the Department shall not control the use of a well that is between one-quarter mile and one-half mile of a Gaining Reach during that Irrigation Season. For example, if a senior user makes a valid call on July 15th based on a water right or Call Threshold, as applicable, of 100 cfs, and the Watermaster determines the flow (measured at the appropriate location) is 93 cfs, then the shortfall is 7 cfs. This equates to a 7% shortfall, which under this provision has the result that wells between one-quarter mile and one-half mile of a Gaining Reach shall be controlled to satisfy the call. (In this scenario wells less than one-quarter mile from a Gaining Reach would also be controlled, pursuant to sections (7) and (9)).¶

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

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

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

(C) The first valid call based on a specific senior water right or Call Threshold (as applicable) is made on or before July 31. If the first valid call based on a specific senior water right or Call Threshold (as applicable) is made after July 31, the Department shall not control the use of a well that is between one-half mile and one mile of a Gaining Reach during that Irrigation Season. For example, if a senior user makes a valid call on July 15th based on a water right or Call Threshold, as applicable, of 100 cfs, and the Watermaster determines the flow (measured at the appropriate location) is 87 cfs, then the shortfall is 13 cfs. This equates to a 13% shortfall, which under this provision has the result that wells between one-half mile and one mile of a Gaining Reach shall be controlled to satisfy the call. (In this scenario wells less than one-half mile from a Gaining Reach would also be controlled, pursuant to sections (7), (9), and (10)(a)).¶

(c) Notwithstanding sections (10)(a) and (10)(b), if a valid call is made by a senior surface water right holder, and

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

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

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

~~(a) Wells located between one-quarter and one-half mile of a Gaining Reach that are continuously cased and continuously sealed to a minimum depth of 500 feet below land surface will be regulated as if they are located between one-half mile and one mile of a Gaining Reach; and¶~~

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

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

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

~~(a) The Department shall control a well located within one mile of a spring or stream if use of the well would result in depletion of the flow of a Gaining Reach at a rate greater than 25 percent of the rate of appropriation within 30 days of pumping.¶~~

~~(b) The Department shall control wells located within a one-mile radius of a particular spring if the combined use of these wells would result in depletion of the spring flow rate in an amount that is greater than 20 percent within 30 days of pumping.¶~~

~~(c) The Department shall make the determinations described in subsections (14)(a) and (14)(b) based on the best available information, which could include employing at least one of the methods set forth in OAR 690-009-0040(4)(d). Prior to making such a determination, the Department shall notify the water right holder(s) subject to the call and the party or parties making the call, and provide them with an opportunity to submit additional information to the Department.¶~~

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

~~information. For the purposes of measuring distances from individual wells to springs, streams, or Gaining Reaches, as applicable, resulting from the changes described in subsections (a) through (e), the Department will use the most current year of NAIP imagery.¶~~

~~(a) If a replacement or additional well under an existing registration, permit, or certificate is located at a distance greater than one mile from a surface water source, the well may not be regulated without a critical groundwater area determination.¶~~

~~(b) If a riparian restoration action results in movement of the nearest edge of a surface water body to a well to an extent that would change how a well is regulated based on the distance measurement criteria in sections (6) through (14), then for the purposes of sections (6) through (14), the distance prior to the restoration action will continue to apply for that well.¶~~

~~(c) A replacement or additional well under an existing registration, permit, or certificate shall be evaluated for the purposes of sections (6) through (14) based on the distance criterion applicable to the original well; except that for the purpose of the stream relief calculation described in section (13), the replacement or additional well's measured distance, according to the applicable criterion, shall be used.¶~~

~~(d) The Department may determine, based on the best available information, whether a natural change in stream location has caused a material change in the distance of a well to a Gaining Reach or stream. If the Department determines that a material change has occurred, then for the purposes of sections (6) through (14), the new distance shall apply. If the Department determines that there is a material change, the Department shall notify affected persons.¶~~

~~(e) The Department may modify the location of a Gaining Reach for the purposes of OAR 690-025-0010 based on the best available information. The Department shall notify affected persons of a proposed modification and of the Department's decision on the proposed modification.¶~~

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

~~Statutory/Other Authority: ORS 537.505 - 537.795, 540.045~~

~~Statutes/Other Implemented: ORS 537.505 - 537.795, 540.045~~

ADOPT: 690-025-0020

RULE SUMMARY: Defines terms used in OAR 690, Division 25, including sections -0025 and -0040

CHANGES TO RULE:

690-025-0020
Definitions
Notwithstanding OAR 690-008-001, the following definitions apply to OAR 690-0025-0020 to OAR 690-0025-0040, unless the context requires otherwise:¶
(1) "Determined claim" means a claim for surface water as provided in the Findings of Fact and Order of Determination issued on March 7, 2013 and Amended on February 28, 2014 subject to regulation pursuant to ORS 539.170.¶
(2) "Existing rights of record" means authorized groundwater uses, determined claims, groundwater registrations, and surface water rights.¶
(3) "Groundwater registration" means an unadjudicated claim to use groundwater as provided in ORS 537.605 that is registered with the Oregon Water Resources Department.¶
(4) "Groundwater reservoir" or "aquifer" means a body of groundwater having boundaries which may be ascertained or reasonably inferred that yields quantities of water to wells or surface water sufficient for appropriation under an existing right of record. ¶
(5) "Groundwater use authorization" means use of water authorized by a permit, certificate or groundwater registration. ¶
(6) "Hydraulically connected" means water can move between or among groundwater reservoirs and surface water.¶
(7) "Upper Klamath Basin" means the area above and around Upper Klamath Lake that encompasses all water sources that are tributary to Upper Klamath Lake, including groundwater, the Wood River, Williamson River and Sprague River and their tributaries and the Klamath Marsh and its tributaries.¶
(8) "Surface water right" means certificated and permitted water rights, and determined claims, the source of which is surface water, including springs, streams, and rivers.¶
(9) "Well" or "wells" means a well as defined in ORS 537.515(9) that is located in the Upper Klamath Basin and is used to beneficially withdraw water for authorized groundwater uses including domestic, stock, irrigation, industrial, municipal, and aquifer storage and recovery uses.
Statutory/Other Authority: ORS 536.027, ORS 537.525
Statutes/Other Implemented: ORS 539.170, ORS 540.045, ORS 537.525

ADOPT: 690-025-0025

RULE SUMMARY: Outlines that the Department may manage surface water and groundwater uses to protect senior holders of water rights and determined claims in accordance with the users' water rights and determined claims pursuant to these rules, instead of the existing Division 9 rules.

CHANGES TO RULE:

690-025-0025
Distribution of Water between Existing Rights of Record
(1) Whenever impairment of, or interference with, existing water rights to appropriate surface water exists or impends, the Oregon Water Resources Department may regulate the distribution of water among the various users of water from any natural surface or groundwater reservoir in accordance with the users' existing rights of record as authorized by ORS 537.525, ORS 539.170 and ORS 540.045.¶
(2) These rules, OAR 690-0025-0020 to OAR 690-0025-0040, govern the control of wells in the Upper Klamath Basin that produce from a groundwater reservoir that is hydraulically connected to surface water and subject to regulation in the course of distribution of water in accordance with the users' existing rights of record.¶
(3) These rules operate in lieu of OAR Chapter 690, Division 09, and in conjunction with OAR Chapter 690, Division 250, except that these rules govern distribution of groundwater and surface water in the Upper Klamath Basin in lieu of OAR 690-250-0120(2).
Statutory/Other Authority: ORS 536.027, ORS 537.525
Statutes/Other Implemented: ORS 539.170, ORS 540.045, ORS 537.525

ADOPT: 690-025-0040

RULE SUMMARY: Specifies Department finding of the hydraulic connection between surface water and groundwater in the Klamath Basin, and that groundwater use results in stream and spring flow depletion, based on the best available information. Indicates that the Department finds regulation of wells within 500 feet of surface water will result in relief to holders of surface water rights, that the Department shall determine the distance between each well and the source of surface water rights, and that the Department may regulate these wells when a valid call is made by a holder of a senior right or determined claim. Specifies effective date of rules, and that they do not set a precedent.

CHANGES TO RULE:

690-025-0040
Regulation of Hydraulically Connected Wells
(1) In the Klamath Basin, groundwater and surface water are hydraulically connected.¶
(2) Wells that withdraw groundwater in the Klamath Basin reduce groundwater discharge and surface water flow.¶
(3) Notwithstanding that groundwater is hydraulically connected to surface water in the Klamath Basin, the Department has determined that in the Upper Klamath Basin, regulation of wells that are located a horizontal distance equal to or less than 500 feet from a source of surface water rights will result in effective and timely relief to those surface water rights. ¶
(4) The determinations in subsections (1) and (2) are based on the best available information, including but not limited to, water well reports, basin and hydrologic studies, topographic maps, hydrogeologic reports, groundwater and surface water elevation data, groundwater flow models, model simulation results for the Klamath Basin, and any other information that is used in the course of applying generally accepted hydrogeologic methodologies.¶
(5) Before regulating an authorized groundwater use, the Department shall determine the horizontal distance between each well and the source or sources of surface water rights. ¶
(6) The Department may regulate wells that are located a horizontal distance equal to or less than 500 feet from a source of surface water rights whenever a valid call for surface water is made and the Department is regulating in accordance with the users' existing rights of record. Under this rule, the Department will not regulate wells located a horizontal distance greater than 500 feet from a source of surface water.¶
(7) Groundwater regulation in the Upper Klamath Basin before March 1, 2021, will occur pursuant to OAR 690-0025-0020 to OAR 690-0025-0040. After March 1, 2021, OAR 690-0025-0020 to OAR 690-0025-0040 will no longer be in effect and groundwater regulation in the Upper Klamath Basin will occur under OAR 690-009, unless the Commission adopts new rules governing groundwater regulation in the Upper Klamath Basin.¶
(8) Notwithstanding present conformance of these rules with ORS 537.780(2)(a), these rules do not establish a precedent that precludes different or additional regulation of groundwater as may be established in future rulemakings consistent with the authorities of the Water Resources Commission.
Statutory/Other Authority: ORS 536.027, ORS 537.525
Statutes/Other Implemented: ORS 539.170, ORS 540.045, ORS 537.525

GWAC Member	Member Affiliation
Marshall Gannett	Portland, Hydrogeologist
John Stadeli	Newberg, Monitoring/Water Well Industry
Chad Courtney	Pendleton, Monitoring/Water Well Industry
Chris Hyatt	Portland, Environmental Consultant
Kenneth Masten	Bonanza, Groundwater Irrigator
Mark Owens	Crane, Groundwater Irrigator
Phil Brown	Beavercreek, Hydrogeologist
Scott Kruger	Corvallis, Local Government
Trent Castner	Portland, Monitoring/Water Well Industry

- February 19, 2019 – Division 025 Rulemaking Recommendation:
  - The Groundwater Advisory Committee recognizes the need for these interim rules in order to engage the community to develop long-term water management policy. To that end GWAC recommends that the Commission adopt these rules with the following additions:
    - Include "Upper Klamath Basin" in rule 0040 (1,2,3,4,5,6)
    - Add to -0040(1) that "there is a wide range in the timing and magnitude of surface water impacts from groundwater pumping from wells."

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OREGON WATER RESOURCE DISTRICT RULEMAKING
DIVISION 25, PUBLIC HEARING NO. 1
HELD ON
FEBRUARY 21, 2019
4:15 P.M.
CONDUCTED BY
MEG REEVES, HEARING OFFICER

MS. REEVES: All right. So let's get this hearing started. This hearing is now in session. It is being tape-recorded to maintain a permanent record. My name is Meg Reeves. I'm the chair of the Water Resources Commission, and I'm the hearing officer for today. Today is Thursday, February 21st, 2019, and the time is 4:15. The purpose of this hearing is to provide an opportunity for public comment on proposed rules in OAR Chapter 690, Division 025, Upper Klamath Basin groundwater use regulations to protect senior surface water rights.

The proposed rules include a repeal of 690-025-0010 and the addition of 690-025-0020, which is Definitions, 690-025-0025, Governing distribution of water between existing rights of record, and 690-0250-0040 related to regulation of hydraulically-connected wells.

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In addition to the opportunity to present at this hearing, anyone may submit written comments by 5:00 p.m. on Monday, March 4th, which is the close of the public comment period.

I'm going to say here where to send these rules -- or send the comments. But if you want to send them, if you check with these guys, you can get this in writing. Send comments to Rules Coordinator at Oregon Water Resources Department, 725 Summer Street Northeast, Suite A, Salem, Oregon 97301, or by email to racquel.r.rancier@oregon.gov.

Comments received after 5:00 p.m. on Monday, March 4th, 2019, will not be reviewed or considered by the agency unless the agency decides to extend the public comment period for everyone.

Today the Commission will not be responding to questions, as our role is to collect public comment on the proposed rules. The Department will review comments submitted during the public comment period. A subsequent staff report will be prepared and made available, addressing issues raised by the comments received. All the comments will be provided to the Commission for consideration before adoption of any rules.

So I will use the cards that people have filled out to ask people to come forward and provide comment. There are nine requests for comment. And given the time and, probably, some of you may have long drives ahead -- I'm not sure -- we'd like to try to keep each person's comments to not more than five minutes. And if anyone -- for people who are driving a long way tonight, if you want to kind of get to the head of the line, that would be fine with me. You know, I'm not sure who among you might be doing that. But if anybody wants to raise their hand and come on up, that's fine. Otherwise I'll just go through these in the order that I have them.

Somebody would like to come up? And if you could tell us your name and your affiliation when you come up.

MR. TOPHAM: My name is Bruce Topham. And I want to start by saying, I appreciate you having us here. Some of us went to quite a lot of trouble to make it today, and I will explain that. I am Bruce Topham. My family and I bought a cattle ranch in the Sprague River Valley in 1972, and we still reside there and raise cattle there. That's been 47 years in the same place.

I want to use my time here to present history that I have observed firsthand to get us to this point in our water problems. We are calving right now in snow and zero degree nights. I am part of the night shift, so I came in at 6:00 a.m. this morning so I could drive 250 miles on a lot of icy road to speak to you today. My son talked to you earlier. He was the other part of the night shift, so he's out all night, too, with these cows. Some calved. We didn't lose any, so that part of our day was a success. But as far as sleep, that's a dim history. 50 years ago, I had a ranch in Wyoming. That is a dry part of the country, and I was always on the lookout for an area free of water problems. When I discovered the Sprague River Valley, it looked like the Garden of Eden. The only water problem was too much. Some neighbors Doug drainage ditches 10 feet deep to dry out their farm ground. At least 25 wells within nine miles of my ranch have flowing artesian. These wells were drilled in the middle 1950s to the late 1950s and flowed three to 4,000 gals per minute each. That was then.

Being educated as a groundwater geologist, I found the artesian aquifer systems most fascinating. So I proceeded to acquire all the information I could on the hydrology of the North Klamath County drainages. What I learned in the

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early '70s was very concerning to me. It turned out that the artesian wells were generally not cased deeply enough to prevent leakage of high pressure artesian water into shallow, unconfined aquifers. Furthermore, the wells had no shutoff valves to close off the water flow during the eight months of the non-irrigation season.

Several geological reports on the Sprague River Valley all mentioned these problems, which led to the declining hydraulic pressure in the artesian aquifers, and in several instances, to reduced spring flows. By 1980, the very large spring that we needed for irrigation purposes was reducing flows, and after several years, dried up completely.

In the late 1970s, I began talking to Chris Wheeler, the Oregon State Engineer. At that time, that office also included him being the head of OWDR. He refused to take steps to get the defectively feet constructed wells up to code. His answer was that if we wanted water, drill a well. I didn't have $50,000 to do that.

The next OWDR director, James Saxon, agreed to study the problem with the wells. Their field geologist spent two years doing aaquifer whichever tests on field geology, as well as

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monitoring various wells and springs. I put in many hours during those two years, helping facilitate those studies. The result of the studies showed that the year-round flow of these wells had depressurzied the aquifers to the point of not flowing, and electric pumps were required to get water out of the ground.

James Saxon recognized this, and his answer to the problem was for me to drill a well, even though at one point, OWDR had agreed to repair seven of these defective wells at State expense, because OWDR had failed to monitor the wells in question.

The next OWDR director was Bill Young. By the time he arrived at the ranch in 1984, he observed the springs exhibiting reverse flows as the creek disappeared underground in response to wells pumping. I still have no well, and Bill Young told me to drill a well. Three directors in a row told me to drill a well instead of fixing the problem that we were trying too to address.

By 1986, I located financing and drilled a well in accordance with well-building codes. This well exhibited no conflicts with any springs in the area. I should note here that in the 1980s,

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Department of Water Resources was encouraging development of irrigation, and to that end, they would provide low interest loans to land owners for development of infrastructure such as wells, pumps, mainlines and sprinkler systems.

I should also note that the OWDR promised our wells would eventually be adjudicated, and we would secure a priority date. This has yet to occur. No wells have been repaired or have valves installed by OWDR to date. As a result of this inaction, as far as back as the 1950s, OWDR has ensured the destruction of this hydraulic system, which if preserved and property managed, would still be viable and provided adequate water for all concerned.

Now that's the history. Now addressing what you guys are talking about here, let me address your pretty pictures. There is no evidence that all groundwater is hydraulically connected to surface water. There's no data that says that. Some maybe, all no. It's not there. Also, many of the faults you refer to are only suspected to be present, and only a limited number of them are known to leak. OWDR has written reports about some faults that are, in fact, boundaries to hydraulic movement. Also, I

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know of no test that empirically proved the depth that spring water originates.

Many water wells from confined aquifers have water that is higher temperature and has mineralization unique to its own confined aquifer that does not show up in surface water. Our deep confined aquifers -- 1,000 feet or more -- are often overlain by four to 500 feet of clay and impermeable volcanic ash. These type of formations do not leak and do not support fractures. They're clay. The OWDR requires only five or 10 feet clay thickness to seal wells. We've got hundreds of feet, and that's not good enough. That five or 10 feet around a pipe in the ground, that's fine.

What about surface water enhancement from pumping groundwater? When we irrigate our fields, water comes out of the ground that wouldn't otherwise be coming out. And it migrates downhill and gets to the river, just like you guys want it to do. A lot of it will get there. That goes into the river and increases the flow. Then you guys measure the river and say, Oh, well all this extra flow here in September, that's coming out of the ground. But a lot of it is coming off of our land. And that wouldn't be there.

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The way the system works on our deep confined basalt lava flows. You pour water in the top in the spring when the snow melts. It fills them up. You take it out of the bottom during the summer, some of it -- not a large amount, but some of it -- and you irrigate with. A lot of that goes into the river that year. You've got more water in the river than you would if we weren't pumping. Winter comes. The next spring, the snow melts. The aquifer is filled up again. I'm the guy that measures a lot of these wells every year. That's my job. I do that. And they're stable, done properly. But you've got to build the well correctly.

And I'll commend Water Resources, the rules for well construction are good. Enforce them. Enforce them. We've got artesian wells out there that are flowing year-round right now. Water resources was made aware of that clear back in the 1980s. They're still flowing, haven't done a damn thing about it. But yet, they come after us. They can't prove empirically that we have a problem at all with -- connected to the river. But you can see these ones that are flowing all winter long, 1,000 gallons a minute. These are not small amounts of water. This is a lot. And they ignore them.

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I was involved in an aquifer test, I guess it's three years ago now, probably, on a well that was 900 to 1,000 feet deep, 35 pounds of pressure. And it maintains its pressure all the time. You open the valve, and you irrigate the drops of pressure about three or four pounds. You close the valve, and the pressure comes right back up. They shut that well off because they said it was preventing water from going into the river.

A mile away, there's a flowing artesian that flowed year round. They didn't do one thing to address that issue. This is why we get disenchanted with this outfit. We've tried for years to -- we want to preserve our groundwater, too. But they -- I can't use the word. But they frittered away our aquifers -- our confined aquifers and our pressurized wells. I mean, anybody can know, if you leave the valve open, eventually, it's going to go dry. And the law says you can't do that. But they allowed it to happen on 25 wells, just close to me. There's more other places. These were close to me. So that's frustrating to us who care about doing it right.

So then they come up with their model. You know, they ran, I believe, three different runs

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of the Sprague River in a big long reach between Beatty and Sprague River, where my ranch is. Starting in 1972 was the first one. They could not find any extra water coming in the river. It was not an open reach. There was no water coming in. And yet, after I believe it was the third time, they could not measure the top of the reach and the bottom of the reach and show a discrepancy in the amount of water from what they could measure on the surface.

So they decided, well, we don't do gaining reaches anymore. Now we make models. And you can't argue with a model because that's the last word on the subject. But in the real world, you couldn't get those results that they're talking about. They couldn't get it. So they abandoned the effort and went to a different approach to get their way with it.

This is frustrating. It's the same way -- they talk about these fictitious faults. There are faults out there. There's one on my ranch, obvious as hell. You can see it. It's the exception, and it doesn't seem to do anything. There's no springs associated with it or anything else. But there was a well that I had to write a report on that went to

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a court case, a civil case, between a land owner and a well user, a pumper, an irrigator.

Then the State did a report, too. Their report -- and you can get it, dig it out, 1977, Robert Almy wrote a report. He came out there. He was a field geologist. He measured everything, and this is what he found. You got a well about 250 feet deep or so, not contained water. It was uncontained. It was the top part, the formation. The guy start the well up, he pumps about 4,000 gallons a minute, and he affects a spring 4,000 feet away, in 20 minutes. The spring is a big one, 158 gallons a minute is what they measured. So 20 minutes after he starts his well, the spring starts down. And in 23 hours, the spring ceased to flow, period.

That looks pretty straightforward, except about four or 500 feet from that spring, there was another spring. It flowed 154 gallons a minute. It was about the same size as the first one. It was not impacted in any way from this pump test. Run the pump for several days. One spring's dry, the other one stays going just like it's supposed to go.

Back where the big well was, 400 feet away, they have a house well drilled into the same

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formation. Good well logs. The drillers there -- and that's a problem we have with some of the drillers, especially in older times, they couldn't -- you had to decipher their well log and try to figure out what they were trying to say. This had good well logs. And that big well could pump all summer long and never affected the house well 400 feet away. But it affected the spring 4,000 feet away. Now, you're telling me that there's nothing impermeable out there? I did the work.

MS. REEVES: Mr. Topham, I'm concerned about everybody else who's waiting to speak having time. I'm wondering if you can move toward the conclusion.

MR. TOPHAM: Okay. The conclusion is that there was a fault -- I mean, I don't want to leave you at the end of this mystery not knowing the answer. There was a presumption, and I have every reason to believe a fault extended from the east side of the well to the east side of the spring, and that was a boundary. And the water on that side could interfere between the well and the spring because of this fault which, in effect, there was actually a boundary. The other house well and the other spring were not affected.

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So that's a case where the Water Resources Department themselves, their own field geologists proved that, which is different from some of what they're saying today. Thank you.

UNIDENTIFIED SPEAKER: Do you support the rules?

MR. TOPHAM: No, I don't support the rules. I guess that's why I'm here. This was the background. The part I most don't support is the fact that the groundwater and the surface water are considered to be hydraulically connected in all circumstances. And that's not true, and I just gave you an example.

MS. REEVES: Thank you for clarifying. Brandon Topham?

MR. BRANON TOPHAM: I will CEDE. I'm going to come later.

MS. REEVES: Oh, okay. Erika Norris? If you could state your name for the record and your affiliation.

MS. NORRIS: Okay. I'm Erika Norris, and I'm here to speak in regards to Virginia Topham. She -- they pretty much -- her family pretty much adopted me out of college. I was a college kid, and I wanted to ranch. They took me in. So she's like

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my mom. And anyway, she wrote this letter, and she has seniority, so I had to come and give it. She's at home count calving, so --

Okay. Speaking as Virginia. I am a cattle rancher in the Sprague River Valley. I have been a landowner and have continuously irrigated on our family ranch for 48 years. My children were born, raised, and still reside on the ranch. They represent the third generation on the land. This is our life and our heritage that is being threatened with destruction by Water Resources' unreasonable, illegal and unproven tactics.

I have several concerns about Water Resources changing the rules all the time. How are we to operate our family cattle ranch when our water is always in jeopardy? This land has been continuously irrigated for over 150 years. Without water, the ranch becomes a desert.

Three successive Water Resources directors told us that if we wanted water long term, we needed to drill wells. In fact, water resources financed many wells in the area in the 1980s.

Water Resources has taken away all of our surface water. When the surface water was adjudicated years ago, we received a letter from

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Water Resources stating that if we had a ground supply, we were not a party to the proceedings. I'm sure you know how that worked out.

Our groundwater has never been adjudicated, yet last year our well was culled because we were within one mile of Whiskey Creek. What happened to first in time? Now you say that we can have water for two years, but then what? Frankly, we don't trust Water Resources. They say that they're going to be studying the situation, but they say that their science cannot be questioned. I thought America was built on the principle that one is innocent until proven guilty.

Water Resources says groundwater and surface water are hydraulically connected, and yet the computer modeling in no way resembles the real world. Apparently, the State of Oregon says that we are guilty until we prove we are innocent, and yet, we cannot prove a negative. Water Resources is making a political decision and not a decision based on science. I just hope that you guys are aware of the ramifications of this political decision, because many lives and livelyhoods are being destroyed.

MS. REEVES: Thank you. Lisa Brown?

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MS. BROWN: FOR the record, Lisa Brown with Water Watch of Oregon. Thank you for the opportunity to testify on the proposed rules. Water Watch will be filing more detailed written testimony, but I wanted to just highlight one thing today. And that is that we're unable to see how the agency has the authority to adopt the proposed rules. The rules fail to protect senior surface water rights holders from impacts of groundwater pumping by junior water rights holders. We don't believe there's statutory authority to do that. Just as the agency couldn't pass a rule that said a junior upstream surface water diverter could take the water that a senior downstream surface water diverter had a right to, we don't think you have authority to do what these proposed rules are trying to do.

This might seem more complicated than that scenario, because it's groundwater, and we've got the USGS study, and because there were these intervening Division 25 rules that grew out of a settlement agreement. But we're unable to see a legal distinction. The rules would result in wells whose regulation would provide timely and effective relief not being regulated.

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And it may also be that some view this situation differently because the most senior water rights here are water rights for end stream use. Those here are held by the Klamath Tribes, and such review would obviously be legally incorrect. End stream water rights enjoy the same protections under the water code as other surface water rights and must be afforded those protections. Oregon has a duty to protect those end stream surface water rights, and we believe the proposed rules fail to do that.

Thank you for the opportunity to testify. And again, we'll be submitting more detailed written comments. Thank you.

MS. REEVES: Thank you. Kevin Newman?

MR. NEWMAN: Thank you for this opportunity. I'm Kevin Newman, and I'm with the Sprague River Water Resource Foundation. My family raises cattle in the upper Sprague River Valley, along the south fork of the Sprague River near Bly, Oregon. I am also a member of the Sprague River Water Resource Foundation, a nonprofit organization dedicated to protection of sustainable agriculture and the sustainable use of water resources in the Sprague River Valley and Lower Williamson River in

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Klamath County, Oregon.

Irrigation water is critical in order for us to grow feed for our cattle through the summer. My family has previously adjudicated surface water rights that date back to the late 1800s, but they are practically unusable now as a result of OWRD's inaccurate quantification of end stream flows for the Bureau of Indian Affairs.

The Department set the end stream flows so high, they are only met during flood event or in years of enormous snowpack, and even then, only for short period of time. As a result, unless or until those end stream flows are corrected as part of the adjudication process, groundwater is our only lifeline for sustaining our family business and many others throughout the Sprague River Valley.

Many ranchers in the Sprague River Valley have invested hundreds of thousands of dollars to develop wells as a supplemental source of water. Despite these investments and the importance of groundwater as a supplemental source of water for when surface water is not available, the Department shut off more than 140 wells last summer, based on the enforcement of the BIA's unrealistic and unobtainable end stream flows. Our community had no

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chase but to act.

My family and nine other ranchers in our area filed lawsuits challenging the regulation orders. Our main concern is that irrigators are entitled to due process before being regulated, not after they are regulated. We think the legislature has made it clear that contested case proceedings must be afforded to irrigators before they can be regulated to fulfill a surface water right. We don't think the Department can regulate an entire agriculture community off on the basis of a hydrolic model without site specific data and giving ranchers due process.

In addition, we think the Department's modeling and assumptions about the interaction with groundwater and surface water is horribly flawed. In 2014 and '15, the Department ran seepage runs in the area of our ranch. The perimeters of the 2014 seepage run consisted of approximately five miles of South Fork of the Sprague. When the Department assessed measurements and data from that seepage run, no gain was detected.

I personally have irrigated from the South Fork for 40 years, and the only gains I've seen is from the wells being on. And many years, as late

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summer approached, turning on the wells kept the river running. The model now being used to determine connectivity between ground and surface water, no credit for net consumptive use is figured into the equation.

When dealing with people's livelihoods, I believe everyone wants to ensure accuracy. I also believe experience, year after year irrigating, develops a keen sense of what is truly going on with river levels and wells. Hopefully, you will take into account our experience and at the bear minimum, weigh them equally with the Department's model.

That said, my family agreed to dismiss our lawsuit when the Department agreed to propose new groundwater rules for 2019. Although I do not think the rules are perfect, I support the Department's overall approach of backing off on regulation to provide a two-year period for the parties to try to resolve these difficult issues. Not only will this provide needed relief to Upper Basin irrigators, this is a necessary step for the Department to have an opportunity to build trust and credibility with the Upper Basin irrigation community.

I continue to have reservations about the Department statutory authority, and I do not think

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it is fair for the Department to regulate the seven wells targeted by these rules. But I appreciate the fact the Department is stipulating, and these rules do not establish precedence for future regulation. Therefore, I urge the Commission to adopt the rules as proposed.

Thank you.

MS. REEVES: Thank you. Roger Nicholson?

MR. NICHOLSON: Madam Chairwoman and Commission, it's a pleasure. Thank you for the opportunity to speak. My name is Roger Nicholson. My family came and developed some of the regional irrigation systems in Fort Klamath, Oregon in the 1890s. I've been continually irrigating there ever since, and now have operations in California, Washington, Oregon, and Colorado, various cattle operations, but emphasizes a point of how big the cattle business is for the Klamath Basin, the question was how many cattle numbers are affected. There's easily 100,000 head of cattle affected that with water shutoffs in the Klamath Basin, will not have a home, easily 100,000. That's how big a problem has been created by the Water Resource Department and the adjudication, but recognize some of the problems in the adjudication were caused by

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the Water Resource Department. In fact, a lot of them.

Anyway, I'll let you know a little bit about myself. I'm the president of the Fort Klamath Critical Habitat Landowners, nonprofit, representing -- for the last 25, 30 years, representing the Fort Klamath people. I'm also the founder of Water for Life, which you've probably seen on the legislative front. And I've a been involved and still the president of Water for Life Foundation.

Just a few comments, and I will submit written comments. I know the hour is getting late. I didn't get shut off. I haven't been shut off. I did drill two wells because of surface water shutdown. They're both a mile away from river systems. And was that done on purpose? Yes, and sort of by the advice of the Water Resource Department, also. But the it's now rather troublesome, where we're ledded with the rules. My problems, I know, aren't near as ir serious as those that are within the mile and have been cut off. But nevertheless, it is a problem with the rule process.

Under Division 9, provides absolute protection, except for critical groundwater designation for wells over a mile. Division 25 --

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which I and another individual in the room got the Upper Klamath Basin settlement agreement started, the whole process started, and a lot of the negotiation of that process was on wells, and that same protection under Division 25, the former 25 that expired, was offered. One mile, there would be no shutoffs.

These new rules, you have a 500-foot section, but nothing, no provision that would go back under Division 9 for the purpose of protecting over a mile afterwards. There's been tremendous investment made on the basis of the recommendations and actions of the Department, tremendous investment made, and still is. Like the City of Chiloquin, moving their well a mile away, if that isn't continued, I would suggest the State of Oregon, since they financed the well, might own a well. So we definitely need a provision in the new rules which will automatically go into the new new rules after two years of the protection of the one-mile provision.

In an instance I'm very familiar with -- and I'm part of that permit -- the State of Oregon just has extended a permit, that was essentially fully drilled out, to drill new wells now to the

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mile limit to the tune of an existing -- another $500,000 investment. Large investments are being made upon that one mile, and that needs to be recognized.

I've got to say something about the hydrology. You know, I was also in the Martha Pagel regime. God bless her, she tried to start an alternate suit resolution process that was a precursor to the settlements. The last settlements we had failed. But interesting enough, the Department had a hydrologist there that just more or less said, this modeling we're doing is just a whole lot of guesses. And one guess can miss by 10 percent, and you're missing by 100 percent before you get done. It exaggerates itself. And we need actual studies on the ground.

I was also a member of the RAC. And a quick comment about the RAC. I appreciate the opportunity to participate in things like that. But it seemed like contentious issues. We had butcher block paper up on the wall, and we put contentious issues into a "parking lot." In the parking lot essentially meant we were never getting back to them. And we were towed off afterwards, essentially, out of the parking lot. It was a, We

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won't go there any further.

One of those contentious issues or points that I made -- and I'll to try end with this -- is on the Sprague River. And I'm not a Sprague River user and probably shouldn't be talking about it. But the evidence is very clear, from USGS reports, they have over 100 years of measurement in the Sprague River system, over 100 years. In two 50-year periods. In the second 50-year period, starting during the time when wells start started to be drilled, admittedly, there could be other cultural impacts. But it was simultaneous with the wells. In two 50-years periods that were statistically exactly the same climate, the outflow of water at Sprague River doubled.

Now, how could we be impacting an aquifer on a long-term basis, as the Department seems to apply, if we have 50 years of evidence? We doubled the flow. Now, what will happened with cutting wells off? We'll decrease the flow of Sprague River once again, immediately throwing it into additional end stream flow claims by the Klamath Tribe and never allowing any surface water irrigation. They complement each other.

Upon me bringing the subject up,

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Department of Personnel said, Well, Oregon just doesn't recognize that. It's there. Do we really want that water or do we not?

Anyway, thank you for the opportunity to comment.

MS. REEVES: Thank you. Hannah, I'm not sure -- is it SeCoy? Is that the correct pronounciation?

MS. SECOY: Yeah.

MS. REEVES: Thank you.

MS. SECOY: I'm here on behalf of Susan Topham, who's at home calving still. Both my family and hers are ranchers in the Sprague River Valley.

I am writing to ask you to oppose the proposed water resources rules. Even though these rules are temporary, they set a dangerous precedent for how water is managed in the west by codifying the fallacy into law that all surface water and groundwater is connected. Water Resources has done studies that have concluded the opposite is true in many instances, but this rule isn't about science. This is purely a political move to further diminish agriculture in Klamath County and eventually the whole state.

Currently, groundwater is supposed to be

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managed separately from surface water. There are a lot of good reasons for that. If all groundwater is connected to surface water, then well construction standards are no longer needed. Also, this rule change could impact hundreds of construction standards, hundreds of Department of Environmental Quality sites in Klamath County. They settled cases based on the science that showed no interference between surface and groundwater. If real science is to be ignored and this political opinion is codified into law, the settlements will be moot.

I'm also so very concerned about the way these rules have been created. I attended both rules advisory committee meetings, and it greatly concerns me how Water Resources completely ignored the suggestions of members on that committee. It seems that Water Resources has an agenda and is going to push these rules through, no matter what. These rules are being touted as necessary to allow Water Resources time to engage the community and create permanent rules. Thus far, Water Resources has completely ignored the concerns of the community. How are these rules going to change that? I don't think they will.

I urge you to either reject these rules in

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their entirety or at least remove the part about all surface and groundwater being connected. This rule bodes ill for all water users in Oregon. Thank you.

MS. REEVES: Thank you. David Mosby?

MR. MOSBY: Thanks for this time to comment. My family owns the Bar Y Ranch consisting of more than 6,500 acres along Williamsom River from the southern end of the Klamath Marsh. These lands were, for the most part, originally alotted land or former tribal lands. Several hundred acres of the Bar Y Ranch are irrigated with water rights from Sandcreek unit of the Klamath Irrigation Project. We also have surface water rights from these rivers as well as several wells. Most of our surface water rights have been put at enormous risk as a result of other BRDs, erroneous quantification of end stream flows for the BIA.

Nevertheless, to help offset our inability to utilize surface water rights during times that BIA's water rights are going enforced, we have invested hundreds of thousands of dollars to fill up wells as a supplemental water source. We rely on these wells for irrigation during times that surface water is unavailable. Despite these investments and the importance of groundwater as a supplemental

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source of irrigation water for when surface water is not available, the Department shut off more than 140 wells last summer, based on the enforcement of the unrealistic and unattainable end stream flows the Department awarded to the BIA.

Some of our wells were regulated, and others were not, because they were outside the one mile zone. However, I'm concerned by the Department's approach to regulation last summer, regulating all those wells off without giving irrigators prior could you process. I also have concerns about the practice of the Department relying on hydrolic modeling. There is little ground truth in supporting its assumptions and predictions.

Finally, I'm alarmed and object to the Department's decision to go forward with attempting to declare scientific facts in these proposed rules which touched on issues that are very much in controversy. Although I appreciate the Department has tempered these rules by stipulating they will not establish future precedent, that is all the more reason to leave the controversial scientific findings out of the rule.

I served on the RAC for the draft rules

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under consideration today. I submitted suggested changes to the rules, which went largely unadopted by the Department. Although I still preferred my proposal, I support the Department's overall approach of backing off on regulation to provide a two-year period for the parties to try to resolve these difficult issues. Not only will this provide needed relief to Upper Basin irrigators, this is a necessary step for the Department to have an opportunity to build trust and credibility with the Upper Basin irrigation community.

I continue to have reservations about the Department's statutory authority in the scientific issues. These rules attempt to address, as expressed in my RAC statement, while I appreciate the fact that the Department is stipulating that the rules do not establish precedent for future regulation. So I urge the Commission to adopt the proposed rules.

There's something else I wanted to point out, is that I went and looked at the groundwater hydrology of the Upper Klamath Basin, a study that was done by USGS in '07. And I have a summary of the selected aquifer tests, Upper Klamath Basin, Oregon and California. It's a summary of selected aquifer tests. That's interesting, because there's 31 wells

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here. There's two in the Sprague River Subbasin and nothing in the upper basin. Here they are, 31. You can find them online all day long, just like I did.

That doesn't seem very representative for a scientific study of the Upper Basin to me. Thank you.

MS. REEVES: Tom Mallams? If you could state your name just for the record, too, please.

MR. MALLAMS: Thank you, Madam Chair and commissioners. My name is Tom Mallams. I am an irrigator in the Upper Klamath Basin. I've been there for over 40 years, irrigating there with my family. I was a RAC member, and at this point, I also represent the Oregon Cattlemen's Association. We strongly oppose this rule as it's written, this interim rule in its entirety.

I will say that the two-year hiatus is a very a appealing nugget, but for the long term, this will come back to hurt the entire state of Oregon. First it will hurt the Klamath Basin. And to me personally, and apparently for the Cattlemen's Association that I'm acting at their direction, it's not palatable for them neither.

I will be submitting more detailed written statements, probably before the next week's meeting.

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I would also ask that you, in your spare time, look at the capitalpress.com. There's a commentary in there. If you just look for Trojan Horse, that will give you a little bit more insight as to what the mentality is or the thought process that's going on in the Klamath Basin in respect to Oregon Water Resources and their Trojan Horse in this temporary rule.

I will start off with a 1990 letter, which I offered here to pass around so you can actually see it for yourself, from Oregon Water Resources Department, sent to all water users planning estates on the lower portion of page 1. If you only use water from a groundwater source or from a municipal water supply, then you need not do anything further. You will not an party to this proceeding, speaking of the surface water adjudication.

With groundwater being shut off under surface water cull, this is a blatant lack of due process for any and all groundwater users. This not only includes ag irrigators, it also includes three cities in Klamath County, stock water users, homeowners using spring water, and numerous industrial and rereational business interests in Klamath County that have been really strapped hard

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with these rules. Remember, with the water shutoffs.

The two recent rules advisory committee meetings, the RAC strongly objected to this interim rule. Most all of the edits or strike-outs were completely ignored. It is widely believed that the RAC was convened only because it was a requirement, and once done, OWDR can then check the box that shows the RAC had met as required.

Also, widely believed is this two-year interim rule, the purpose is to reduce the ongoing litigation against the OWDR. They have spent current litigation funds of $836,000 and received another $1.4 million and are now asking for another $1 million. The question will be how many wells could they have tested with that millions and millions of dollars. And this will continue on for many more years.

All they have to do is test some of these wells and see if their model really works. One of the strongest criticisms -- well, another argument here, you can see why Governor Brown is now asking for a $2.6 billion tax increase with agencies like they're spending money.

One of the strongest criticisms of this

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current groundwater being regulated off and this interim rule is a complete lack of site specific, verifiable peer-reviewed science. That should be required. There is much current site-specific scientific information available that we feel continues to be completely ignored. Any rule should require site specific science and recognize outside site specific science as well, because that is out there and has been given to Water Resource, but they continue to not look at it seriously.

Ivan Gall's eight-page memorandum states that there is considerable controversy concerning the regulation off of groundwater rights that the Department has determined to have the potential for substantial interferene with senior surface water rights. Using a potential for justifying and destroying multi-generational private enterprises is completely unwarranted.

In January of 2018, my wife and I and our legal counsel met with OWDR staff in Salem. OWDR actually told us, in order to regulate our well off, their computer model only has to show that pumping our well would potentially prevent one droop of water from reaching a waterway. That is ridiculous. It is such a miniscule amount of water.

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In the same meeting, we tried to work with a compromise. We wanted to work with Water Resources. We knew they were in the driver's seat. So we asked what can we compromise here? Their bottom line compromise amounted to saying, We might be able to maybe, in some years, allow to you pump 100 gallons a minute. You can't even charge a system with 100 gallons a minute. That's not a compromise. That's a death sentence for another family farm operation.

According to OWRD, I and many other groundwater users are guilty until proven innocent. I must be misunderstanding the constitution. We have asked what we need to do to show we are innocent. They asked for more specific irrigation practices, such as, but not limited to, time of use, length of use, crop information, use of frequency dry pumps and all kind of things. We gave that information to them, and again, it was ignored.

Again, we asked what we need to do to prove our innocence. We were told to have individual wells tested by competent, licensed, geohydrologist. That has been done, and again was ignored. And they actually still do not understand why there is near zero trust in OWDR among the

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citizens of the Klamath Basin.
A lot of the science is out there. It just needs to be looked at. And really, seriously looked at, as one of the members said here, put back into that model the new information and see what comes up. But they will not do it. They say it comes out the same. You can't have many variables change and come out with the same outcome. That's not a true model. Every input is going to change a model outcome. It has to.
These interim rules are supposed to be for the Upper Klamath basin. However, in 690-025-0040, the actual worked is, in number 1, "In the Klamath Basin, groundwater and surface water is hydraulically connected." (2) "Wells that would draw groundwater in the Klamath basin reduce groundwater discharge and surface water flow." OWDR admitted in the RAC meeting that that wording means the entire Klamath Basin, not just the Klamath Basin. This seems to be a reach into the Klamath reclamatkion project and other groundwater users. It's supposed to be rules for the upper basin, but it's gobbling up with the rest of the Klamath Basin.
OWDR claimed their science document, 2007 USGS 50/50 report shows there are no confined

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aquifers in the Klamath Basin. That actual document acknowledges that there is compartmentalization of aquifers with impermeable boundaries in the Klamath Basin. That is a confined aquifer.
Our individual well, when we drilled it back in -- we got the permit in 2001, and at the encouragement of Water Resources, it pumps, when it was drilled -- it doesn't pump, it flows 750 gallons a minute, artesian flow, under about five pounds of pressure. Now that same well flows 850 gallons a minute artesian flow and about 700 pounds of pressure. The flow and the pressure is coming up. According to the model, everything should be going down.
There are other wells beside ours that are showing the same characteristics. Another side note of the same USGS study acknowledges that 85 percent of wells in the Klamath Basin are not even in the Upper Basin. Why are they picking on the Upper Basin? Our OWDR claimed their science is peer-reviewed, but it seems to be only done in-house. According to USGS standards, they say, but with this type of financial consequence, higher standards of peer-review is required under the USGS standards. And those are not being done, either.

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OWRD's financial impact statement refused to acknowledge the impending loss of a major portion of the over 600 to $700 million agriculture industry in the Klamath Basin. This has been shown in three different financial impact studies. There seems to be a total lack of public viewing for the comments that are coming up in this conference call with all of you to make a decision making process there. I don't know if the public can have any input during that meeting. It's kind of problematic, I would think.
Also, the -- which was mentioned once before in this, they are ignoring the historic river flows from the '20s to the present. In the 1950s, when wells started being drilled, the river flows came up. So if you start shutting off wells, the opposite will be true. River flows will go down.
Their modeling shows a small, even mentioned as a microscopic amount of influence on surface water. Drilling wells has shown a drastic increase in water flows in the end streams. It's going to make the streams worse as you shut wells off. And the financial impact is just horrendous.
This does open the door, also, for some DEQ issues with the 380 known site in Klamath County

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alone, by saying that the groundwater and surface water is hydraulically connected. That can open up previously settled cases on many DEQ sites where DEQ determined there wasn't interaction between ground and surface water. This kind of a rule in place will open that door up. It will countermand what DEQ has determined.
So I thank you again for your time and your efforts in this very critical issue. This is not just just a Klamath Basin issue. We fully believe this is a state-wide issue if it's not stopped here. Thank you. I appreciate it.
MS. REEVES: Thank you. Brandon Topham?
MR. BRANDON: Madam Chairman, hopefully I've calmed down and don't sound so aggressive. When I get vervous, I sound more aggressive than I am. I thank you all for convening this meeting and letting us speak.
I think I'll start by talking about the RAC meetings. Those were very interesting to me. I greatly enjoyed watching those from the audience. And I think it's noteworthy -- I haven't heard anyone else mention it here -- but at the first RAC meeting, they asked everycody present if you support the rules or are against them. Every single person

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in the room was against them.
They did not ask that at the second meeting. Just as me wandering around asking people, I could not at that time find a single person who supported these rules. That includes the Indians, Water Watch, every irrigator in the room at that point. I couldn't find anybody that was in favor of these.
Different people have different objections with the RAC rules, or with these proposed rules. Most of the irrigators are complaining about the assertion that Water Resources is making that Klamath Basin and surface water are hydraulically connected. We believe that that is blatantly false, or at least to a measurable degree, it is blatantly false, at least in certain areas.
Water Resources likes to cite the 50/50 report, so I'm going to thumb through it here a little bit with you guys and throw some things back at them that they like to talk about. One thing to note is almost every broad statement Water Resources has been throwing out recently, they usually cite the 50/50 report. In almost all cases, it is actually referencing parts that are not actually above Klamath Lake. I would urge the Department to

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come up with some new terms to say above Klamath Lake and below Klamath Lake, because when you read the 50/50 report, it at defines Upper Klamath as everything from Iron Gate down up and includes the side basin of Lost River.
There's a lot of different geology over there that is not present, or it's different in the Sprague River Valley in particular. Earlier, we saw a lovely report talking about the basin and range, for example, and the geology out there.
Sprague River is very interesting in that it goes at right angles to the basin and range. I was present at a field trip with a bunch of geologists. And at that time -- I think that was about 10 years ago -- they could not explain, why does the Sprague River go the other way? That's a rather basic question, why does it go this way instead of that way. Every other one goes like their map, but the Sprague River goes right angles to all the others.
There's a lot of other questions that are not answered with regard to the Sprague River. And if you look through the 50/50 report there, that will mention a lot of them. Page 10, for example, can characteristics of this unit are not well known,

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but springs emerge from basalt basalt contact with unit. This unit is most prominent in Sprague River. So they don't know what the hydrolic characteristics of that is. And that particular one is actually quite common in our area.
The spatial distribution of groundwater discharge in the Upper Sprague River, et cetera, is more uncertain. Here's one where there's flat out talking about due to lack of data, quantifying temporal variations in groundwater discharge in the Sprague River Subbasin is difficult due to a lack of data.
Ultimately, when you get down to it, they don't really know what the hell is going on out here. They haven't really spent much time. In their defense, it is very complicated territory. We have faults going all over the place. Speaking of faults, earlier, they were talking about,those. The above Klamath Lake area has a lot of faults. Sometimes Water Resources likes to claim the faults caused the ground to leak water, and other times, they claim there are no faults, or any faults that may be there do not affect anything.
The 50/50 report makes it sound a bit more complicated. Page 12, "Geologic structures,

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principally faults and fault zones, can influence groundwater flow. Fault zones can act as either boundaries to or conduits for groundwater flow, depending on the material in and between the individual fault plains." So in some places, your water flow gets better, some places not so much because of the fault.
Then it continues, "Faults do not always influence groundwater. There are regions in the Upper Klamath Basin where groundwater flows appear unaffected by the presence of faults." Nobody knows where all the faults are, and there's no way of knowing, of a given fault, if it's going to make things better or worse, other than going out there and measuring things. Probably one of the best ways to go about doing that is going to be aquifer tests. I was talking with you, I believe it was in June, about aquifer tests and how that's the gold standard. Other states like them, and I was happy to see in the 50/50 report, they talk about aquifer tests.
There are 32 aquifer tests that they talk about in the 50/50 report and their summary of it. Only two of them, it's noteworthy, are above Klamath Lake. The other 30 are all below Klamath Lake. The

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other guy that said there was 31, I believe that document claims there's 32, and I actually thought I counted 32.

Anyway, so there's -- they base most of their information on stuff that is actually not in our area. Most aquifer tests show evidence of boundaries complicated by aquifer geometry or possible double porosity conditions where flow occurs in fractures and in the blocks between fractures. Many tests in Butte Valley and Tule Lake, Lower Klamath Lake, Sprague River, and Upper Lost River Subbasin show inflections in drawdown curves suggesting the presence of no-flow boundaries. These no-flow boundaries were, in some cases, associated with faults. Such boundaries include tertiary volcanic aquifer system -- indicates that the tertiary volcanic aquifer system is, at least locally, somewhat compartmentalized and somewhat resistant to flow between individual subregions.

When you boil it down, if you look at that, that makes it pretty much impossible to make one computer model for the whole area. Keep in mind, this computer model also includes the stuff below Klamath Lake. That's where they got their 30

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wells, was below Klamath Lake. So somehow they're taking all of that and then trying to apply -- come up with one model that applies to all of those and then apply that same model to my one well, yet they don't know where the faults are. They don't know how the faults interact. Even if they did know where the faults are, does this fault have any effect, and what is the effect? They have no way of knowing that without an aquifer test.

While we're talking about aquifer tests and that 50/50 report, aquifer tests show the transmissivity of a particular kind of volcanics widely varies from 2,700 to 610,000 cubi feet per day. That is a wide range of numbers there. How can you plug that into a computer model on a regional basis and apply that to an individual site and expect the results to be anything close to correct.

I already spoke earlier today about the 1.8 million acre feet and how that's not actually the correct numbers for our area, 50/50 reports talking about that being the total number from the whole basin, including below Klamath Lake.

So looking forward, what are we looking at here? Ultimately, everything that we're doing today

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-- which I do thank you for having us -- letting us speak. And while I would really love to irrigate for the next two years, ultimately, whatever happens here today is going to have no effect long-term. If you guys end up signing off on this, great. We'll get to irrigate for two years. If you don't, that's okay, whatever.

What is happening here is Water Resources has given the Klamath Tribes a tribal claim that is insanely too high. At another or venue, I could go into how that came about. But because of this high tribal claim, those flows cannot be reach. There's no way to do it and be able to irrigate. So eventually, we're going to have to compromise with the Tribes. That's been tried several times. It's getting to the point now, though, every time somebody tries to compromise with the Tribes, the Tribes are emboldened, and their starting compromise position is further -- is more unachievable than it was the last time.

It's gotten to the point where the Mickelson (phonetic), I believe is the guy that is from the federal level who's out here trying to settle things, and it's the point where he doesn't even bother talking to the Tribes. They're just so

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far out there, he can't talk with them. So he's flat out told us, everybody above Klamath Lake, you're just screwed. I can help with the project maybe. But above Klamath Lake, I'm sorry, there's just nothing we can do for you. So ultimately, we're either going to have to settle the Tribes, or we're going to have to litigate with them and get their tribal claim knocked back down into reality.

And between now and then, I would love to irrigate. On the flipside, if you guys approve this as written, you're substantiating the claim here that all groundwater and surface water is interconnected. It's going to make it harder for us to fight the Tribes at a later date when we've got to get them knocked back into reality.

So thank you for your time. Thank you for this chance to speak. And may everybody have a good day.

MS. REEVES: So that is -- I believe that's all of the people that wanted to provide comment. Have I missed anybody? It looks like I have not. So thank you for coming. And this adjourns this public rulemaking hearing.

(Whereupon, the hearing was adjourned.)

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OREGON WATER RESOURCE DISTRICT RULEMAKING
DIVISION 25, PUBLIC HEARING NO. 2
HELD ON
FEBRUARY 26, 2019
1:07 P.M.
CONDUCTED BY
DANNY WATSON, HEARING OFFICER

MS. WATSON: All right. So we're going to get started. Again, I have to read an opening statement. It's somewhat similar to the last one. The hearing is now in session. It is being tape-recorded to maintain a permanent record. My name is Danny Watson. I am the District 17 water master, and I am the hearing officer. Today is Tuesday, February 26th, 2019, and the time is 1:07 p.m.

The purpose of this hearing is to provide an opportunity for public comment on proposed rules in Oregon Administrative Rules, Chapter 690, Division 25, Upper Klamath Basin Groundwater Use Regulations to protect senior surface water rights. The proposed rules include a repeal of 690-025-0010 and the addition of 690-025-0020 Definitions, 690-025-0025, Distribution of water between existing rights of record, and 690-025-0040, Regulation of

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hydraulically connected wells.

In addition to the opportunity to present at this hearing, anyone may submit written comments by 5:00 p.m. on Monday, March 4th, 2019, which is the close of the public comment period. Please send comments to the rules coordinator at Oregon Water Resources Department, 725 Summer Street Northeast, Suite A, Salem, Oregon, 97301, or email comments to racquel.r.rancier@or.gov. Comments received after 5:00 p.m. on Monday, March 4th, 2019 will not be reviewed or considered by the agency unless the agency decides to extend the public comment period for everyone.

Today the department will not be responding to questions during the hearing, as our role is to collect public comment on the proposed rules. The department will review comments submitted during the public comment period. The subsequent staff report will be prepared and made available addressing issues raised by comments received. All comments will be provided to the commission for consideration before adoption of any rules.

I have the names of everyone that wants to submit. Correct? Okay. Can everyone hear me okay

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if I don't use a mic?

UNIDENTIFIED SPEAKER: Yes.

MS. WATSON: Thank you. Okay. So the first person with a comment, I call Nathan Jackson. Please state your name for the record and what organization you represent. Yes, you can use a mic if you need to.

MR. JACKSON: Nathan Jackson, representing the Oregon Cattleman's Association. The Oregon Cattlemen's Association is a member of the rules advisory committee for the Oregon Water Resource Department, proposed temporary Division 25 Rulemaking. The proposed Division 25 rules include unnecessary factual findings for the purposes of the proposed rules that OCA believes OWRD may attempt to use to prevent groundwater users from challenging future groundwater regulations by OWRD.

OWRD's proposed Division 25 rules include new definitions for "aquifer" and "hydraulically-connected" that conflict with other regulations and broaden OWRD's jurisdiction to regulate off groundwater users. The proposed rules extend to impending interference rather than existing interference, again broadening OWRD's regulatory jurisdiction and conflicting with statutory

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authority. The rules make expansive generalizations about groundwater and surface water hydraulic connection in the Klamath Basin and the alleged effects of wells on spring and surface water flows.

OWRD's proposed definitions, findings, and conclusions cited above are unnecessary to OWRD's regulation of wells within close proximity to surface water sources when a valid call for water is made by a senior surface water user. The definitions, findings, and conclusions, if adopted, may provide support for OWRD's interpretation of future rules governing the regulation of upper Klamath Basin groundwater users, allowing OWRD to claim deference from courts and avoid legal challenges to the science and methodology used by OWRD to shut off irrigation wells, causing severe and permanent effects on the agricultural community.

The Oregon Cattlemen's Association is supportive of regulatory relief for wells greater than 500 feet, but cannot support the proposed temporary Division 25 rules as long as the objectionable provisions cited above remain. In any permanent rulemaking, OCA will advocate for and insist that OWRD put forth rules that require scientific support that individual wells actually

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and measurably reduce surface water flows that would otherwise be available to senior surface water users prior to regulating off such wells.

Conjunctive groundwater management cannot be "one size fits all" for groundwater users within a groundwater basin, and OWRD must be able to determine actual interference with surface water flows prior to regulation under the laws of the State of Oregon.

And we'll provide a written copy of this comment. Thank you.

MS. WATSON: Thank you, Nathan. I appreciate it. We next call Chairman Gentry. You have about five minutes.

MR. GENTRY: Okay. How do you turn this on?

MS. WATSON: It should be on, isn't it?

MR. GENTRY: Test. Okay. My name is Don Gentry. I'm chairman of the Klamath Tribes. We're headquartered in Chiloquin, Oregon. We have provided written comments to senior policy coordinator Rancier here, emailed those off today. We also have a few hard copies that we could distribute to those appropriate here, so maybe you can let me know if that might be before the end of

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the meeting.

I wasn't -- I don't think it would be all that helpful to go through all the changes. We have some redlining and suggested evidence in that we provided in our letter, in our comments. And we may be providing additional comments before the deadline.

But I think it's important to note a few things. I'm also here with our water rights specialist, Brad Parrish. He was really instrumental in helping us pull these comments together. And also some representatives of the Klamath Tribe, our youth council and others that are here, you know, because of their concerns about protecting our treaty resources.

We know we've gone quite a ways into the adjudication. We have adjudicated enforceable claims which are important to protect our treaty resources. The way that things have worked with -- that we have this federal treaty right, because of the McCarran Amendment. That's why we're here dealing with the State of Oregon. And hopefully, the State of Oregon would recognize their responsibility to protect the resources, according to that responsibility delegated to them by

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Congress.

So the Tribes have surviving treaty rights. And to provide for those treaty resources, we also have a water right that's been recognized into the court. And being the most senior water user, it's very important to make sure that in these interim rules, any revision of the rules that are forthcoming would protect our rights and any other senior right holder appropriately.

We don't support the interim rules as proposed. That's pretty clear, and we explain the reasons why in our letter. They're not protective of our senior adjudicated claims to this point, and actually don't really fulfill the responsibility the State has currently under the rules.

So we actually have provided some specific revisions that are more protective, recognizing that we're in a process that would hopefully end up in something that would be permanent and would serve the purpose that they need to protect the senior right holders appropriately and the rights of all those subsequent.

In agreement with the current science, you know, basically, which confirms that there is a connection between wells and surface water, you

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know, we believe the recommended changes that we have proposed will address that appropriately. We do support the development of basin-wide rules that would be protective of our rights and other senior rights holders in rights for domestic use.

Okay. As I mentioned earlier, I've got some bullet points here that I'm going from, kind of speaking -- but you know, our rights are meant to protect our treaty resources, you know, as I mentioned. And the State has that responsibility to do that. And you know, part of our treaty resources are not only endangered C'wam and Koptu that are important to us, and should be here in the system, but also redband trout, and also important to the restoration of salmon c'iyaals in steelhead back to the basin area here.

And, you know, because of the spawning that occurs in these areas, redband trout pretty much exclusively rely on, you know, the spring systems responding. That water is very important. So it's not only important to keep sufficient water in stream for all the life stages of the resources that are important to us, but for spawning in particular. That's been recognized even by the Oregon Department of Fish and Wildlife, the

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importance of maintaining these spring sources.
Not only important for spawning, but the springs provide refugia, you know, when water conditions in the are bad, or even in the Sprague River, which is listed as being compromised because of temperatures. So those spring flows are important to the health of the system and all the species that are important to the tribes and important to other folks in the community, too.
So because of declining -- there's even data that, you know, talks about the declining spawning populations of the redband trout. The red counts are down. You know, these are indicative of problems that we're facing in the basin that not only affect the redband, but also our endangered fish. So it's critical that the State adopt even interim rules that protect our rights and these resources.
MS. WATSON: Thank you, Chairman. Next, I call Brad Parrish from Klamath Tribes. Brad, you have five minutes.
MR. PARRISH: I only wanted two. I'm Brad Parrish, representing the Klamath Tribes. I think Don covered most of my bullet points. I do want to -- we did, like you said, provided written comments

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to Racquel.
The Klamath Tribes are -- we don't support the interim proposed rules as written. We have provided comments and suggestions to change that. We don't support them because we feel it's not -- they're currently, as written, not standing up to the statutory obligations we feel that OWRD is required to follow.
I do want to also clarify that we are supportive of basin-wide groundwater rule development. We feel it's necessary. We feel both the interim Division 9 and Division 25 currently aren't protective of groundwater rights or surface water rights.
I think that's about it. I think Don covered the majority of my bullet points. But I do want to make sure that Racquel and -- we have copies if anybody else needs our written comments.
MS. WATSON: Thank you, Brad. Next I'd like to call Conrad Fisher. You have five minutes.
MR. FISHER: Thanks for coming all this way, everyone who's here. My name is Conrad Fisher on behalf of Water Climate Trust. I live in Fort Klamath, Oregon. My family has been here four generations, since about the '30s. I come from

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loggers. I consider myself more of a human rights advocate than an enviro or a fish advocate.
In my -- I've worked for more than 20 years on water allocation policy, trying to realize the greatest benefits for everyone who depends on naturally flowing waterways. And in that capacity, I helped to write the portion of the California Groundwater Bill of 2014 that dealt specifically with what we're doing here today. And it's about adverse impacts on interconnected surface water. So I've heard a lot of these dialogues before.
I've been in California when the ag community was pushing back on all regulation, Don't do this, Don't do this, Leave us alone, Leave us alone. But at the end of the day, it was that red phone in the California governor's office that rang, and it was the Farm Bureau -- well, not the Farm Bureau, but other ag interests in California saying, Okay, Governor Brown, you can finally pass the groundwater bill. It wasn't us fisheries advocates; it was the ag community, because they realized, in the end of the day, they were harming each other, because it was the law of the biggest bump. And that's what I see going on in Fort Klamath right now.

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Even my groundwater well runs 24/7. Please make it stop. And this just can't go on. It's bad for Upper Klamath Lake. It's bad for the ag community. And in some parts of the Klamath Basin, it's bad for low income people who have water coming out of their tap, because the big rancher next door in Lower Klamath happens to be billionaires, people worth a billion or a few hundred million, getting a big pump, and these poor people no longer have water coming out of their taps. So whether you care about fish or human beings having a right to drink, we've got to do something.
So we look around Fort Klamath, the wells are running 24/7. I personally, and on behalf of Water Climate Trust, we oppose these rules. It does not comply with the existing Oregon water law. It also doesn't comply with common law. So in the end of the day, it won't stand. So at the end of the day, we, not the State, need to do something.
But I will say, having lived in the Klamath Basin for a long time, the fisheries advocates and the farmers are fighting each other. And it's sad and it should not be that way. It is the government that allowed too much water to be

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allocated. So if we want to blame somebody, not individual staff who care and are compassionate, but the government has allowed more and more to happen. Right now, they default to yes, they default to hands off, and then it causes us to fight with each other.

So six quick recommendations I hope you will consider that would allow you to implement Oregon's existing groundwater law and also common law, namely the public trust doctrine, and the Endangered Species Act. (1) You can't regulate what you don't measure. Despite what we've heard, water use in the Klamath Basin is not measured. We don't know how much is used, and yet we talk about settlements and regulations. So let's start measuring. In California that could either -- well, I won't get into that. There's a debate about how to do it, but feel free to ask.

(2) Recognize and protect senior end stream water rights -- senior end stream water rights. And that is not just tribal rights. That's the rights that all future generations have, pursuant to the Endangered Species Act, pursuant to the public trust doctrine. We have passed laws that basically say, we want future generations to be able

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to go out to Wood River and catch a fish, or upper Klamath Lake. Those are senior end stream water rights. So it's all future generations. Protect those by measuring and regulating, as necessary, groundwater consumption.

(3) Conservation without dedication. One of the ways to do that, it doesn't have to be taking. It doesn't have to be undermining livelihoods. Let's use all that existing public conservation money and dedicate that back to the fish. We hear about these farmers. I know many of them. They're working their butts off conserving water. And when I tell them that conserved water is not flowing by my house down river where I used to live, they're pissed, because they think they're helping, but they're not, because the water is not going down river.

(4) Dialogue between State and public interest advocates. This meeting right here, it would have been nice to have some dialogue so we could all talk together. So whoever said, We won't be responding to questions, it's our role to just do this, it can also be your role to take a dialogue. There's no law that says you can't have dialogue. Protect the human right to water, first and

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foremost, and the rights of fish.

And then finally, the precautionary principle. This is number (6). If users -- water users have to -- the burden of proof should be on those who are taking the resource. The Cattlemen's Association says, Prove to us we are not hurting the public; I say, water users should have to prove to the public that they are not harming the public. So it's a precautionary principle. In Cattlemen's Association, there are ag interests who have, to a larger extent, embraced that principle.

Thanks.

MS. WATSON: Thank, Mr. Fisher. Next I'd like to call Paul Wilson. You can state your name and who you represent, and you have five minutes.

MR. WILSON: Awesome. Thank you. I won't be needing that. Good afternoon, everybody, my name is Paul Robert Wilson. I'm a federally recognized member of the Klamath Tribes. I am also a member of the ancestral guard as a nonprofit that's based on the Klamath River.

I just wanted to get up here and speak on -- as a member of the Klamath Tribes, we hold senior water rights. Enforcement of our senior water rights is not for our financial benefit. Our end stream

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flows, our calls on the water, really aren't an easy conversation to have. They're not a call that we like to make, because, you know, we live in the same basin as y'all. And this last summer was a really difficult summer for a lot of my family members that are ranchers and farmers. But we have to persist with our senior water rights, because when we make those calls, we're answering the call of stewardship to the water and the lands that we've inhabited for more than 8,000 years.

I know a lot of you trace back three or four generations, and it's tough to see these hard times. But speaking as somebody who has family, you know, my uncle's 80 some years old, and he's out on the Sprague River dealing with the same things that you guys are.

But knowing that this isn't -- it's not an easy conversation for us to have -- and we need to have more discourse between tribal members and ranchers. It's a slippery slope to be giving the OWRD, the State these kind of rights to be intervening between senior water rights holders and groundwater users. We need to be have having those conversations between us. We're not in Salem. We're right here. And there's no reason why the

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ranchers shouldn't be talking with the Tribe. When you guys give that right to the State and we go down this path, that's a different type of discourse. And we're seeing in California how that's going.

So I just wanted to thank you guys for giving your time and showing up here, because this kind of discourse is what gives me hope for the future.

Thank you.

MS. WATSON: Thank you, Mr. Wilson. Next I'd like to call Del Fox. Please state your name for the record and whatever organization you represent, if you do. And you have five minutes.

MR. FOX: I won't take that long. Thank you. Del Fox, I live in Derry. I'm an irrigator. I'm also president of the Pine Flat District Improvement Company, which is an irrigation and drainage district. Without our district pumping water out of Pine Flat, you wouldn't get down to 140 in the wintertime.

I don't disagree with anything that's been said here today, but I do disagree with the rules that you've written, especially the ones that say that notwithstanding groundwater and hydraulically-connected to surface water in the Klamath Basin,

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like you said, if you don't measure, you can't regulate. That's wrong.

We can regulate that. When the Swan Lake North Pump Storage did their test up there, one of my wells went to test wells to see if it was interfering. It was not. Anyway, the FERC statement for Swan Lake Pump Storage says that the groundwater in the north side of Swan Lake Valley is not hydraulically connected to the water in the southern portion, which is Pine Flat. At any rate, so we are opposed to that statement in the ORS 0040 there, in the your rules.

Also, limiting the -- going to 500 feet for two years is a fool's game. That doesn't help anybody. That just delays the problem. Let's solve the problem. We can work with the Tribes. We can work with the other water users. We can work with the downstream water users. We can work with the Fish and Wildlife environmentalists, which I'm one of them. We can work those people. We need to talk and discuss. We don't need more rules. What we need is good discussion.

Thank you.

MS. WATSON: Thank you. Thank you, Mr. Fox. Steve Hartzell? Please state your name for the

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record.

MR. HARTZELL: Steve Hartzell with Wilks Ranch.

MS. WATSON: You have five minutes.

MR. HARTZELL: I'm just going to read this. Thank you for giving me the opportunity to speak in regards of the proposed adoption of the Interim Division 25 rule. As a board member of Sprague River Water Resource Foundation and a representative of Wilks Ranches, we have concerns that the interim rule may set a precedent on how long-term groundwater management is applied in the upper basin. However, we believe that in the term rule, we create two years of flexibility and, hopefully, lead to be helpful in the development of a long-term approach to groundwater management and stability.

Water used. We propose the proposed Division 25 rule and look forward to engaging in developing long term.

MS. WATSON: Thank you, Mr. Hartzell.

MR. HARTZELL: Thank you.

MS. WATSON: Next we'd like to call Tom Mallams. Please state your name for the record. You have five minutes.

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MR. MALLAMS: My name is Tom Mallams. I'm an irrigator in the upper basin groundwater irrigator. I've also represented the Oregon Cattlemen's Association in the RAC meetings and in the testimonies that were given last week in Salem. The testimony that was given last week in Salem still stands. I would like to acknowledge that the comments from Nathan Jackson here today and the comments I gave in Salem last week don't quite match. Oregon Cattlemen's Association, I believe, will have some written comments possibly in the future. But as far as I'm concerned, I don't agree with any part of these rules, not one ounce of these rules.

While the two-year hiatus sounds really nice, 500 feet really sounds nice, the Herald News, I was surprised even termed that a bait and switch. I agree with that. That's a bait and switch. After two years, that will go back to the one mile, and people that support even a little tiny piece of this rule will be stuck because they will have set precedent in future litigation. That's just a proven fact. Water resources has done this time and time again. Attorneys that have been representing the Oregon Cattlemen's Association acknowledge that

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fact. That's ongoing right now.
A couple of things that I didn't get to touch on last week is the predictions that have happened in the past and showing a historical perspective and the track record of Oregon Water Resources. Back a number of years ago, Oregon Water Resources supported the Klamath Dam removal. And we predicted that this will spread throughout the area, not just in the Klamath Basin. And they said we were crazy, this was just a Klamath issue. But you can see right now, there's a very aggressive effort to remove dams on the Snake River and the Columbia River. The prediction was 100 percent correct.
Prediction number 2, the adjudication in 2013 of the Klamath Tribal end stream rights, we said that's going to set a very big precedent of Oregon Water Resources Department reallocating water not just here. And we were again told, you're crazy. Well, now you need to talk to the people in the Willamette Basin. The Oregon Water Resources is saying they're going to reallocate, I believe it's 1.6 billion acre feet -- or million acre feet of water. They're going to reallocate that. Prediction again, true, 100 percent.
Our prediction right now is that this

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interim rule will go forward in its entirety without the 500 foot and the two-year part of that. Once the two years is up, it's going to go back to one mile, and everybody will be shut off, period. And that will speak into existence such onerous language in the statute and rules that we can't live with it.
The simple blatant fact that they're saying is a fact, the water in the Klamath Basin groundwater and surface water in the Klamath Basin are hydraulically connected, that's not been proven. But if that gets into the statutes, it's going to be very hard to challenge that. It will be a precedent-setting item. And we cannot live with that.
They're modeling -- they're basing all this on modeling. And in fact, the Oregon Department of Environmental Quality has already used this same type of model in regulating forest and ag ground for mercury pollution in the State of Oregon. So they have a history of using that type of thing.
I mentioned last week that there is a DEQ Pandora's Box that will be opened with this kind of language, 380 sites within the Klamath Basin on the previous DEQ sites that could be opened back up, if they accept the fact that groundwater and surface

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water is connected, period. That could be devastating for all kinds of businesses and property owners in Klamath County.
Something that hasn't been really addressed at all is if ground and surface water are connected, how are water resources going to react to every private property owner's leach fields if they have a septic system near any water way? What kind of push back is that going to have? What kind of Pandora's Box is that going to be? And I've actually called this a Trojan Horse, and I truly believe that.
Clear back in 1990, all irrigators were given a letter that plainly states on the first page, if you only use water from a groundwater source or from a municipal water supply, then you need not do anything further. In other words, in the surface water adjudication, we were denied any due process at all. Now we're being regulated off under surface water culls.
The recent rules advisory committee did not like this at all. There's not a whole lot of people that do like this, for very different reasons, obviously. But the history of the Oregon Water Resources Department is not very good. We

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were asked to supply -- well, in this water shut-off, we were actually considered guilty until proven innocent, and we had to ask time and time again, what do we have to do to prove our innocence. And we've done everything they've asked, whether it's additional information, actual on-site specific studies. They've ignored it all.
I believe totally that there needs to be basic science, onsite science that determines these type of things. That needs to be in any rule. But these rules are not appropriate. I do not support them. And the last I talked to the superior people in the Oregon Cattlemen's Association, they don't either. But I believe there's going to be written comments coming from the Cattlemen's Association.
Thank you.
MS. WATSON: Thank you, Mr. Mallams. Next I call Hollie Cannon.
Mr. Cannon, state your name, please, for the record. You have five minutes.
MR. CANNON: My name is Hollie Cannon. I'm here on behalf of Wood River District Improvement Company. The board of directors of Wood River District would like to go on record as supporting the adoption of the Division -- temporary

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Division 25 rules and looks forward to working with all parties to develop the permanent rules.

Thank you.

MS. WATSON: Thank you, Mr. Cannon. Next I call Bill Gallagher.

Mr. Gallagher, could you restate your name for the record.

MR. GALLAGHER: Bill Gallagher, I'm a rancher at Sprague River. This is about politics. It's not about water. In 1982, we had a dispute over a well that we drilled. But we drilled every well on our ranch perfect, the way the water resource department had it. My dad wasn't real happy those guys kept coming and testing and testing and coming back and forth. But they were easy to get along with.

When you have the political situation, as we have in Oregon, we have no chance -- as being conservative people -- to ever get past that politics. And when we had our water fight, we had we had a gentleman named Walter Anderson out of Boise, Idaho, who was the number 1 premier biologist or geologist in the country. He said there was enough water in this basin for everybody. It's not all on the surface. There are aquifers here that

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never had a well and, to this day, don't have a well in them. He said this groundwater, surface water thing, he said it's going to become a problem. He said the problem is going to be the government is going to use the Tribes, the Endangered Species Act, and the environmentists to try and take your water and control your water from the farmers and ranchers in this basin. He said that in 1982. He was exactly right.

It's exactly what he said is happening today. It's happening all the over the country. I don't know how we're going to stop it with the political people we have in office where we have the whole Water Resource Department -- not all of them -- but a lot of people in the Water Resource Department are green, liberals. And I don't know what the Tribe and the liberals want to do, to run every farmer and rancher out of the county or out of the valley or whatever, but they're working really hard at doing that.

Thank you.

MS. WATSON: Thank you, Mr. Gallagher. Next I call Margaret Jacobs.

Could you state your name for the record, please?

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MS. JACOBS: I'm Margaret Jacobs, and I'm an upper basin irrigator. I've lived in Bly Valley for 67 years. I have seen a lush green valley with ample grass for livestock and wildlife cut drastically. Now a drive around the valley during the summer months presents a much drier image. I am concerned and believe strongly that the Department should not be regulating an entire ag community off on the sole basis of a hydraulic model without a site specific data and giving us ranchers due process. I believe much more information needs to be taken to account before a decision is made as to the connectivity between ground and surface water.

I am one of the 10 families that has agreed to dismiss our lawsuit when the Department agreed to propose new groundwater rules for 2019. Although I do not believe that these rules are perfect, I support the Department's plan to back off regulation in order to provide the two-year period for all parties to resolve these tough problems. I hope during this period the Department will listen to our concerns and knowledge about regarding our wells.

Thank you.

MS. WATSON: Thank you. Okay. Next we'd

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like to call Jerry Jones, please. Mr. Jones, could you restate your name for the record, please? You've got five minutes.

MR. JONES: My name is Jerry Jones. I'm a former member of the County Water Resources Board. I'm a member of the Modoc Point Irrigation District. I believe that these rules are way out of bounds as far as private property rights. The lawyers that have been representing many of you have been playing us for fools. And I'll state the reason why.

The one that represents our district told me there was no legal argument he could make to solve our problem, water problem. Well, what good is he?

I'm in opposition to the Oregon Water Resources plans to regulate wells on private property on the basis of the Klamath adjudication. We have to look at history to see what really holds true. When you talk about Tribal rights, I believe they're entitled to everything that their treaty says they're entitled to.

In 1986 -- or 1906, rather, two parcels of land were ceded out of the Klamath Indian Reservation, one for 621,824 acres ceded out of the reservation in a boundary settlement agreement, for

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which they were paid $537,007.20 at that time. This area started about one mile west of the current Ivory Pine Road and extended to the Quartz Mountain Area. In exchange for this payment, the Tribes were required to cede, grant, and convey to the United States all their claim, right, title and interest in and to all this land.

In 1969, the Indian Claims Commission awarded the tribe $4,162,992 for this land known as the 1901 cessation agreement. In 1985, the U.S. Supreme Court ruled, in Oregon Department of Fish and Wildlife vs. Klamath Tribes, the 1864 treaty's language indicates that the Tribe's right to hunt and fish was restricted to the reservation. The 1901 agreement's broad language accomplished a diminution of the reservation boundaries.

The second area was 87,000 acres in the upper Williamson area, and is currently owned by the Green Diamond Timber Company. In 1906 it was offered to the California/Oregon Land Company in exchange for 111,000 acres of land patents the company owned within the reservation, as a result of a little military road contract granted before the Tribe's treaty establishing the reservation. The tribes were paid an additional $108,750 for this

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exchange, and in 1938, the tribes were paid over $2 million more in this exchange agreement to establish fair market value. In both cases, the Tribal counicls approved the settlement agreements.

In granting the Tribes the right to water from private land outside the 1954 reservation boundaries, the Oregon Department of Water Resources has literally gone off the reservation of legal boundaries. Tribal rights are determined by treaty, known as federal reserved rights. Oregon Water Resources Department has mixed up western water law with Tribal rights they tried to extend and end claims to private land. The only time immemorial rights the Indians have are hunting, fishing, and gathering rights. Water rights cannot be separated from these rights.

In the Adair decisions, the federal courts ruled the Tribes were entitled to enough water to support the modern standard of living regarding hunting and fishing rights. OWRD, Oregon Water Resources Department, declined to even determine what a modern standard of living is in this context. This is important, because in the United States vs. New Mexico, the U.S. Supreme Court wrote, "Noting that each time this court has applied the implied

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Reservation Water Doctrine, it has carefully examined, both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water, the purposes as a reservation would be entirely defeated."

MS. WATSON: Mr. Jones, one minute.

MR. JONES: Okay. So the Court decisions -- there's two other court decisions that determined the limits of what adjudication can be, the Cappaert decision, which allowed the Tribal rights to go into adjudication, was a specially created water right. It wasn't a reserved right.

The other court decision I really want to mention is Taylor vs. United States, 1930. The 9th Circuit Court of Appeals ruled the federal government cannot give the tribes end stream water rights, that they were already appropriated by the State. Since Oregon acquired State water in 1859 and the Klamath Tribes, the treaty didn't happen until 1864, the whole premise of taking water from the private property owners is flawed. The State would do well to abolish all its rules regarding well regulation on behalf of the tribes.

MS. WATSON: Thank you, Mr. Jones.

Well, some of you were a little short-

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winded, so we have a little time left. Is there anyone who did not fill out a comment request slip that wants to speak? Anybody who want to speak that didn't fill out a comment card?

Mr. Duarte, would you like to speak? What's that, sir? Come on up to the front, and we'll get you on the record. Please restate your name. Five minutes.

MR. DUARTE: Okay. I don't need five minutes. I'm Eric Duarte, and I'm an upper basin irrigator. I belong to Sprague River Water Resource Foundation. I'm a board member. I've been there quite a long time.

We support -- we disagree with a lot of the rules that are in this. Okay. We don't agree with them. But we do support the two-year portion where we can try to be on the rulemaking committee, try to get our -- try to figure out where we're at with all this. We've all got to get on the same page at one point or another. If it takes us two years to get there, it's going to take us two years. But at that point in time, we'll be able to irrigate a little bit. We'll be able to support our families and our community as well, and try to get to the end and try to make some kind of rules that will fit,

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hopefully, everybody.
You know, we've been there quite a long time. You know, it's funny. I'm going to tell you a little story, and I want everybody to think about this. But about five, six years ago -- probably six or seven years ago, we were coming back from Klamath Falls, and we had a water rally in town. And I've got a four-year-old son sitting in back in a car seat. He's listening to all of us talk about all this water and all this stuff, and he said, Dad, what's going to happen to the polywogs?
You know, a four-year-old kid in the back seat can understand that there's a whole lot more animals and a whole lot more aquatic life that lives in those irrigation ditches and in those fields than just one fish or two that go up and down that river. And he's four years old. There's a lot more to this than just one fish or two going up and down the river. And I'm saying ranching and everything. We've all got to get together, otherwise it's not going to happen for any of us.
That's it.
MS. WATSON: Thank you, Mr. Duarte. You have five minutes.
MS. POWLESS: My name is Willa Powless,

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and I'm an enrolled Klamath Tribal member. And I just want to go on record and say that I also oppose the proposed rules. And I think there needs to be more discussion from both sides. I do want to state that Tribal water rights are inherent water rights. They're aboriginal water rights. They existed before the treaty, and they existed before this country was even bounded. So those rights weren't granted to us. We've always held them, and that's why we still hold them.
As the last gentleman just said, there's other resources at stake, not just, you know, water and fish. But we have a lot of Tribal rights that we utilize that might not, you know, be -- basically, the water is impacting our other resources such as basket-weaving resources. We use the tules and different things. We have wokas. We have a lot of different resources that are being impacted, and those need to be taken into consideration when make these kind of rules.
And also, when we talk about water rights, we need to consider future water rights. If ever we are to obtain land back -- which is something we all strive for -- we're going to be using more groundwater as well. So we need to take that into

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consideration, our future water rights. That's all. Thank you.
MS. WATSON: Anyone else who would like to speak? We have some time left. If you have a comment, if you would just like to hang around, we can have considerations on the side. Anybody else want to have a comment that's on public record?
All right. I appreciate everyone coming. I know it's been a horrific trip for just about everybody to get here -- well, except for me. So I do appreciate your time. Please drive safe going home. Thank you for your comments. They will be incorporated into the public record. And again, if you'd like to stay around and just yack, we are here to listen. All right. Okay. Thank you very much.
(Whereupon, the meeting was adjourned.)

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CERTIFICATE

I, Robyn Fiedler, do hereby certify that the proceeding named herein was professionally transcribed on the date set forth in the certificate herein; that I transcribed all testimony adduced and other oral proceedings had in the foregoing matter; and the the foregoing transcript pages constitute a full, true, and correct record of such testimony adduced and oral proceeding had and of the whole thereof.

IN WITNESS HEREOF, I have hereunto set my hand this 29th day of March, 2019.

/S/ Robyn Fiedler

KWUA Klamath Water Users ASSOCIATION

Phone (541) 883-6100 ~ Fax (541) 883-8893 ~ 735 Commercial Street, Suite 3000 Klamath Falls, Oregon 97601

January 30, 2019

Via Electronic Mail Only

Ms. Racquel Rancier
Senior Policy Coordinator
Oregon Water Resources Department
725 Summer Street NE
Salem, OR 97301
racquel.r.rancier@oregon.gov

Re: Comments on Proposed Interim Rule – "Upper Klamath Basin Groundwater Use Regulation to Protect Senior Surface Water Rights"

Dear Ms. Rancier:

On behalf of the Klamath Water Users Association (KWUA), thank you for the opportunity to participate on the Rule Advisory Committee (RAC) for the proposed interim rule titled "Upper Klamath Basin Groundwater Use Regulation to Protect Senior Surface Water Rights."

KWUA is a non-profit private corporation that has represented Klamath Reclamation Project farmers and ranchers since 1953. The Klamath Project (Project), authorized in 1905, is home to over 1,200 family farms and ranches. Project facilities store or deliver water for approximately 200,000 acres of productive farm and ranch land, most of which is diverted from the Klamath River system. The Project water users are among the senior surface water right holders that the proposed regulation seeks to protect.

At this time, KWUA takes no position on the ultimate effect of the proposed interim rule (i.e., the number of wells that will be subject to regulation during the interim period). However, KWUA does have several concerns regarding the current language of the proposed interim rule.

1. **The Proposed Interim Rule's Definition of "[D]etermined Claim" Lacks Clarity**

KWUA proposes to modify the definition as follows:

> "Determined claim" means a claim for surface water as provided in the Amended **and Corrected** Findings of Fact and Order of Determination issued ~~on March 7, 2013 and~~ on ~~April 10~~ February 28, 2014, **and** subject to regulation pursuant to ORS 539.170.

The Amended and Corrected Findings of Fact and Order of Determination (ACFFOD) is the currently operative order that is subject to regulation in the Klamath Basin pursuant to ORS 539.170. The Oregon Water Resources Department (OWRD) issued the ACFFOD on February 28, 2014.

2. The Definition of "Upper Klamath Basin" is Potentially Ambiguous

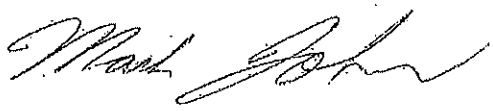
KWUA understands that the geographic scope for application of the proposed interim regulation includes areas surrounding and tributary to Upper Klamath Lake, including groundwater, the Wood River, Williamson River, Sprague River (and tributaries), and the Klamath Marsh and its tributaries. The phrase "Upper Klamath Basin" is often used in different contexts with various meanings. For example, in the Klamath Basin Compact, "Upper Klamath River Basin" generally includes all of the Klamath River Basin in Oregon. *See* ORS 542.620. To add clarity, KWUA suggests the use of the phrase "Upper Klamath Lake Drainage Area" to describe the area subject to the proposed interim regulation, in place of "Upper Klamath Basin."

3. The Proposed Interim Regulation Improperly Includes Klamath Basin-Wide Findings

The proposed interim regulation provides that "[i]n the Klamath Basin, groundwater and surface water are hydraulically connected." *See* Proposed OAR 690-025-0040(1). "Klamath Basin" is not defined in the proposed interim regulation, but presumably includes some area larger than "Upper Klamath Basin" or the "Upper Klamath Lake Drainage Area." The title of the proposed interim regulation is "Upper Klamath Basin Groundwater Use Regulation to Protect Senior Surface Water Rights." The proposed interim regulation is limited to "Upper Klamath Basin" and should not include regulatory findings relating to geographic areas outside its scope.

KWUA appreciates the opportunity to provide these comments on the proposed interim rule and looks forward to continued participation in this process.

Sincerely,



Mark Johnson
Deputy Director
Klamath Water Users Association

LEE TRAYNHAM
P.O. BOX 769
ARBUCKLE, CA 95912

My name is Lee Traynham. I am the Chairman of Wood River District Improvement Company (WRDIC) and own a ranch in Fort Klamath. WRDIC has invested a lot of money in development of the six wells allowed by water right Permit G-17506. We did this based on the existing Division 25 rules as they existed when they were first adopted. We went to considerable extra expense in construction the wells to satisfy the conditions for not impacting surface water as outlined in Division 25. The resending of Division 25 and regulation of groundwater according to Division 9 rules caused sever harm to the members of WRDIC in 2018.

Therefore I want to go on record, for myself and on behalf of WRDIC, as very strongly supporting the proposed changes to Division 25 and the drafting of groundwater regulation rules specific to the Klamath Basin to be completed in 2021.

Because of the investment WRDIC has put into the wells, based on OWRD conditions in the permit and the original Division25, WRDIC has no option but to pursue the use of these wells either through the OWRD rule making process of through the court. We would much rather reach a reasonable solution through the rule making process.

Thanks you for the opportunity to provide comments.

Lee Traynham

2-14-19

My name is Mike LaGrande. I own a ranch of almost 1400 acres in the Fort Klamath area. I am also a Board member of the Wood River District Improvement Company.

I want to go on record as strongly supporting the proposed rule changes to Division 25.

The implementation of the Final Order of Determination of the Klamath Adjudication and the regulation of groundwater according to Division 9 has had a devastating impact on my ranch in Fort Klamath. In 2018, I was able to grow less than one fourth the pasture historically produced. The proposed rule change to Division 25 will not come close to making me whole, but the rule change along with other measures I am taking might lessen the impact to my business.

Thank you for the opportunity to comment and I hope the adoption of the proposed changes to Division 25 leads to a reasonable adoption of permanent rules in 2021.

Mike LaGrande

Mike LaGrande

Anthony & Mary Booker
P.O.B. 177
61137 Hwy 140 E
Bly, OR 97622
Ph: 541 353 2261

February 17, 2019

By email to: racquel.r.rancier@oregon.gov

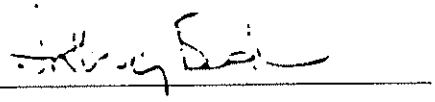
Racquel Rancier, Senior Policy Coordinator
Oregon Water Resources Department
725 Summer St. NE, Suite A
Salem, OR 97301-1271

PUBLIC COMMENT RE: PROPOSED INTERIM RULES: OAR 690-025-0020, -0025 AND -0040.

After reviewing the above-referenced proposed rules, attending both RAC sessions, listening to argument from many perspectives and providing argument, we conclude that the proposed interim rules are a reasonable compromise and should be adopted by the Commission immediately.

We look forward to discussion towards the Department framing a comprehensive Basin Management Plan during the next two years which accommodates all interests,

Anthony and Mary Booker



Michael Harding
P.O.B. 205
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Ph: 541 281 6946

February 17, 2019 By email to: rquel.r.rancier@oregon.gov

Racquel Rancier, Senior Policy Coordinator
Oregon Water Resources Department
725 Summer St. NE, Suite A
Salem, OR 97301-1271

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Michael Harding

Steve and Suzanne Cornell
PO B. 124
Bly, OR 97622
Ph: 541 891 0501

February 17, 2019

By email to: racquel.rancier@oregon.gov

Racquel Rancier, Senior Policy Coordinator
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by Steve Cornell

Bly Water & Sanitary District
61138 Highway 140E
Bly, OR 97622
Ph: 541 353 2562

February 17, 2019 By email to:rmquel.r.rancier@oregon.gov

Racquel Rancier, Senior Policy Coordinator
Oregon Water Resources Department
725 Summer St. NE, Suite A
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We look forward to discussion towards the Department framing a comprehensive Basin Management Plan during the next two years which accommodates all interests,

Bly Water and Sanitary District

By Steve Cornell, President

Received 2/21/19

February 19, 2019

To the Oregon Water Resources Department,

The purpose of our government is to equitably protect its citizens and it resources. This purpose is accomplished through the creation and enforcement of laws that provides a framework that will not infringe on the freedom of those citizen who consent to be governed by these laws.

Those who are elected or appointed the task of administering these laws ARE NOT MORALLY SUPERIOR persons. Administrators are required to abide by these same laws. They are also required to be held to a higher standard of behavior that comes as a cost of the trust that citizens place in these administrators.

The actions and history of administrators of Oregon Water Resources Department has been displaying a distinct lack of respect for their fellow citizens. In one specific example, respect has not been demonstrated by changing the scientific assumptions that OWRD must use in calculating the amount of water that ranchers use in making hay. When it was pointed out to an administrator that at least four flaws exist in this model, and when it was requested that the model be corrected to reflect reality, the response from the administrator was an emphatic refusal to make any changes.

When have these administrators demonstrated distinct attitude of moral superiority? A specific example occurred when, at a recent open house, in a condescending manner, an administrator remarked that he "just wished there was a way to explain the water model in a way that we could understand".

We are your fellow citizens. We are intelligent enough to discern that the models that are being forced on us are not accurate. They do not reflect the reality. These models are being used to force harm on our freedoms and livelihood.

Since the inaccurate science being used to justify these actions is not allowed to reflect reality, then these laws are clearly being used for political reasons. ORWD has not only an obligation to protect natural resources and society, but they also have a MORAL obligation to be equitable in their administration. OWRD's current actions break down the societal framework that protects citizens. The attitudes of the administrators destroy the trust of their fellow citizens. The economic and emotional hardships caused by politically motivated, false scientific-based enforcement are unfairly suffered by those who have caused no harm.

Every person, regardless of their station in life, will at some point need to give an accounting of their life's choices and decisions. OWRD administrators – each and every one of you – will at some point be required to answer for the grief and stress that YOU are choosing to inflict on others. Even the science of OWRD cannot deny this most basic law of life.

You are inflicting harm on our family. On our neighbors. On our community. And you will be held responsible for this. Take this into consideration while you spend the next two years making those "permanent rules" for the Klamath Basin.

Ann SeCoy

Ann SeCoy
Beatty, OR

PRYBYL Stephanie H * WRD

From: RANCIER Racquel R * WRD
Sent: Tuesday, February 19, 2019 10:07 AM
To: PRYBYL Stephanie H * WRD; GALL Ivan K * WRD
Subject: FW: Division 25 comment

From: Hollie Cannon [mailto:hcannon@waterrightsolutions.com]
Sent: Tuesday, February 19, 2019 9:13 AM
To: RANCIER Racquel R * WRD
Cc: Lee Traynham (traynham@frontiernet.net); Buckley Cox (info@traynhamranch.com); Michael LaGrande (mlagrande@sunvalleyrice.com); Robert Wallace; Cathy Waters
Subject: Division 25 comment

Racquel
I am the contract manager of Wood River District Improvement Company (WRDIC). It is my duty to get water to the land of WRDIC. The irrigation season of 2018 was a disaster because of the regulation of wells by Division 9 rules.

OWRD needs to do a better job of developing the knowledge of the connectivity of groundwater and surface water. And a better job of communicating to the landowner the **impact of each individual well** to surface water. At this time, OWRD cannot provide me with the calculations of the impact of the WRDIC wells on the surface water. Maybe the wells are connected to surface water, but without the individual calculations, it feels like there is a blanket regulation that may or may not be correct.

Permit G 17506 requires the wells of WRDIC to be "continuously cased and continuously sealed to a minimum depth of 400 feet below land surface". This condition and the fact that the permit was issued implies that OWRD found that by meeting the conditions of the permit, the wells would not impact surface water. Further, the old Division 25 rules said wells continuously cased and sealed to 500 feet would keep the wells from being regulated because of surface water connection. Therefore WRDIC spent a lot of money to meet the conditions set by OWRD to gain security that the wells would be able to operate. Then, in 2018 OWRD pulled rug out from under WRDIC, with devastating consequences. WRDIC put faith in what was said by OWRD and invested about $2.5 million to complete the wells. WRDIC is one of the parties who intends to bring a lawsuit against OWRD if the Division 9 rules remain in effect.

But, WRDIC would much rather work with OWRD to settle these issues outside the court. Therefore WRDIC strongly supports the proposed Division 25 rules. WRDIC looks forward to collaboratively working with OWRD and the other interests in the water resources of the Klamath Basin in the development of the rules that will replace the Division 25 rules in 2021. Until then, the proposed Division 25 rules should be adopted as soon as possible.

Thank you for this opportunity to comment.

Hollie Cannon
Water Right Solutions, LLC
Office: 409 Pine St, #311
Klamath Falls, OR
Mail: 3246 Hammer St
Klamath Falls, OR 97603
Phone: 541-821-5848

Oregon Water Resource Commission
725 Summer Street NE, Suite A
Salem, OR 97301-1271

February 21, 2019

Commissioners:

I was a member of the Rules Advisory Committee that met in January 2019 for the purpose of providing feedback on the draft interim rules for the Upper Klamath Basin.

In ORWD's "Need for Rules" section in the "Notice of Proposed Rulemaking" filing it states that "In the Klamath Basin, significant amounts of groundwater discharges to surface water, such as springs streams, and rivers. Pumping wells capture **some** of this water reducing the amount of surface water".

I don't remember that any RAC members disputed that some wells might interfere with surface water but they did stress that this would not be the case with all wells within the Upper Klamath Basin or in fact the entire Klamath Basin.

These statements from the majority of the RAC members prompted them to request that each well be tested individually to conclude if a well is definitely interfering with a surface water source prior to regulating-off that particular well.

Also stated was, "In the 2000's through present, significant data were collected in the basin and **several reports** documented hydraulic connection between surface water and groundwater in the basin". Does this mean that several other reports did not document hydraulic connection? This was not answered during the RAC meetings. The majority of RAC members did not agree with ORWD that surface water and groundwater are hydraulically connected.

And, "Regulation under the existing OAR 690-009 statewide rule has resulted in litigation, prompting these proposed basin specific rules". Does this mean that the well irrigators of the Klamath Basin are to be discriminated against and not be allowed our constitutional right to litigate if so desired?

Also, I do not agree with the proposed OAR 690-025-0040 sections (1), (2), (3) and (4).

Sincerely,

Joan Amaral Sees
Beatty, OR

February 21, 2019

Before the Oregon Water Resources Commission

Testimony of Roger Nicholson on Proposed Division 025 Rules

The Nicholson family has been ranching in the Wood River Valley since the late 1800s. I own several tracts of land with pre-1909 water rights that were decreed in the prior Wood River adjudication, as well as water rights that have been adjudicated in the KBA. I am also the president of Fort Klamath Critical Habitat Landowners, Inc. ("Fort Klamath"), an Oregon non-profit formed to facilitate research and legal advocacy regarding water rights of the Wood River Valley watershed and other water bodies to protect people and water resources; and, to educate and involve the public in sustaining water rights.

Irrigation water is critical in order for my business to grow feed for cattle through the summer. However, all of my surface water rights have been put at enormous risk as a result of OWRD's erroneous quantification of instream flows for the BIA. The Department set the instream flows so high that surface water for irrigation in the Wood River valley is extremely limited. As a result, unless or until those instream flows are corrected as part of the adjudication process, groundwater is often my only available supply for a lot of my acreage. I have invested hundreds of thousands of dollars to develop wells as a supplemental source of water. I have relied on OWRD's division 009 rules promising that no wells located more than one mile from a surface water source will be regulated in the absence of a statutory critical groundwater determination. I purposely drilled my wells outside of the one-mile zone so that I could rely on these wells for irrigation during times that surface water is unavailable. I am not alone. Other irrigators, the City of Chiloquin and other municipalities have spent, or financed, millions of dollars to drill wells outside of the one-mile zone.

Despite these investments and the importance of groundwater as a supplemental source of irrigation water for when surface water is not available, the Department shut off more than 140 wells last summer based on the enforcement of the unrealistic and unobtainable instream flows the Department awarded to the BIA. Because my wells are outside of the one-mile zone, I was fortunate to not be among those that were regulated. But I am concerned by the Department's approach to regulation last summer, regulating all those wells off without giving them any prior due process. I also have concerns about the practice of the Department relying on hydraulic modeling that has little ground-truthing supporting its assumptions and predictions. Finally, I am alarmed and object to the Department's decision to go forward with attempting to declare scientific facts in these proposed rules, which touch on issues that are very much in controversy. Although I appreciate that the Department has tempered these rules by stipulating they will be not establish future precedent, that is all the more reason to leave the controversial scientific findings out of the rule.

I served on the Rules Advisory Committee for the draft rules under consideration today. I submitted suggested changes to the rules (attached), which went largely unadopted by the Department. Although I still prefer my proposal, I support the Department's overall approach of

backing off on regulation to provide a two-year period for the parties to try to resolve these difficult issues. The one issue that this Commission needs to strengthen is the one-mile protection under the Division 009. As I have stated, there are a lot of us in the Klamath Basin that have made huge investments to drill wells outside of the one-mile zone. Those wells must be given regulatory assurances they will not be regulated in favor of surface water rights in the future, no matter what the outcome of the Department's future rulemaking processes in the basin. However, I understand the fact the Department is stipulating that these rules do not establish precedent for future regulation. This leaves those of us who have relied on representations from the department that there will be no calls on wells beyond a mile without any long term protection. These representations have continued with recently the department granting an extension of time on an expiring permit in order to drill new wells to replace several within one mile of a stream. The investment in the new wells is estimated to be over $500,000. In division 009 and the former division 25 rules protections for wells over one mile from surface waters have been continually in place. In summary, while today I urge the Commission to adopt the rules to provide numerous Upper Basin irrigators much-needed relief I urge the commission to strengthen the protections for wells located outside of the one-mile zone by a provision that automatically puts division 009 and the former division 25 protections back in place upon the new rule expiring.

Received 2/21/19

Commissioners:

I am writing to ask you to oppose the proposed water resources rules. Even though these rules are temporary, they set a dangerous precedent for how water is managed in the west by codifying the fallacy into law that all surface water and ground water is connected. Water Resources has done studies that have concluded the opposite is true in many instances, but this rule isn't about science. This is purely a political move to further diminish agriculture in Klamath county, and eventually the whole state. Currently, ground water is supposed to be managed separately from surface water. There are a lot of good reasons for that. If all groundwater is connected to surface water, then well construction standards are no longer needed. Also, this rule change could impact hundreds of Department of Environmental Quality sites in Klamath County. They settled cases based on the science that showed no interference between surface and groundwater. If real science is to be ignored and this political opinion is codified into law, those settlements will be moot.

I am also very concerned about the way that these rules have been created. I attended both rules advisory committee meetings and it greatly concerns me how Water Resources completely ignored the suggestions of the members on that committee. It seems that Water Resources has an agenda and is going to push these rules through no matter what.

These rules are being touted as necessary to allow Water Resources time to engage the community and create permanent rules. Thus far, Water Resources has completely ignored the concerns of the community. How are these rules going to change that? I don't think that they will.

I urge you to either reject these rules in their entirety, or at least remove the part about all surface and groundwater being connected. This rule bodes ill for all water users in Oregon.

Thank You,

Susan Topham
Rancher in the Sprague River Valley

delivered by Tom Wallaus 2/21/14

THE KLAMATH BASIN

WATER RIGHTS

ADJUDICATION

HOW TO FILE A CLAIM--SHOULD I FILE?

WHAT AREA IS BEING ADJUDICATED?

The Director of the Water Resources Department has filed a notice to begin an adjudication of the water rights of the Klamath River and its tributaries. According to state law and regulations this includes all waters that drain to the Klamath River. All water right holders within the Klamath Basin will be bound by the final determination of this adjudication.

Portions of the Klamath Basin have been previously adjudicated. These previously adjudicated areas include: the North and South Forks of the Sprague River, Anna Creek, Cherry Creek, Four-Mile Creek, Seven-Mile Creek and the west side of Wood River. The Lost River is not considered to be part of the Klamath River drainage basin in Oregon. Claims to use water in the previously adjudicated areas may not be filed unless you or your predecessors were not notified at the time of the adjudication.

WHO MAY FILE A CLAIM IN THE KLAMATH ADJUDICATION?

You may file to participate in the Klamath adjudication if:

1) You claim to have a use of surface water from a spring, creek, stream,river or lake that began before February 24, 1909 and the use has been continuous since then;
2) You have a claim to a federal reserved right;
3) You are an Indian claiming a right to practicable irrigable acreage;
4) You have a claim based on an Indian reserved right for practicable irrigable acreage and have developed that right within 5 years of purchase of the lands; or,
5) You are a surface water right holder within the Klamath basin and wish to have the opportunity to contest the claims of others.

WHAT IF I RECEIVE WATER FROM AN IRRIGATION DISTRICT OR FROM THE U.S. BUREAU OF RECLAMATION?

Either the irrigation districts or the U.S. Bureau of Reclamation may choose to file a claim for all of their customers. A water right will be allowed only once for each valid claim. You may check with your irrigation district, or the Bureau of Reclamation, or the Oregon Water Resources Department to determine if your property has been mapped and included as part of a larger claim.

If you only use water from a groundwater source or from a municipal water supply then you need not do anything further. You will not be a party to this proceeding.

WHAT HAPPENS AFTER I FILE THE CLAIM?

The Water Resources Department reviews each claim to determine if it is complete and accurate. All claims and maps are gathered together. In about one year, notice will be sent to all parties to come and examine all of the evidence. Those who are participants may file contests against any other person's claim. Contests are resolved either by the concerned parties or as a result of separate hearings. Findings are prepared by the Department and submitted to the Klamath Circuit Court. The Court holds hearings and issues a final decree on all of the vested water rights. There is an opportunity to appeal the Court's decision.

WHAT SHOULD I DO NOW?

If you use water directly from a spring, creek, lake, ditch or stream, decide if you will file a claim as an individual or as part of a larger district. If you wish to file your own claim, complete the enclosed form as best as you can and bring it with you during one of the times listed on the enclosed notice.

Your claim must include facts requested on the enclosed form:

a. Your name and address.
b. The stream from which water is taken.
c. How you use the water.
d. How much water is used.
e. The date water was first put to use on your lands from that stream.

A large number of water uses in the Klamath Basin have been mapped by the Water Resources Department. The maps were prepared as a result of persons filing a notice of intent to file a claim in 1977. You may check the mapped area and Department files for your property at the time you file your claim. If your claim has not been mapped, you must have a map prepared by an engineer,surveyor, or a certified water rights examiner.

The facts of your claim should be documented as best you can with copies of land patents, deeds, contracts, and/or easements. Proof of uses of water may include statements from persons who know about the historical use of the water, letters, county records of an intent to use water, or other documents from the original developers of the water use. You must pay the fees listed below at the time you file your claim.

WHAT USES OF WATER CAN I CLAIM?

Only water that is used without waste can be claimed. Uses may include:

a. Domestic use for a household including up to 1/2 acre of lawn and garden, and livestock for the family's use.
b. Stock water for animals for commercial sale, or for wildlife.
c. Irrigation of any crop.
d. Commercial, industrial, or municipal uses.
e. Power development or mining.
f. Other uses, as can be documented.

HOW MUCH DOES IT COST TO FILE A CLAIM?

When you file a claim you must pay a fee.

For Irrigation Uses:	$2.00 for each acre of irrigated lands up to 100 acres. $1.00 for each acre over 100 acres, or a minimum fee of $30.00.
For Power Use:	$2.00 for each theoretical horsepower (thp) up to 100 thp. $ 0.50 for each thp over 100 thp up to 500 thp $ 0.35 for each thp over 500 thp up to 1000 thp and $ 0.25 for each thp over 1000 thp.
For Each Other Use:	$200.00 for the first cubic foot per second of pumping rate or fraction thereof. $ 50.00 for each additional cubic foot per second.

WHAT HAPPENS IF I MISS THE DEADLINE?

If you fail to file during one of the times listed in the enclosed notice, you will be stopped from making any claim to the use of the water and will have forfeited your right to the use of the waters. You may request an extension of time for providing documentation of your claim, if you file the form and minimum fees by the deadline in the attached notice.

WHO SHOULD I CONTACT IF I HAVE QUESTIONS?

If you have have questions about filing a claim please call our Salem office at 378-3066.
To avoid the crowds and to make better use of your time, please call for an appointment at 883-5533, after our Klamath Falls phone is available, beginning 10:00 am Wednesday, October 10, 1990.

Received 2/21/19

Oregon Water Resource Commission
725 Summer Street N.E., Suite A
Salem, OR 9730-1271

Commissioners:

I am Virginia Topham. I am a cattle rancher in the Sprague River Valley. I have been a land owner and have continuously irrigated on our family ranch for 48 years. My children were born, raised, and still reside on the ranch. They represent the third generation on the land. This is our life and our heritage that is being threatened with destruction by OWRD's unreasonable, illegal, and unproven tactics. I have several concerns about OWRD changing the rules all the time. How are we to operate our family cattle ranch when our water is always in jeopardy? This land has been continuously irrigated for over 150 years. Without water the ranch becomes desert. Three successive OWRD directors told us told us that if we wanted water long term we needed to drill wells. In fact, OWRD financed many wells in the area in the 1980's. You have taken away all our surface water. When the surface water was adjudicated years ago, we received a letter from OWRD stating that if we had a ground water supply we were not a party to the proceedings. I'm sure you know how that worked out! Our ground water has never been adjudicated yet last year our well was called because we are within one mile of Whiskey Creek. What happened to first in time? Now you say we can have water for two years, then what? Frankly, we don't trust you. You say you are going to be studying the situation but Ivan Gall says your science cannot be questioned. I thought America was built on the principle that " one is innocent until proven guilty." OWRD says groundwater and surface water are hydraulically connected. Your computer modeling no way resembles the real world. Apparently the State of Oregon says "we are guilty until we prove we are innocent." We cannot prove a negative. You are making a political decision, not a decision based on science. I just hope you are aware of the ramification of your political decision because many lives and livelihoods are being destroyed.
Thank you for your time.

Virginia Topham
Flying T Ranch
35133 Sprague River Road
Sprague River, OR 97639
cattle@flyingtsalers.com

February 25, 2019

Racquel Rancier

Senior Policy Coordinator

Oregon Water Resources Department

725 Summer Street NE, Suite A, Salem, OR 976301

Re: Klamath Tribes comments for Commission on OWRD Notice of Proposed Rulemaking

Dear Racquel:

On behalf of The Klamath Tribes I would like to submit several concerns and comments for consideration by the Department and Commission regarding OWRD's Notice of Proposed Rulemaking Including Statement of Need and Fiscal Impact issued on January 29, 2019. Given the hydrology of the Klamath Basin, the proposed draft interim rules will result in loss of flow to adjudicated senior water rights to the benefit of non-adjudicated junior groundwater users. The Klamath Tribes, supported by various members of the RAC, put forth a series of revisions to OWRD's initial proposal, but none of these changes were implemented into the current draft. The Tribes' proposed modifications would allow for appropriate domestic use while still providing the protection senior surface water users are entitled to under Oregon's prior appropriation system. Consideration of the Tribes' proposed changes is warranted and necessary to ensure the Department remains in compliance with its statutory obligations.

Oregon Revised Statute 537.525 requires that beneficial use of groundwater be made only within the capacity of available resources. In the Upper Klamath Basin, groundwater and surface water are extensively interconnected and groundwater resources are a significant source of flows for surface streams and rivers. The Klamath Tribes possess adjudicated water rights for instream flow in many of the streams and rivers of the Upper Klamath Basin, which are for the benefit of the Tribes' treaty resources, the use of which redound to the benefit of many groups and individuals. The majority of these streams and rivers are spring fed or otherwise depend on groundwater for meaningful portions of their base flows. Further depletion of groundwater will impact these surface flows by over allocating available water resources. Over allocation will result in negative impacts to treaty resources and ultimately numerous groups and individuals, including adjudicated surface water users.

Groundwater/Spring fed sources are extremely important to both native Redband trout and ESA listed sucker species and used as both spawning and thermal refugia habitats. All of the spawning habitat of the Upper Klamath Lake Redband Trout fishery is reliant on groundwater sources. Decreases in groundwater sources have also coincided with a decrease in the spawning population of Redband Trout. Sound management of water resources within the Upper Klamath Basin is necessary to maintain access to habitats provided by groundwater sources. Over allocation of groundwater resources through development of unsustainable OAR's including interim OAR's is not acceptable and should not be abetted by the Department.

It is my belief that both current OAR's under Division 25 (possible regulation of 40 wells) and Division 9 (possible regulation of 140 wells) are inadequate for protection of current surface water claims and the Klamath Tribes consequently would welcome the development of a protective set of Basin Wide Rules. Indeed, a comprehensive set of Basin Wide Rules are necessary in order to properly protect the adjudicated water rights of the Upper Klamath Basin. The Klamath Tribes understand that OWRD is

prepared to begin a process to promulgate such rules. The Tribes support and look forward to participating actively in that process.

The proposed interim Division 25 rules, however, are even less protective than the current rules, leaving only 7 wells in the Upper Klamath Basin susceptible to regulation. Paring back groundwater regulation in this way would result in increased groundwater use, an outcome that is neither sustainable nor responsible. Under current conditions, many of the Tribes' instream rights protecting treaty resources are rarely met, most likely at least partly as a result of groundwater extraction. ORS 537.525 also states that reasonably stable ground water levels are to be determined and maintained. Stability of groundwater should require maintaining levels that provide for the satisfaction of adjudicated instream claims and the protection of domestic uses.

The Klamath Tribes' proposed changes to the interim Division 25 rules, if adopted, could allow for protection of senior water users without impacting domestic uses. We strongly advocate for their inclusion in any final rules adopted by the Commission.

Proposed changes with brief descriptions:

690-025-0020:

(2) "Existing Rights of Record" means authorized groundwater uses, determined claims, groundwater registrations, rights arising under federal law and surface water rights.

This recommended change was meant to protect any federal reserved rights not included in an Adjudication.

(9) "Well" or "wells" means a well as defined in ORS 537.515(9) that is located in the Upper Klamath Basin and is used to beneficially withdraw water for authorized groundwater uses limited to ~~including domestic~~, stock, irrigation, industrial, ~~municipal~~ and aquifer storage and recovery uses.

The striking of domestic and municipal wells needs to include a moratorium on future applications or cap on current use during the interim while basin wide rules are developed.

This recommended change was meant to protect domestic use consistent with past water calls. Under the current proposed rules, a call could impact all wells, including domestic ones.

690-025-0040:

(1) In the Klamath Basin, there is a rebuttable presumption that groundwater and surface water are hydraulically connected. To rebut this presumption, the party withdrawing or seeking to withdraw groundwater must demonstrate to the Department by clear and convincing evidence that no hydrologic connection exists between the groundwater reservoir being withdrawn or proposed to be withdrawn and surface water, and that such groundwater withdrawals have no measurable depletion to senior existing rights of record.

This recommended change would be consistent with current state of the science yet allow for new science to be produced, just not at the State's or senior water user's expense.

(6) The Department ~~may~~ shall regulate wells that are located a horizontal distance equal to or less than 500 feet from a source of surface water rights whenever a valid call for surface water is

made and the Department is regulating in accordance with the users' existing rights of record. ~~Under this rule, the Department will not regulate wells located a horizontal distance greater than 500 feet from a source of surface water.~~

This recommended change would consider groundwater within 500 feet as being directly connected to surface water, requiring regulation. Deleting the last sentence be consistent with current state of the science by allowing for the possibility of regulation beyond 500 feet where appropriate.

(7) Whenever a valid call for surface water is made and the Department is regulating in accordance with the users' existing rights of record, the Department may regulate wells that are located horizontal distance greater than 500 feet from a source of surface water rights if such regulation will provide effective and timely relief to the right(s) for which the valid call has been made.

This recommended change would be consistent with current state of the science and OWRD's statutory obligations by allowing for regulation beyond 500 feet where appropriate.

Make the following revision to new proposed Subsection 7, (OAR 690-025-0040(7), as follows:

(~~7~~8) Groundwater regulation in the Upper Klamath Basin before March 1, 2021, will occur pursuant to OAR 690-0025-0020 to OAR 690-0025-0040. After March 1, 2021, OAR 690-0025-0020 to OAR 690-0025-0040 will no longer be in effect and groundwater regulation in the Upper Klamath Basin will occur under OAR 690-009, unless the Commission adopts new rules governing groundwater regulation in the Upper Klamath Basin prior to March 1, 2021.

On behalf of The Klamath Tribes, I recommend adopting above recommended changes in order to meet Department's statutory obligations.

Thank you for consideration,

Brad Parrish

Water Rights Specialist

The Klamath Tribes Research Station

Racquel Rancier
Oregon Department of Water Resources
725 Summer Street NE Suite A
Salem, Oregon 97301

Dear Ms. Rancier:

I am writing in opposition to Oregon Water Resources plans to regulate wells on private property on the basis of the Klamath adjudication.

In 1906, two parcels of land were ceded out of the Klamath Indian Reservation. One, for 621,824 acres, was ceded out of the reservation in a boundary settlement agreement for $537,007,20. This area started about 1 mile west of the current Ivory Pines Rd. and extended to the Quartz Mountain area. In exchange for this payment the tribes were required to "cede, grant, and convey to the United States all their claim, right, title and interest in and to all" this land. In 1969, the Indian Claims Commission awarded the tribe $4,162,992 for this land known as the 1901 cessation agreement. In 1985, the U.S. Supreme Court ruled ODFW v. Klamath Tribes "The 1864 Treaty's language indicates that the tribe's right to hunt and fish was restricted to the reservation, and the 1901 Agreement's broad language accomplished a dimunition of the reservation boundaries.

The second area, was 87,000 acres and is in the Upper Williamson river area and is currently owned by the Green Diamond timber company. In 1906, it was offered to the California and Oregon Land Company in exchange for 111,000 acres of land patents the company owned within the reservation as a result of a military road contract granted before the tribes treaty establishing the reservation. The tribes were paid an additional $108,750 for this exchange. In exchange for this payment the tribes were required to execute "a release of any claims and demands of every kind against the United States for the land involved. In 1938, the tribes were paid over 2 million dollars more by an Act of Congress for this exchange agreement to establish fair market value.

In both cases, the tribal councils approved these settlement agreements.

In granting the tribes right to water from private land outside the 1954 reservation boundaries the Oregon Department of Water Resources (ODWR) has literally gone off the reservation of legal boundaries. Tribal rights are determined by treaty and known as federal reserved rights. OWRD has mixed up western water law with tribal rights to try to extend Indian claims to private land. The only time immemorial rights the Indians have are hunting, fishing, and gathering rights. Water rights cannot be seperated from the time immemorial rights.

In the Adair decisions the federal courts ruled the Klamath tribes were entitled to enough water to support a modern standard of living regarding hunting and fishing rights. ODFW declined to even determine what a modern standard of living is in this context.

This is important because in United States v. New Mexico, 438 U.S. 696, 700 (1978) The U.S. Supreme Court wrote

(noting that "each time this Court has applied the 'implied-reservation-of-water-doctrine' it has been carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated.")

This rule applied by the Supreme Court is restated in Cappaert, 426 U.S. at 139 which said the reserved rights doctrine is a rule mandating a determination of legislative intent : In determining whether there is a federally reserved water right implicit in a reservation of public land , the issue was whether the Government intended to reserve unappropriated and thus available water." This is the very same court decision that determined reserved rights could be decided in state adjudication.

The state's well restrictions are being applied to land where the land is already appropriated and the state has offered no evidence the primary purpose of the former reservation would be entirely defeated with no restrictions on water wells.

In fact, Attorney General Isaac Van Winkle stated in his opinion dated Nov. 14, 1930 that there was only 200 cubic feet of unappropriated water from the Klamath basin at the Link River as of that date. This is far below the wells the state is trying to regulate. Unfortunatly, the records he relied upon no longer exist as the state has failed to maintain these records despite legal requirements to do so since the establishment of the office of state engineer in 1905. In granting modern water rights, the U.S. Court of Claims in Aug. 31, 2005 2005 (No.01-591 L)
stated "Flaws similar to those found in the 1950 (Neuner) opinion are exhibited in the position of the Oregon Attorney General has taken in the adjudication. See In the Matter of the Determination of the Relative Rights of the Waters of the Klamath River, a Tributary of the Pacific Ocean, Oregon Water Resources Department's Closing Brief on Reply 36-41 (July, 14, 2005).

The truth is courts cannot reserve or create federal property rights; only Congress, or the Executive acting under statutory authority, can do that (U.S. Constitution. art. IV 3)

The truth is the state has been trying to defeat the exclusive right language the U.S. Supreme court in ODFW v. Klamath tribes since the establishment of the Oregon Water Commission in 1985 and the notice of adjudication registration in 1990. It has done so by granting various state agencies and the Forest Service instream water rights with priority dates of 1974 and later. As a practical matter these water rights are worthless. But it allowed the state in adjudication to claim in its Feb. 12, 2007 Amended Order #4 that "the non-exclusive nature of the Tribes' hunting, fishing, and gathering rights do not affect their water rights."

This statement trys to sow confusion. Outside of the reservation, tribal members have the same rights as everyone else in the state of Oregon. Of course these rights don't affect water rights because they have no time immemorial rights apart from the reservation.

In Tayler et. al. v. United States (44 F.2d 531 1930) the Ninth Circuit Court of Appeals ruled the federal government cannot give the tribes in stream water rights if they were already appropriated by the state. Since Oregon acquired state water in 1859 and the Klamath Tribes treaty didn't happen until 1864; the whole premise of taking water from private property owners is flawed. The state would do well to abolish all its rules regarding well regulation on behalf of the tribes.

Jerry Jones
Jerry Jones
356 Day School Rd.
Chiloquin, Oregon 97624

Leland Hunter

PO Box 264

Bly, OR 97622

Ph: 541-891-8116

February 27, 2019 By email to:Raquel.r.rancier@oregon.gov

Raquel Rancier, Senior Policy Coordinator

Oregon Water Resources Department

725 Summer St. NE, Suite A

Salem, OR 97301-1271

PUBLIC COMMENT RE: PROPOSED INTERIM RULES : OAR 690-025-0020,-0025 AND-0040.

After reviewing the above-referenced proposed rules we conclude that the proposed interim rules are a reasonable compromise and should be adopted by the Commission immediately.

We look forward to discussion towards the Department framing a comprehensive Basin Management Plan during the next two years which accommodates all interests.

Leland Hunter

PRYBYL Stephanie H * WRD

From: RANCIER Racquel R * WRD
Sent: Saturday, March 2, 2019 10:03 AM
To: PRYBYL Stephanie H * WRD; GALL Ivan K * WRD
Subject: FW: comments

From: Rob Wallace [mailto:rob@delriovineyards.com]
Sent: Friday, March 01, 2019 8:33 AM
To: RANCIER Racquel R * WRD
Subject: comments

I am the owner of approximately 600 acres along HWY 140 in the upper Klamath Basin. My ranch is subject to the Division 25 rules. The ground water rules have a huge impact on the future of my ranch. Therefore I strongly support the adoption of the proposed division 25 rules.
I look forward to being involved in the permanent rule making process planned for the next two years.
Thank you

Rob Wallace
Del Rio Vineyards & Winery
52 North River Road
P.O. Box 906
Gold Hill, OR 97525
cell (541) 840-8953
Winery (541) 855-2062
www.delriovineyards.com

March 4, 2019

Before the Oregon Water Resources Commission

Comments of Sprague River Resource Foundation, Inc. on Proposed Division 025 Rules

Sprague River Water Resource Foundation, Inc. ("Sprague River") is an Oregon non-profit corporation organized under Oregon Revised Statutes Chapter 65 dedicated to the protection of sustainable agriculture and the sustainable use of water resources in the Sprague River Valley and lower Williamson River in Klamath County, Oregon. Sprague River represents dozens of irrigators throughout the Sprague River valley. Sprague River's members irrigate from the Sprague River and its numerous tributaries, as well as other tributary streams of the lower Williamson River. Its members own lands upstream of the former Klamath Indian Reservation on lands ceded by the Klamath Indian Treaty; or, on allotted lands within the former Klamath Indian Reservation. Several Sprague River members own wells that are vital in order to keep agricultural lands irrigated in the Sprague River Valley, particularly since OWRD's quantification of instream flows for the U.S. Bureau of Indian Affairs ("BIA") leaves little-to-no surface water available for withdrawal by irrigators. Therefore, Sprague River provides the following comments on the Oregon Water Resource Department's proposed Division 025 rules, pertaining to groundwater use in the Upper Klamath Basin.

Irrigation water is critical in order for Sprague River members to grow feed for their cattle through the summer. Surface water is practically unusable now, as a result of OWRD's inaccurate quantification of instream flows for the Bureau of Indian Affairs. The Department set the instream flows so high, they are only met during flood events or in years of enormous snowpack—and even then, only for short periods of time. As a result, unless or until those instream flows are corrected as part of the adjudication process, groundwater is the only lifeline available for Sprague River members to sustain their operations and family businesses. Many Sprague River members have invested hundreds of thousands of dollars to develop wells as a supplemental source of water.

Despite these investments and the importance of groundwater as a supplemental source of water when surface water is not available, the Department shut off more than 140 wells last summer, under current Division 009 rules, based on the enforcement of the BIA's unrealistic and unobtainable instream flows. Our community had no choice but to act. Eight of our members filed lawsuits in Marion County Circuit Court, challenging OWRD's authority to regulate their use of their wells under Division 009 rules. Those lawsuits are:

- *Margaret Jacobs v. Thomas Byler, et al.*, Case No. 18CV26118
- *Duane Martin Ranches, L.P. v. Thomas Byler, et al.*, Case No. 18CV26120
- *Kevin Newman and Jennifer Newman v. Thomas Byler, et al.*, Case No. 18CV26124
- *Barbara A. Duarte and Eric Lee Duarte v. Thomas Byler, et al.*, Case No. 18CV26125
- *Lon D. Brooks and Mary E. Brooks, et al. v. Thomas Byler, et al.*, Case No. 18CV26126
- *Geoffrey T. Miller and Catherine A. Miller, et al., v. Thomas Byler, et al.*, Case No. 18CV26130;
- *Franklin J. Melsness and Janet G. Melsness v. Thomas Byler, et al.*, Case No. 18CV26153

- *Anthony Edwards and Charmaine Edwards v. Thomas Byler, et al.*, Case No. 18CV28865

While Sprague River members' specific concerns are outlined in their lawsuits, their overarching concern is that irrigators are entitled to due process *before* being regulated, not after. We think the legislature has made it clear that contested case proceedings must be afforded to irrigators before they can be regulated to fulfill a surface water right—whether that be in the context of a critical groundwater area determination or otherwise. We do not think the Department can regulate an entire agricultural community off on the basis of a hydraulic model without site-specific data nor without giving ranchers due process. In addition, we think the Department's modeling and assumptions about the interaction with groundwater and surface water are horribly flawed. Nevertheless, based on consideration paid by OWRD, coupled with the agency's promise to propose rules aimed at reducing regulation in 2019 and 2020, Sprague River's members settled and dismissed their lawsuits with OWRD. They chose a path of trying to work cooperatively with OWRD over the next two years on these difficult issues, rather than continued litigation.

Importantly, one of the agreements in the parties' stipulated dismissal was that settlement was to "not have any preclusive effect on any of the parties whatsoever on any future litigation that is based on the alleged occurrence or recurrence of any claim, fact, circumstance or legal issue raised" in the litigation. Sprague River's support for OWRD's proposed Division 025 rules is conditioned on that same stipulation. The proposed Division 025 rules have a sunset date of March 1, 2021 and, further, state that "these rules do not establish a precedent that precludes different or additional regulation of groundwater as may be established in future rulemakings." Thus, in supporting the Commission's adoption of these rules, Sprague River makes no preclusive concessions of fact or law with respect to either these rules, or any future rules, that may be adopted by the Commission.

To be clear, Sprague River member Troy Brooks was on the RAC and, along with David Mosby and Roger Nicholson and in consultation with our shared legal counsel, proposed revisions to OWRD's proposed Division 025 rules, which OWRD rejected. Mr. Brook's comments and proposed revisions are attached to these comments and incorporated by reference. Sprague River believes that the Mr. Brooks' proposed revisions are a far better and fairer approach than the OWRD's approach. Specifically, those revisions remove the unnecessary and toxic scientific assertions about the alleged connection between surface water and groundwater. Further, the revisions would allow the seven well owners potentially subject to regulation (allegedly within the 500' zone)[1] to request site-specific testing from OWRD, prior to being regulated. Given that we are only talking about seven wells potentially subject to regulation, that are allegedly within the 500' zone, this is a reasonable and fair proposal that would encourage OWRD to ground-truth key assumptions and predictions from its hydrologic models. **Thus, Sprague River urges the Commission to consider taking up a motion to adopt the revised Division 025 rules proposed by Mr. Brooks, Mr. Mosby and Mr. Nicholson (and attached to these comments).**

[1] Sprague River and its members, Franklin J. Melsness and Janet G. Melsness, dispute whether the Melsness's well is within 500' of any perennial stream, contrary to OWRD's assumption.

However, if the Commission is not inclined to adopt the attached revisions, Sprague River nevertheless supports the Department's overall approach of backing off on regulation to provide a two-year period for the parties to try to resolve the difficult legal, factual and scientific disputes relating to groundwater regulation in the basin. Not only will this provide needed relief to Upper Basin irrigators, this is a necessary step for the Department to have any opportunity to build trust and credibility with the Upper Basin irrigation community.

In sum, Sprague River has serious reservations about the Department's statutory authority, the toxic scientific assertions in the Department's proposed Division 025 rules, and it opposes the Department regulating the seven wells targeted by these rules without first giving them an opportunity for site-specific testing. Nevertheless, because, consistent with Sprague River members' litigation settlements, the Department is stipulating that these rules do not establish precedent for future regulation, Sprague River supports the Commission adopting these rules to provide irrigators needed relief and provide a two-year period to try to reach a mutually-acceptable long-term solution.

Sincerely,

/s/ Eric Duarte

Eric Duarte, President
Sprague River Resource Foundation, Inc.

January 22, 2019

Ivan Gall
Field Services Division Administrator
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301

Re: Statement of Troy Brooks on Proposed Division 025 Rules

Dear Ivan:

On behalf of my family, our businesses and companies, and Sprague River Water Resource Foundation, Inc., and as a member of the Rules Advisory Committee ("RAC") the Oregon Water Resources Department ("OWRD") assembled, please accept this written statement and comments on OWRD's proposed Division 025 rules.

INTRODUCTION AND INTERESTS

Sprague River Water Resource Foundation, Inc. ("Sprague River") is an Oregon non-profit corporation organized under Oregon Revised Statutes Chapter 65 dedicated to the protection of sustainable agriculture and the sustainable use of water resources in the Sprague River Valley and lower Williamson River in Klamath County, Oregon. Sprague River's members irrigate from the Sprague River and its numerous tributaries, as well as other tributary streams to the lower Williamson River. Its members own lands upstream of the former Klamath Indian Reservation on lands ceded by the Klamath Indian Treaty; or, on allotted lands within the former Klamath Indian Reservation. Several Sprague River members own wells that are vital in order to keep agricultural lands irrigated in the Sprague River Valley, particularly since OWRD's erroneous quantification of instream flows for the U.S. Bureau of Indian Affairs ("BIA") that leaves little-to-no surface water available for withdrawal by irrigators.

My family raises cattle in the Upper Sprague River Valley, along the South Fork Sprague River. We have both surface water rights from the South Fork of the Sprague River and several wells, one of which is within 500 feet of the river. All of our surface water rights have been put at enormous risk as a result of OWRD's erroneous quantification of instream flows for the BIA. Nevertheless, to help offset our inability to utilize surface water rights during times that BIA's water rights are being enforced, we have invested hundreds of thousands of dollars to develop wells as a supplemental source of water. We rely on these wells for irrigation during times that surface water is unavailable. Without them our livestock production business would fail.

In considering the adoption of any groundwater regulation rules, OWRD must recognize the vital importance of groundwater as a *secondary source* of irrigation when surface water is not available, the significant investments irrigators such as myself have made in developing those

second sources and the careful balance of Legislature has sought to achieve in protecting surface water rights while encouraging the development of groundwater rights as a secondary source of irrigation.

It is particularly important to me that the Department recognize site-specific data in determining whether a well is substantially interfering with surface water or not. In 2014-15, the Department conducted "seepage run" tests at my property and found that my well within 500 feet of the stream was not substantially interfering with surface water. I was personally promised by the watermaster that I would not be regulated under the then-in-effect Division 025 rules as a result of the Department's testing. I expect the Department to keep that promise under whatever new rules it may adopt. Nevertheless, under the proposed Division 025 rules, I would be automatically regulated based on an assumption of hydraulic connection and substantial interference. That is not acceptable. The Department must commit itself to only regulating wells where site-specific data actually demonstrates a real, measurable problem and to exempt wells like mine that have been proven to not substantially interfere or when the evidence is inconclusive.

COMMENTS

Enclosed with this statement are proposed revisions to the draft Division 025 rules OWRD released to the RAC on January 2, 2019. Below are specific comments directed at the proposed rules and explaining my proposed revisions.

Proposed OAR 690-025-0020

- **-0020(1):** Claims determined in the ACFFOD are provisional, subject to change based on the circuit court's decree.
- **-0020(3):** Although this may not be necessary to address here, the Department has also been provided notice of unadjudicated groundwater claims within the former Klamath Reservation for which groundwater registrations were not required to be filed.
- **-0020(4):** "Aquifer" is already defined at OAR 690-008-0001(1). It is unclear why a different definition is needed.
- **-0020(6):** This definition is too vague. A scientific term like this is unnecessary here and should be subject to scientific input and peer-review, and irrigators must be afforded due process, before such a term is adopted in a rule.
- **-0020(8):** This definition essentially repeats the definition of "existing rights of record."
- **-0020(9):** Stockwatering needs to be included as a beneficial use.
- Finally, the Department should recognize that definitions already exist in Division 008 rules, which apply to "all statutes and rules employed in the management of ground water by the Water Resources Department and Commission ... unless the context requires otherwise[.]"

Proposed OAR 690-025-0025

- **-0025(1):** This provision should be deleted. OWRD does not have statutory authority to regulate classes of wells, or geographic areas encompassing wells, outside of a statutory critical groundwater designation. Currently, OWRD's Division 009 rules state that they "govern the use of groundwaters, pursuant to [ORS] 537.730 and 537.775." ORS 537.730 governs critical groundwater designations and ORS 537.742(1) provides that regulation of existing groundwater rights can only occur after providing affected parties an opportunity for a contested case. ORS 537.775 provides authority for regulating "defective wells" on an individual basis and also requires OWRD to provide an opportunity for a contested case, consistent with the agency's past practices in issuing a Notice of Violation under ORS 537.775. Neither of those statutes allow for the regulation classes of wells, or geographic areas encompassing wells, outside of a statutory critical groundwater designation and neither do any of the statutes cited in the proposed **-0025(1) rule.** Notwithstanding that the Department lacks such statutory authority, the remaining comments and proposed revisions are intended to try to make the rules tolerable and workable for irrigators.
- **-0025(2):** Needs clarification on the circumstances under which these rules govern and the trigger for their application.
- **-0025(3)**: Needs clarification to better incorporate other regulations.

Proposed OAR 690-025-0040

- **-0040(1)-(2), (4):** These scientific determinations and explanations are inappropriate and prejudicial and should be deleted. Scientific determinations such as this should only be considered on a case-by-case basis, not in a rule. If the Department insists on eventually addressing these issues in a rulemaking context, it must provide affected individuals an opportunity for a contested case. The Department cannot make these kinds of determinations without affording affected irrigators due process.
- **-0040(3):** This needs to be clarified so that hydraulic connection and potential for substantial interference are determined on a case-by-case basis instead of being assumed.
- Additional proposed revisions are necessary in order ensure that determinations affecting regulation occurs on a case-by-case basis and ensuring that irrigators have an opportunity for site-specific testing.
- The proposed revisions also make clear that, under these rules, the Department will not regulate wells outside of either 500 feet or, under any circumstance, one mile under Division 009 rules without a critical groundwater area designation.

In my view, the proposed revisions are necessary in order for the irrigation community to possibly find these rules tolerable and workable.

Sincerely,

s/ Troy Brooks

Troy Brooks

[Amendments to Proposed Division 025 Rules]

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025-0020

Definitions

As used in these rules unless the context requires otherwise:

(1) "Provisionally-Ddetermined claim" means a claim for surface water as provided in the Amended Findings of Fact and Order of Determination issued on March 7, 2013 and on April 10, 2014 subject to regulation pursuant to ORS 539.170.

(2) "Existing rights of record" means authorized groundwater uses, determined claims, groundwater registrations, and surface water rights.

(3) "Groundwater registration" means an unadjudicated claim to use groundwater as provided in ORS 537.605 that is registered with the Oregon Water Resources Department.

~~(4) "Groundwater supply" or "aquifer" means a designated body of moving groundwater having exterior boundaries which may be ascertained or reasonably inferred that yields quantities of water to wells or surface water sufficient for appropriation under an existing right of record.~~

(54) "Groundwater use authorization" means use of water authorized by a permit, certificate or groundwater registration.

~~(6) "Hydraulically connected" means water can move between or among groundwater supplies and surface water.~~

(75) "Upper Klamath Basin" means the area above and around Upper Klamath Lake that encompasses all water sources that are tributary to Upper Klamath Lake, including groundwater, the Wood River, Williamson River and Sprague River and their tributaries and the Klamath Marsh and its tributaries.

(86) "Surface water right" means ~~certificated and permitted water rights, and determined claims~~existing right of record, the source of which is surface water, including springs, streams, and rivers.

(97) "Well" or "wells" means a well as defined in ORS 537.515(9) that is located in the Upper Klamath Basin and is used to beneficially withdraw water for authorized groundwater uses including domestic, irrigation, stockwater industrial, municipal, and aquifer storage and recovery uses.

(8) In the event of any conflict between these definitions and those found at OAR 690, Division 008, the rules found in Division 008 shall control.

690-025-0025

Distribution of Water between Existing Rights of Record

~~(1) Whenever impairment of, or interference with, existing water rights to appropriate surface water exists or impends, the Oregon Water Resources Department may regulate the distribution of water among the various users of water from any natural surface or groundwater supply in accordance with the users' existing rights of record as authorized by ORS 537.525, ORS 539.170 and ORS 540.045.~~

(2~~1~~) These rules govern the control of wells in the Upper Klamath Basin that produce from a groundwater supply that ~~is~~the Department finds, pursuant to OAR 690-025-0040, to be both hydraulically connected to a source of a surface water right ~~and subject to regulation in the course of distribution of water in accordance with the users' existing rights of record~~and have the potential to substantially interfere with a surface water right that is the subject of a valid and verified complaint of water shortage under OAR 690-250-0100 to -0120.

(3~~2~~) Except as otherwise provided herein, ~~T~~these rules operate in lieu of OAR Chapter 690 Division 09 and in conjunction with OAR Chapter 690 Division 250 ~~except that these rules govern distribution of groundwater and surface water in the Upper Klamath Basin in lieu of OAR 690-250-0120(2)~~.

690-025-0040

Regulation of Hydraulically Connected Wells

~~(1) In the Klamath Basin, groundwater and surface water are hydraulically connected.~~

~~(2) Wells that withdraw groundwater in the Klamath Basin reduce spring discharge and surface water flow.~~

(3~~1~~) ~~Notwithstanding that groundwater is hydraulically connected to surface water in the Klamath Basin, t~~The Department has determined that in the Upper Klamath Basin, ~~regulation of~~ wells that are located a horizontal distance equal to or less than 500 feet from a source of surface water rights, and which are determined to appropriate water from an aquifer hydraulically connected to a surface water source, have the potential to cause substantial interference as defined in OAR 690-008-0001(8)~~will result in effective and timely relief to these surface water rights.~~

~~(4) The determinations in subsections (1) and (2) are based on the best available information, including but not limited to, water well reports, basin and hydrologic studies, topographic maps, hydrogeologic reports, groundwater and surface water elevation data, groundwater flow models, model simulation results for the Klamath Basin, and any other information that is used in the course of applying generally accepted hydrogeologic methodologies.~~

(5~~2~~) After verifying a valid complaint of water shortage under OAR 690-250-0100 to -0120, the Department shall evaluate wells within 500 feet of the source of surface water right(s) subject to the complaint for both a hydraulic connection between the aquifer and the surface water source and substantial interference as defined in OAR 690-008-0001(8). The Department shall further evaluate whether regulation or control of such wells would provide timely and effective relief to the surface water right(s).

(3) Before regulating an authorized groundwater use, the Department shall determine the horizontal distance between each well and the source or sources of surface water rights using an on-the-ground measurement technique that is verifiable and repeatable.

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(4) All determinations made under section (2) shall be made using site-specific data and information and scientifically repeatable methods.

(5) At any time, a well owner subject to actual or potential regulation under these rules may request site-specific testing, including but not limited to seepage measurements in the vicinity of the well, by the Department and at the Department's expense.

(5) The Department will not regulate wells within 500 feet of the source of a surface water right where site-specific testing, previous or future, by the Department indicates a lack of hydraulic connection or substantial interference or the results of the testing are otherwise inconclusive.

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(6) So long as these rules are in effect, the Department shall control the use of wells greater than 500 feet from a surface water source only through a critical ground water area determination in accordance with ORS 537.730 through 537.740. Under no circumstance shall wells greater than one-mile from a surface water source be regulated unless through a critical ground water area determination, pursuant to OAR 690-009-0050(2)(b).

~~(6) The Department may regulate wells that are located a horizontal distance equal to or less than 500 feet from a source of surface water rights whenever a valid call for surface water is made and the Department is regulating in accordance with the users' existing rights of record.~~

United States Department of the Interior
Bureau of Indian Affairs
Northwest Regional Office
911 NE 11th Avenue
Portland, Oregon 97232-4169

In Reply Refer To:
Regional Director's Office

MAR -4 2019

Mr. Ivan Gall
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, Oregon 97301

Subject: Comments on Proposed Interim Rulemaking to Change Oregon Administrative Rule (OAR) Chapter 690, Division 25

Dear Mr. Gall,

This letter provides comments from the Bureau of Indian Affairs (BIA) Northwest Region regarding the above-captioned proposed interim rulemaking initiated by the Oregon Water Resources Department (OWRD). OWRD's proposal is to (1) repeal OAR 690-025-0010 governing the regulation of well use in the "Off-Project" area of the Klamath Basin, adopted by OWRD in 2015; and (2) temporarily adopt three new sections (proposed OAR 690-025-0020, -0025, and -0040) to address groundwater regulation in the Upper Klamath Basin that will be in place until March 1, 2021.

We understand OWRD proposes to repeal OAR 690-025-0010 because those regulations were enacted as part of the Upper Klamath Basin Comprehensive Settlement Agreement (UKBCA). According to the terms of the UKBCA and the regulations themselves, if the UKBCA were ever to terminate, then groundwater regulation in the "Off-Project" area would instead be in accordance with OAR 690-009, the state-wide regulations addressing groundwater interference with surface water. *See* OAR 690-025-0010(16). The UKBCA terminated in December 2017, and OWRD regulated groundwater in the Klamath Basin in 2018 pursuant to OAR 690-009.

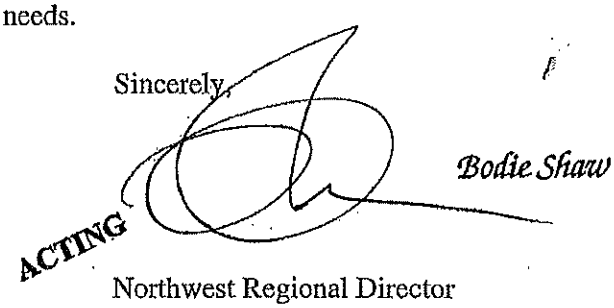
As you know, the United States owns (and the BIA administers) water rights in the Basin in trust for the Klamath Tribes. Some of these rights—particularly instream and lake/marsh level rights—are the most senior rights in the Basin with a priority date of "time immemorial." These rights (referred to as determined claims) are fully enforceable under Oregon law. ORS §§ 539.130(4), 539.170.

The proposed interim rule seems to intimate that OWRD intends to work on a new permanent regulation for Division 25 to govern the Upper Klamath Basin. *See* proposed interim rule 690-025-0040(7). We appreciate OWRD's commitment in the Notice of Proposed Rulemaking to "significant engagement and outreach" as it "develop[s] a longer term approach for water

management in the area." However, we note the proposed interim rule does not address with specificity whether OWRD intends to gather information to support a final rule during the two years in which the interim rule will be in existence. We request OWRD be more explicit in the interim rule about what steps it intends to take—including any new modeling or information gathering efforts and public involvement or input—during this period to determine whether regulation of a given well will provide timely and effective relief to senior water right owners in the Basin. Such information, timelines, and goals would be helpful and useful knowledge for all water users in the Basin, including the United States.

The BIA, on behalf of the Klamath Tribes, is ready to engage with you as you move forward with the development of a final rule for water management in the Klamath Basin and hope this process moves quickly, efficiently, and with some urgency, so that impacts to senior water users are lessened. Please feel free to contact Michael Dammarell of my staff, at (503) 231-2269, if you have any questions or information needs.

Sincerely,



Northwest Regional Director

PRYBYL Stephanie H * WRD

From: RANCIER Racquel R * WRD
Sent: Monday, March 4, 2019 3:19 PM
To: PRYBYL Stephanie H * WRD; GALL Ivan K * WRD
Subject: FW: public comment proposed rule changes

From: Nora Koenig [mailto:limiecows@e-isco.com]
Sent: Sunday, March 03, 2019 10:52 AM
To: RANCIER Racquel R * WRD
Subject: public comment proposed rule changes

Concerns with the process of the proposed rule changes for the upper Klamath basin irrigators are many to say the least. At the one meeting we were able to attend, the first statement by a OWRD staff member was to say , and I paraphrase, None of the recommendations made by the RAC from last meeting will be added into the proposed rule changes in any way. There were some very good and legitimate suggestions by the RAC members and for OWRD to say none of them will be considered in the rule changes really raises the frustration levels and increases concerns OWRD is solely on a mission to take away water rights and nothing else. The law states the RAC had to be formed and meetings held and so OWRD did the process to be in compliance, but obviously with the unwavering attitude of we go forward no matter what, and with how we want this to go, OWRD is continuing their strong hand tactics with one objective in mind. Take water away from irrigators.

The common perception is that OWRD is trying to appease the huge amount of distrust and anger in these communities by giving the 2 yr. reprieve on water calls (as compared with the last several years) and that at the end of the 2 yrs. they would have a manageable plan. Manageable for who?? One can bet it's not going to favor upper basin irrigators since "it has been determined" upper basin irrigators are solely responsible for reduced in-stream water flows. Let's just throw out documented proof, that once the wells were drilled in the upper basin there was 25% more water available for downstream uses than what was ever documented before the wells were drilled. Not one time has anyone heard that OWRD is hopeful at the end of these two years that they will have a plan that will help any upper basin irrigator, or assure any irrigator in the entire basin of their water rights.

In OWRD letter dated 1/23/19, it states that after the 2 yr. period is up there would be public meetings and open house events to discuss and accept public input on surface water and groundwater management options. Really? What can we expect then- more of the same- none of the recommendations will be adopted just like what was said at the RAC meeting in Klamath on 1/28/29? Not very comforting or reassuring that anything to help irrigators is going to come of this process.

On the subject of modeling. Modeling is used and considered a useful tool in several industries. But most people will tell you it was never intended for, and should never be used for management of a system, because the error rates are too high. But we are to believe that your model (are we on the second or third...??) is correct, even when no one can explain how they got the number(s) that are used to plug into the equation that spits out the "science" our wells are taking water away from the rivers??

Oregon water law states, and again I paraphrase, that beneficial use must occur when a water call by a senior holder on a junior holder is made. So where is the proof that by calling the water of junior holders in the upper basin that the senior water holders (Tribe and Project) have gotten any beneficial gain? Are there more fish in the system? The tribe claims their fish will be extinct if every drop is not given to them- so there have

been calls on water for several years now – have the fish populations come up? Has the tribe benefitted monetarily from the water calls? Why is there no law/rule requiring that the senior holder(s) must prove gain from the calls. There has never been a study done to determine how much water is necessary for their fish to survive, so how do we know these calls are beneficial?? Why has OWRD and BOR not come up with figures of how much water the project received when they made calls on upper basin water? How much ground was irrigated because the calls were made, that would have not been, if no call was made? We just wait and see decades down the road for the answers? In the mean time the economic, social and heritage of the upper basin irrigators is not considered? This is wiping out generations of work and tradition for us. Our heritage is what we do and love and what makes us a whole person. The loss we feel is real, the heartache we are enduring is painful, the monetary loss is staggering and devastating. But that doesn't seem to be a concern during this process.

Interesting to note that California does not view that surface water and ground water can be managed together as they are separate and need to be managed separately. This from one of the most environmentally regulated states in our country. I can believe that there are a few areas in the Klamath basin where a well might indeed interfere with nearby surface water. But to blanket that statement for the entire basin is fraudulent in my opinion. And obviously my opinion doesn't matter to OWRD. But when OWRD staff came to my ranch and the statement was made by one of those OWRD staff, "that all the underground geological structures in a 70 mile radius from the spot we are standing, are exactly the same" was made, I think my opinion that that is not only untrue but absolutely ludicrous, is far more accurate.

One recommendation by the RAC was to credit return flows provided to the rivers/streams by wells used for irrigation. Most of the ranches in the upper basin give return flows to the in-stream water sources. I stand by my statement that most of these flows are far larger with the wells being used (pumped) than the estimated (not proven) gain if not pumped. And I take exception to the model not taking into account that very few irrigators in the upper basin use continuous pumping as the norm. News flash- with current power rates none of us can afford to turn the pumps on and let them run for 6 months. OWRD was understanding of this concept previous to using the current model adopted to the Division 9 rules, why the change in thinking on this??

The Tribes claim certain in-stream rights are not being met. Some of those claims will never be met as they are so high the system cannot, and historically has never been able to meet them. Their claims have no scientific proof behind them and the judge in their lawsuit filed in San Francisco in 2018, said that they have no scientific proof supporting the claims in that suit.

Lastly, proof is in the actual testing and independent review of the testing, and not in some model that has been fed numbers to produce desired results to support the end goal of taking upper basin water rights away. One has to wonder about and question the motives in all of this – certainly there has to be an agreement that can support healthy agriculture in the upper basin (healthy as in assured water on a ongoing basis not year to year- or once in 10 years). But I fear that whatever comes of this process will not benefit any irrigator in the upper basin, as it has been designed not to from the start.

Nora Koenig

Upper basin irrigator – endangered specie

March 4, 2019

Before the Oregon Water Resources Commission

Comments of Troy Brooks on Proposed Division 025 Rules

On behalf of my family, our businesses and companies, please accept this written statement and comments on OWRD's proposed Division 025 rules. I served on the RAC for the development of these rules and these comments supplement my statements made while serving on the RAC.

My family raises cattle in the Upper Sprague River Valley, along the South Fork Sprague River. We have both surface water rights from the South Fork of the Sprague River and several wells, one of which is within 500 feet of the river. All of our surface water rights have been put at enormous risk as a result of OWRD's erroneous quantification of instream flows for the BIA. Nevertheless, to help offset our inability to utilize surface water rights during times that BIA's water rights are being enforced, we have invested hundreds of thousands of dollars to develop wells as a supplemental source of water. We rely on these wells for irrigation during times that surface water is unavailable. Without them our livestock production business would fail.

In considering the adoption of any groundwater regulation rules, OWRD must recognize the vital importance of groundwater as a *secondary source* of irrigation when surface water is not available, the significant investments irrigators such as myself have made in developing those secondary sources, and the careful balance the Legislature has sought to achieve in protecting surface water rights while encouraging the development of groundwater rights as a secondary source of irrigation.

It is particularly important to me that the Department recognize site-specific data in determining whether or not a well is substantially interfering with surface water. In 2014-15, the Department conducted "seepage run" tests at my property and found that my well located within 500 feet of the stream was not substantially interfering with surface water and that regulating my well would not provide "timely and effective" relief to any surface water right. I was personally promised by the watermaster that I would not be regulated under the then-in-effect Division 025 rules as a result of the Department's testing. I expect the Department to keep that promise under whatever new rules it may adopt. Nevertheless, under the proposed Division 025 rules, it appears I would be automatically regulated based on an assumption of hydraulic connection and substantial interference. That is not acceptable. The Department must commit itself to only regulating wells where site-specific data actually demonstrates a real, measurable problem and to exempt wells like mine which have been proven not to substantially interfere with surface water, or when the evidence of interference is inconclusive.

With these concerns in mind, I, along with RAC members David Mosby and Roger Nicholson and in consultation with our legal counsel, suggested revisions to OWRD's proposed Division 025 rules. Those suggested revisions are attached to these comments. Those revisions remove the unnecessary and toxic scientific assertions about the alleged connection between surface water and groundwater. Further, the revisions would allow the seven well owners subject

to regulation (allegedly within the 500' zone) to request site-specific testing from OWRD, prior to being regulated. As the Department has already determined from its seepage run test that my well does not substantially interfere with surface water, I would not be regulated. Given that we are only talking about six additional wells potentially subject to regulation, that are allegedly within the 500' zone, this is a reasonable and fair proposal that would encourage OWRD to ground-truth key assumptions and predictions from its hydrologic models. Obviously, despite the model's predictions, site-specific testing revealed that no timely and effective relief would be provided by regulating my well. All irrigators should be entitled to have OWRD conduct the same kind of testing prior to being regulated. **I urge the Commission to deliberate on a motion to adopt the revised Division 025 rules attached to these comments.**

If the Commission does not adopt my proposed revisions then, unfortunately, I cannot support the adoption of these rules. I am a member of Sprague River Resource Foundation, Inc. ("Sprague River") and, while I generally support Sprague River's March 4, 2019 comments on the proposed rules—I, personally, cannot support the Commission adopting rules that would potentially result in my well being regulated off in 2019 and 2020. In order to protect my family, our businesses, and our ranch, I oppose the adoption of any rules that does not require OWRD to offer irrigators site-specific testing, as I have proposed in the attached revisions to OWRD's proposed Division 025 rules.

Sincerely,

/s/ Troy Brooks

Troy Brooks, Sprague River irrigator and RAC member

January 22, 2019

Ivan Gall
Field Services Division Administrator
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301

Re: Statement of Troy Brooks on Proposed Division 025 Rules

Dear Ivan:

On behalf of my family, our businesses and companies, and Sprague River Water Resource Foundation, Inc., and as a member of the Rules Advisory Committee ("RAC") the Oregon Water Resources Department ("OWRD") assembled, please accept this written statement and comments on OWRD's proposed Division 025 rules.

INTRODUCTION AND INTERESTS

Sprague River Water Resource Foundation, Inc. ("Sprague River") is an Oregon non-profit corporation organized under Oregon Revised Statutes Chapter 65 dedicated to the protection of sustainable agriculture and the sustainable use of water resources in the Sprague River Valley and lower Williamson River in Klamath County, Oregon. Sprague River's members irrigate from the Sprague River and its numerous tributaries, as well as other tributary streams to the lower Williamson River. Its members own lands upstream of the former Klamath Indian Reservation on lands ceded by the Klamath Indian Treaty; or, on allotted lands within the former Klamath Indian Reservation. Several Sprague River members own wells that are vital in order to keep agricultural lands irrigated in the Sprague River Valley, particularly since OWRD's erroneous quantification of instream flows for the U.S. Bureau of Indian Affairs ("BIA") that leaves little-to-no surface water available for withdrawal by irrigators.

My family raises cattle in the Upper Sprague River Valley, along the South Fork Sprague River. We have both surface water rights from the South Fork of the Sprague River and several wells, one of which is within 500 feet of the river. All of our surface water rights have been put at enormous risk as a result of OWRD's erroneous quantification of instream flows for the BIA. Nevertheless, to help offset our inability to utilize surface water rights during times that BIA's water rights are being enforced, we have invested hundreds of thousands of dollars to develop wells as a supplemental source of water. We rely on these wells for irrigation during times that surface water is unavailable. Without them our livestock production business would fail.

In considering the adoption of any groundwater regulation rules, OWRD must recognize the vital importance of groundwater as a *secondary source* of irrigation when surface water is not available, the significant investments irrigators such as myself have made in developing those

second sources and the careful balance of Legislature has sought to achieve in protecting surface water rights while encouraging the development of groundwater rights as a secondary source of irrigation.

It is particularly important to me that the Department recognize site-specific data in determining whether a well is substantially interfering with surface water or not. In 2014-15, the Department conducted "seepage run" tests at my property and found that my well within 500 feet of the stream was not substantially interfering with surface water. I was personally promised by the watermaster that I would not be regulated under the then-in-effect Division 025 rules as a result of the Department's testing. I expect the Department to keep that promise under whatever new rules it may adopt. Nevertheless, under the proposed Division 025 rules, I would be automatically regulated based on an assumption of hydraulic connection and substantial interference. That is not acceptable. The Department must commit itself to only regulating wells where site-specific data actually demonstrates a real, measurable problem and to exempt wells like mine that have been proven to not substantially interfere or when the evidence is inconclusive.

COMMENTS

Enclosed with this statement are proposed revisions to the draft Division 025 rules OWRD released to the RAC on January 2, 2019. Below are specific comments directed at the proposed rules and explaining my proposed revisions.

Proposed OAR 690-025-0020

- **-0020(1):** Claims determined in the ACFFOD are provisional, subject to change based on the circuit court's decree.
- **-0020(3):** Although this may not be necessary to address here, the Department has also been provided notice of unadjudicated groundwater claims within the former Klamath Reservation for which groundwater registrations were not required to be filed.
- **-0020(4):** "Aquifer" is already defined at OAR 690-008-0001(1). It is unclear why a different definition is needed.
- **-0020(6):** This definition is too vague. A scientific term like this is unnecessary here and should be subject to scientific input and peer-review, and irrigators must be afforded due process, before such a term is adopted in a rule.
- **-0020(8):** This definition essentially repeats the definition of "existing rights of record."
- **-0020(9):** Stockwatering needs to be included as a beneficial use.
- Finally, the Department should recognize that definitions already exist in Division 008 rules, which apply to "all statutes and rules employed in the management of ground water by the Water Resources Department and Commission ... unless the context requires otherwise[.]"

Proposed OAR 690-025-0025

- **-0025(1):** This provision should be deleted. OWRD does not have statutory authority to regulate classes of wells, or geographic areas encompassing wells, outside of a statutory critical groundwater designation. Currently, OWRD's Division 009 rules state that they "govern the use of groundwaters, pursuant to [ORS] 537.730 and 537.775." ORS 537.730 governs critical groundwater designations and ORS 537.742(1) provides that regulation of existing groundwater rights can only occur after providing affected parties an opportunity for a contested case. ORS 537.775 provides authority for regulating "defective wells" on an individual basis and also requires OWRD to provide an opportunity for a contested case, consistent with the agency's past practices in issuing a Notice of Violation under ORS 537.775. Neither of those statutes allow for the regulation classes of wells, or geographic areas encompassing wells, outside of a statutory critical groundwater designation and neither do any of the statutes cited in the proposed **-0025(1) rule.** Notwithstanding that the Department lacks such statutory authority, the remaining comments and proposed revisions are intended to try to make the rules tolerable and workable for irrigators.
- **-0025(2):** Needs clarification on the circumstances under which these rules govern and the trigger for their application.
- **-0025(3):** Needs clarification to better incorporate other regulations.

Proposed OAR 690-025-0040

- **-0040(1)-(2), (4):** These scientific determinations and explanations are inappropriate and prejudicial and should be deleted. Scientific determinations such as this should only be considered on a case-by-case basis, not in a rule. If the Department insists on eventually addressing these issues in a rulemaking context, it must provide affected individuals an opportunity for a contested case. The Department cannot make these kinds of determinations without affording affected irrigators due process.
- **-0040(3):** This needs to be clarified so that hydraulic connection and potential for substantial interference are determined on a case-by-case basis instead of being assumed.
- Additional proposed revisions are necessary in order ensure that determinations affecting regulation occurs on a case-by-case basis and ensuring that irrigators have an opportunity for site-specific testing.
- The proposed revisions also make clear that, under these rules, the Department will not regulate wells outside of either 500 feet or, under any circumstance, one mile under Division 009 rules without a critical groundwater area designation.

In my view, the proposed revisions are necessary in order for the irrigation community to possibly find these rules tolerable and workable.

Sincerely,

s/ Troy Brooks

Troy Brooks

ATTACHMENT "A"

[Amendments to Proposed Division 025 Rules]

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025-0020

Definitions

As used in these rules unless the context requires otherwise:

(1) "Provisionally-Ddetermined claim" means a claim for surface water as provided in the Amended Findings of Fact and Order of Determination issued on March 7, 2013 and on April 10, 2014 subject to regulation pursuant to ORS 539.170.

(2) "Existing rights of record" means authorized groundwater uses, determined claims, groundwater registrations, and surface water rights.

(3) "Groundwater registration" means an unadjudicated claim to use groundwater as provided in ORS 537.605 that is registered with the Oregon Water Resources Department.

~~(4) "Groundwater supply" or "aquifer" means a designated body of moving groundwater having exterior boundaries which may be ascertained or reasonably inferred that yields quantities of water to wells or surface water sufficient for appropriation under an existing right of record.~~

(54) "Groundwater use authorization" means use of water authorized by a permit, certificate or groundwater registration.

~~(6) "Hydraulically connected" means water can move between or among groundwater supplies and surface water.~~

(75) "Upper Klamath Basin" means the area above and around Upper Klamath Lake that encompasses all water sources that are tributary to Upper Klamath Lake, including groundwater, the Wood River, Williamson River and Sprague River and their tributaries and the Klamath Marsh and its tributaries.

(86) "Surface water right" means ~~certificated and permitted water rights, and determined claims~~existing right of record, the source of which is surface water, including springs, streams, and rivers.

(97) "Well" or "wells" means a well as defined in ORS 537.515(9) that is located in the Upper Klamath Basin and is used to beneficially withdraw water for authorized groundwater uses including domestic, irrigation, stockwater industrial, municipal, and aquifer storage and recovery uses.

(8) In the event of any conflict between these definitions and those found at OAR 690, Division 008, the rules found in Division 008 shall control.

690-025-0025

Distribution of Water between Existing Rights of Record

~~(1) Whenever impairment of, or interference with, existing water rights to appropriate surface water exists or impends, the Oregon Water Resources Department may regulate the distribution of water among the various users of water from any natural surface or groundwater supply in accordance with the users' existing rights of record as authorized by ORS 537.525, ORS 539.170 and ORS 540.045.~~

(21) These rules govern the control of wells in the Upper Klamath Basin that produce from a groundwater supply that ~~is~~the Department finds, pursuant to OAR 690-025-0040, to be both hydraulically connected to a source of a surface water right ~~and subject to regulation in the course of distribution of water in accordance with the users' existing rights of record~~and have the potential to substantially interfere with a surface water right that is the subject of a valid and verified complaint of water shortage under OAR 690-250-0100 to -0120.

(32) Except as otherwise provided herein, ~~T~~these rules operate in lieu of OAR Chapter 690 Division 09 and in conjunction with OAR Chapter 690 Division 250 ~~except that these rules govern distribution of groundwater and surface water in the Upper Klamath Basin in lieu of OAR 690-250-0120(2)~~.

690-025-0040

Regulation of Hydraulically Connected Wells

~~(1) In the Klamath Basin, groundwater and surface water are hydraulically connected.~~

~~(2) Wells that withdraw groundwater in the Klamath Basin reduce spring discharge and surface water flow.~~

(31) ~~Notwithstanding that groundwater is hydraulically connected to surface water in the Klamath Basin, t~~The Department has determined that in the Upper Klamath Basin, ~~regulation of~~ wells that are located a horizontal distance equal to or less than 500 feet from a source of surface water rights, and which are determined to appropriate water from an aquifer hydraulically connected to a surface water source, have the potential to cause substantial interference as defined in OAR 690-008-0001(8)~~will result in effective and timely relief to those surface water rights~~.

~~(4) The determinations in subsections (1) and (2) are based on the best available information, including but not limited to, water well reports, basin and hydrologic studies, topographic maps, hydrogeologic reports, groundwater and surface water elevation data, groundwater flow models, model simulation results for the Klamath Basin, and any other information that is used in the course of applying generally accepted hydrogeologic methodologies.~~

(52) After verifying a valid complaint of water shortage under OAR 690-250-0100 to -0120, the Department shall evaluate wells within 500 feet of the source of surface water right(s) subject to the complaint for both a hydraulic connection between the aquifer and the surface water source and substantial interference as defined in OAR 690-008-0001(8). The Department shall further evaluate whether regulation or control of such wells would provide timely and effective relief to the surface water right(s).

(3) Before regulating an authorized groundwater use, the Department shall determine the horizontal distance between each well and the source or sources of surface water rights using an on-the-ground measurement technique that is verifiable and repeatable.

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(4) All determinations made under section (2) shall be made using site-specific data and information and scientifically repeatable methods.

(5) At any time, a well owner subject to actual or potential regulation under these rules may request site-specific testing, including but not limited to seepage measurements in the vicinity of the well, by the Department and at the Department's expense.

(5) The Department will not regulate wells within 500 feet of the source of a surface water right where site-specific testing, previous or future, by the Department indicates a lack of hydraulic connection or substantial interference or the results of the testing are otherwise inconclusive.

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(6) So long as these rules are in effect, the Department shall control the use of wells greater than 500 feet from a surface water source only through a critical ground water area determination in accordance with ORS 537.730 through 537.740. Under no circumstance shall wells greater than one-mile from a surface water source be regulated unless through a critical ground water area determination, pursuant to OAR 690-009-0050(2)(b).

~~(6) The Department may regulate wells that are located a horizontal distance equal to or less than 500 feet from a source of surface water rights whenever a valid call for surface water is made and the Department is regulating in accordance with the users' existing rights of record.~~

PRYBYL Stephanie H * WRD

From: s smith <smithriver78@gmail.com>
Sent: Monday, March 4, 2019 12:26 PM
To: RANCIER Racquel R * WRD
Subject: Proposed Rule Making Upper Klamath Basin

I am opposed to OAR 690-025-0020, -0025 and -0040 which appears to significantly reduce regulation of wells that are hydraulicly connected to surface water in the Upper Klamath Basin. This is a threat to the aquatic ecosystem which is at risk of losing altogether several federally recognized endangered species which are culturally significant to the Klamath Tribes and to local recreation. The Klamath Basin rivers and lakes are already extremely degraded due to over allocation and use and also from agricultural pollution and runoff. To further deregulate wells and aquifers, even for a short period of time, could have further catastrophic affects on the ecosystem, Klamath Tribal Treaty rights, Federally Recognized Endangered Species and long term recreational and economic viability of the Klamath Basin and it's communities. Please consider this and do not create or pass any new rules that further deregulate and threaten the health, viability and integrity of our water resources.

Sincerely,

Shane E. Smith
Talent, OR
541-698-9801

Racquel Rancier
725 Summer Street NE Ste. A
Salem,OR 97301
503-986-0828
racquel.r.rancier@oregon.gov

3/3/2019

Re: Local rules governing control of well use in the Upper Klamath Basin - comment

The groundwater rules, temporary or not, codify failed premises which are likely, once implemented, to continue in any future versions.

The simple fact is, the computer models are KNOWN deficient and are not sufficiently predictive. Nonetheless, in the interest of the most aggressive template for bureaucratic authority, effective resource confiscation, and Agency boilerplate simplicity of administration, the precedent setting proposed 'rules' state the following assumptions as 'fact':

(1) In the Klamath Basin, groundwater and surface water are hydraulically connected.
(2) Wells that withdraw groundwater in the Klamath Basin reduce groundwater discharge and surface water flow.
(3) Notwithstanding that groundwater is hydraulically connected to surface water in the Klamath Basin, the Department has determined that in the Upper Klamath Basin, regulation of wells that are located a horizontal distance equal to or less than 500 feet from a source of surface water rights will result in effective and timely relief to those surface water rights.

None of those emphatic statements has a definitive connective basis, and yet each of those enforcements will cause irreparable harm to many, without compensation, even if physically inaccurate. Freely admitting OWRD 'modeled' inability to PROVE individual impacts, QWRD still casts vested rights by owners as 'guilty' based upon individually geologically unsubstantiated arbitrarily set distances, distances just as easily arbitrarily altered and expanded at any later date using the same 'previously embedded' defective rationale.
In accordance with constitutional principles of individual rights and property, OWRD should, but no doubt won't, return to a premise of required proof of impact prior to imposing effective condemnation without compensation, a premise I would expect that most OWRD personnel would expect for themselves.

Rex Cozzalio

Racquel Rancier
Senior Policy Coordinator
Oregon Water Resources Department
725 Summer St., NE, Suite A
Salem,OR 97301-1271
Attn: Racquel Rancier
email: racquel.r.rancier@oregon.gov

From Jacqui Krizo
7890 County Rd 120
Tulelake, CA 96134
530 664 3862
krizohr@cot.net

March 3, 2019

OWR Commissioners:

We live near the Oregon-California border. We are all Klamath Basin irrigators. These neighbors are being terrorized by your government-funded goal to take water rights from hard working Americans.

When has it been ok in America to demand someone is guilty until they prove, with limited funds, that they are indeed innocent? Despite some previous declarations that their well water is not attached to a surface water source, you've created models that assume otherwise. They have spent their savings trying to defend themselves from ODWR with your huge legal budget, you then changed your model. Now you are changing the law. You are declaring them all guilty, not on a case by case basis, and not with any individual proof on your part.

You know your demands will eventually eliminate their ability to water their crops, eradicate these irrigators from their land, and set a precedent for government agencies in other areas to destroy water rights, while knowing you have no actual scientific proof that every well within your chosen area has an effect on a surface water source.

The majority of the Rules Advisory Committee requested that you incorporate into your long term water management rules that wells must be tested to confirm whether or not they are connected to a surface water source before you shut them off.

With your great budget, if you truly believe and can prove that each well within your targeted area is affecting a surface water source, then we ask you to give them actual scientific proof of your accusation before you further terrorize them by demanding that they prove they are NOT harming the surface water. Your interim rules need to go away until you have site specific proof for each well. Unless you have an unstated agenda of destroying these family farmers and ranchers and eradicating them from their land, we believe you have no reason to place these horrific rules on them.

Jacqui Krizo

Oregon Cattlemen's Association

1320 Capitol Street NE. Suite 150
Salem, Oregon 97301
503-361-8941
orcattle.com

March 4, 2019

Racquel Rancier
Senior Policy Coordinator
Oregon Water Resources Department,
725 Summer St. NE, Suite A
Salem, OR 97301-1271

Email: racquel.r.rancier@oregon.gov

Re: Division 25 Rulemaking for the Klamath Basin

Ms. Rancier,

The Oregon Cattlemen's Association ("OCA") is a member of the Rules Advisory Committee for the Oregon Water Resources Department's ("OWRD's") proposed temporary Division 25 rulemaking. OCA is supportive of OWRD's approach to limit regulation of groundwater wells in the Upper Klamath Basin to the wells in closest proximity to surface water sources (that is, less than 500 feet) while OWRD drafts permanent rules for the regulation of wells that interfere with senior surface water rights. The proposed Division 25 rules, however, include unnecessary factual findings for the purposes of the proposed rules that OCA believes OWRD may attempt to use to prevent groundwater users from challenging future groundwater regulation by OWRD.

OWRD's proposed Division 25 rules include new definitions for "aquifer" and "hydraulically connected" that conflict with other regulations, and broaden OWRD's jurisdiction to regulate off groundwater users. OAR 690-025-0020(4) & (6). The proposed rules extend to impending interference, rather than existing interference, again broadening OWRD's regulatory jurisdiction, and conflicting with statutory authority. OAR 690-025-0025(1). The rules make expansive generalizations about groundwater and surface water hydraulic connection in the Klamath Basin (OAR 690-025-0040(1)), and the alleged effects of wells on spring and surface water flows (OAR 690-025-0040(2)).

OWRD's proposed definitions, findings, and conclusions cited above are unnecessary to OWRD's regulation of wells within close proximity to surface water sources when a valid call for water is made by a senior surface water user. The definitions, findings, and conclusions, if adopted, may provide support for OWRD's interpretation of future rules governing the regulation of Upper Klamath Basin groundwater users, allowing

OWRD to claim deference from courts, and avoid legal challenges to the science and methodology used by OWRD to shut off irrigation wells, causing severe and permanent effects on the agricultural community.

In the interest of supporting OWRD's approach to limit regulation of groundwater wells in the Klamath Basin temporarily while OWRD drafts new rules, OCA will withdraw its opposition to the proposed temporary Division 25 rules, if OWRD removes the objectionable provisions cited above, or provides legally binding assurances that such provisions will not be relied upon or asserted by OWRD in any future context or legal proceeding to support regulation of any wells 500 feet or more from a surface water source within or outside the Upper Klamath Basin.

In any permanent rulemaking efforts, OCA will advocate for and insist that OWRD put forth rules that require scientific support that individual wells actually and measurably reduce surface water flows that would otherwise be available to senior surface water users prior to regulating off such wells. Conjunctive groundwater management cannot be one-size-fits-all for all groundwater users within a groundwater basin, and OWRD must be able to determine actual interference with surface water flows prior to regulation under the laws of the State of Oregon.

Thank you,

Jerome Rosa

Jerome Rosa
Executive Director
Oregon Cattlemen's Association

March 4, 2019

Racquel Rancier
Senior Policy Coordinator
Oregon Water Resources Department,
725 Summer St. NE, Suite A
Salem, OR 97301-1271

Email: racquel.r.rancier@oregon.gov

Re: Division 25 Rulemaking for the Klamath Basin

Ms. Rancier,

The Oregon Farm Bureau and Klamath-Lake County Farm Bureau submit the following comments on the Oregon Water Resources Department's proposed Division 25 rulemaking around ground/surface water connection in the Klamath Basin.

By way of background, Oregon Farm Bureau is Oregon's largest grassroots agriculture association, representing nearly 7,000 farming and ranching families across the state. Our mission is to promote educational improvement, economic opportunity, and social advancement for our members and the farming, ranching, and natural resources industry as a whole. Klamath-Lake County Farm Bureau is the voice of farmers and ranchers in Klamath County.

Water is the lifeblood for Oregon's farmers and ranchers; it is essential for the Oregon's agricultural economy and many farms and ranches in Oregon cannot operate without secure access to irrigation water. Agriculture contributes an estimated $50 billion dollars to the state's economy, making it Oregon's second largest economic driver. Given the importance of water to all of Oregon's 220+ commodities, the state must protect farmers' water rights and ensure that management decisions are workable for Oregon's farmers and ranchers.

Our members in the Klamath Basin and statewide have been concerned for the last several years about the Department's regulation of groundwater in the Basin, and we have significant disagreement with how the Department has chosen to apply its scientific models in the Basin. As such, we believe that the Department should not codify any of its hotly disputed scientific findings in this rulemaking. However, we do support limiting regulation to 500 feet of surface water, as opposed to the mile the department currently regulates, while the Department works with stakeholders and their scientists to resolve the long-standing disputes about ground-surface water connection in the Basin.

1) The Department Must Improve its Models in the Klamath Basin

As in initial matter, our members have long-standing concerns over the science used to establish ground/surface water connection in the Klamath Basin. Specifically, we understand that a number of well-respected environmental consulting firms with extensive experience in water modeling have informed the Department that they are incorrectly applying their model for estimated stream depletion by groundwater pumping in the Klamath. Based on discussions we have had recently with the Department, it appears the Department is dismissive of the scientists' concerns, and forcing water users in the Basin to take the Department to court to challenge the Department's application of its models. We also understand that the Department has largely refused to revisit its application of its models through these lawsuits, essentially forcing water users in the basin to spend hundreds of thousands of dollars to protect their water rights. This is unacceptable. Given that the Department intends to spend the next two years working within the basin to build a stronger consensus on the state of the science, we strongly encourage the Department to begin to work with water users in the basin immediately to address the concerns around the application of the model. Dismissing the concerns of trained, licensed consultants is not an acceptable approach to resolving this conflict.

2) The Draft Rules Should Not Codify Scientific Findings into Regulation

We do not think the draft rules should codify the hotly disputed science into its regulations or change how its current law works in the Klamath Basin. Water users must still have the opportunity to challenge the department's science on a case-specific basis. The Department's proposed Division 25 rules appear to evidence a wholesale change to how it's approaching ground/surface water regulation during this interim period, and the rules seem designed to limit the opportunities to challenge the Department's science during this interim. Among our primary concerns with the draft rules are the fact that they:

- Change the definition of "hydraulically connected" to do away with the adjacent aquifer requirement;
- Expand the Department's regulation authority in the upper Klamath Basin not only to actual interference, but "impending" interference as well;
- Conclude all wells drawing water in the Klamath Basin reduce spring discharge and surface flow;
- Remove the "effective and timely" requirement, other than to conclude that regulation of all wells 500 feet or less from surface water results in effective and timely relief and may be regulated whenever a valid call is made; and
- Make a determination that all groundwater and surface water are hydraulically connected in the upper Klamath Basin

These changes are unnecessary, unacceptable, and will only result in new litigation during the interim period these rules are in effect. If the intent of this rulemaking is to reduce the amount of litigation happening against the Department over its application of its current ground/surface water regulation, this approach will not achieve that goal, and attempts to de facto resolves almost all of the disputed issues against the water user. This is unacceptable.

If the Department's true goal is to reduce conflict in the basin while they work on resolving the disputes around the science in the basin long-term, the rule should simply set the maximum distance for regulation to 500 feet of surface waters, and not make other changes to how ground/surface water interaction is evaluated or codify disputed science around ground/surface water regulation.

3) **We Support Limiting Enforcement to 500 Feet While Disputes Over the Science Are Resolved**

While we disagree with the department's use of its ground/surface water models in the basin and the findings the draft rule codifies, we do support limiting enforcement to 500 feet in the immediate term while water users work with OWRD to find better agreement on the science in the basin. We believe, if done correctly, this approach will reduce conflict in the basin for the next few years while water users and the Department work together to find greater agreement around modeling used in the basin to determine actual impact. However, as discussed above, we do not believe that the Department's rules simply limit regulation to 500 feet, but instead include a number of unnecessary, incorrect, and precedentially significant changes to its regulation of ground/surface water connection in the basin. We recommend the Department pare down its rulemaking to simply limit its regulation to 500 feet without fundamentally changing the law or codifying its disputed scientific findings in this rulemaking.

Thank you for the opportunity to submit comments, and please do not hesitate to contact us if you have any questions.

Sincerely,

Mary Anne Cooper
Oregon Farm Bureau
Maryanne@oregonfb.org
541-740-4062

John Moxley
John Moxley
President
Klamath-Lake County Farm Bureau

WaterWatch of Oregon
Protecting Natural Flows in Oregon Rivers

WATERWATCH

March 4, 2019

Racquel Rancier
OWRD
725 Summer Street NE STE A
Salem, OR 97301

RE: Proposed Division 25 Rules
Sent via email to racquel.r.rancier@oregon.gov

Dear Ms. Rancier:

Thank you for the opportunity to comment on the proposed Division 25 rules.

While WaterWatch supports the proposal by Oregon Water Resources Department to conduct a two-year process to develop robust rules addressing water management in the Klamath Basin, and look forward to participating in that process, we oppose the proposed rules because of the failure to protect the senior water rights for instream uses in the Upper Klamath Basin.

We are very concerned that the proposed Division 25 rules fail to protect senior surface water rights—which in this case are predominantly rights for instream use—from pumping under junior groundwater rights. In the Upper Klamath Basin, where the proposed rules would apply, the most senior surface water rights are rights for instream uses held by The Klamath Tribes. Instream rights enjoy the same protections under the water code as any other surface water right and the agency's failure to afford these senior instream rights the protections due is alarming. The agency does not get to pick and choose which types of rights it regulates to protect.

In addition to the fact that the proposed rules fail to protect senior water right holders in contravention of the water code, the proposed rules will also adversely impact aquatic ecosystems and the species those ecosystems support including native fish such as redband trout and sucker fish. This is of particular concern in the Klamath Basin where aquatic ecosystems have suffered extensive impacts from the over-issuance of water rights for irrigation. We urge the agency to take into account the impact of the groundwater pumping under junior water rights on these aquatic ecosystems and native species.

Given the extensive data collection and analysis that went into the robust USGS-OWRD groundwater study of the Klamath Basin, the statement in the proposed rules regarding the connection between surface water and groundwater is certainly not an overstatement or overreach. That statement of basic scientific fact is important to include in the rules because it sets the context for the regulation that would take place under the proposed rules, albeit at a totally inadequate level, and for the continued dialogue about science and water management in the basin.

Because the proposed rules fail to protect senior surface water rights, the section of the Notice of Proposed Rulemaking titled "NEED FOR THE RULE(S)" is incorrect. That section states that "this rulemaking proposes [ ] to establish procedures for the control of groundwater uses to protect senior surface water rights. . ." The proposed rules clearly do not do this. The proposed rules would fail to regulate junior groundwater users where that pumping would diminish the instream flows allocated to senior surface water rights, thereby failing to protect those senior rights. By comparison, the proposed rules would subject only seven wells to regulation, where 140 were regulated under Division 9 and 50 under the previous Division 25 rules. Therefore, the NEED FOR THE RULES(S) is inaccurate and is inconsistent with the proposed rules. The rules do not achieve the statement of need.

The FISCAL AND ECONOMIC IMPACT section is also incorrect. For example, it is incorrect to state "[h]owever, the cost to the junior regulated users is offset by the benefit of the regulated water supplying senior water right holders in the basin." As compared to baseline, whether one uses regulation under Division 9 or the previous Division 25 rules, there is no additional cost to junior regulated users and there definitely is not a benefit of regulated water to senior water holders. The rules reduce the cost of regulation to junior regulated users and reduce the benefit to senior water right holders. The statement is inconsistent with the substance of the proposed rules.

Finally, I want to voice my serious concern with the testimony at the February 21, 2019, rulemaking hearing in Salem in which the person testifying complained that the statement in the rules regarding surface and groundwater connection would make it harder to settle with the Tribes and that the Tribes needed to be 'knocked back into reality' (or something very close if not those words exactly). While emotions can run high with regard to water issues, this type of language—which is disrespectful with threatening overtones—should not be tolerated in civil discourse regarding water management (or any other topic). Because this statement was made during testimony at a rulemaking hearing, back and forth between the testifier and the Water Resources Commission, agency or other hearing attendees was not permitted. However, in other settings where back and forth is allowed (such as the upcoming planned two-year discussion in the basin), I urge the agency to impose and enforce strict standards prohibiting this type of language. Further, to the extent the sentiment expressed in the testimony shapes the basis of objections to the statement in the rules regarding surface and groundwater connectivity, those objections are further eroded and should be disregarded by the agency.

Thank you for your consideration of these comments.

Sincerely,

/s/ Lisa A. Brown

Lisa A. Brown
WaterWatch of Oregon
213 SW Ash St. STE 208
Portland, OR 97204
503.295.4039 x4
lisa@waterwatch.org

Attachment J

OFFICE OF THE SECRETARY OF STATE
DENNIS RICHARDSON
SECRETARY OF STATE

LESLIE CUMMINGS
DEPUTY SECRETARY OF STATE

ARCHIVES DIVISION
MARY BETH HERKERT
DIRECTOR

800 SUMMER STREET NE
SALEM, OR 97310
503-373-0701

NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 690
WATER RESOURCES DEPARTMENT

FILED
01/29/2019 5:51 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Local rules governing control of well use in the Upper Klamath Basin

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 03/04/2019 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

CONTACT: Racquel Rancier
503-986-0828
racquel.r.rancier@oregon.gov

725 Summer Street NE Ste. A
Salem,OR 97301

Filed By:
Racquel Rancier
Rules Coordinator

HEARING(S)

Auxilary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 02/21/2019
TIME: 3:30 PM
OFFICER: Meg Reeves
ADDRESS: Oregon Water Resources Dept.
725 Summer Street NE, Suite A
Room 124
Salem, OR 97301
SPECIAL INSTRUCTIONS:
Hearing during Water Resources Commission meeting. To submit testimony, please sign up to testify no later than 3:45 PM.

DATE: 02/26/2019
TIME: 1:00 PM - 3:00 PM
OFFICER: Ivan Gall
ADDRESS: Oregon Institute of Technology
3201 Campus Drive
Mt. Scott Room
Klamath Falls, OR 97601

NEED FOR THE RULE(S):

In the Klamath Basin, significant amounts of groundwater discharges to surface water, such as springs, streams, and rivers. Pumping wells capture some of this water, reducing the amount of surface water. Surface water sources provide water to holders of surface water rights and determined claims. Surface water and groundwater are managed based on a system of prior appropriation where junior water right holders (those with newer water rights) are shutoff to meet the call of a senior water right holder (older water rights) in times of insufficient supply to meet all rights. Similarly, junior groundwater rights can be regulated off to provide water to senior water rights, including surface water rights where there is evidence of hydraulic connection. In the 2000s through present, significant data were collected in the basin and several reports documented hydraulic connection between surface water and groundwater in the basin. As regulation of surface water rights began in the basin in 2013, efforts to find a compromise to regulation began to include groundwater. As a result, the 2014 Upper Klamath Basin Comprehensive Agreement (UKBCA), negotiated by a broad group of stakeholders and governmental entities, addressed water management in the Off-Project area of the Klamath

Basin, including groundwater regulation. Provisions of the UKBCA addressing the control of groundwater use were incorporated into OAR 690-0025-0010 rules, with the provision that if the agreement was terminated, the rules would no longer be effective. In December 2017, the agreement was terminated, making the OAR 690-0025-0010 rules no longer in effect. As a result, this rulemaking is needed to repeal the rules OAR 690-025-0010 that are no longer in effect following termination of the UKBCA. Regulation under the existing OAR 690-009 statewide rule has resulted in litigation, prompting these proposed basin specific interim rules. As a result, this rulemaking proposes to adopt OAR 690-025-0020, -0025, and -0040 to establish procedures for the control of groundwater uses to protect senior surface water rights in the Upper Klamath basin, while further engagement is conducted in the area to develop a longer term approach for water management in the area. These proposed rules are intended to be in effect until March 1, 2021 when more comprehensive rules are expected to be adopted after significant engagement and outreach with individuals in the basin.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE:

Ground-Water Hydrology of the Upper Klamath Basin, Oregon and California, and associated reference material.
https://pubs.usgs.gov/sir/2007/5050/

Groundwater Simulation and Management Models for the Upper Klamath Basin, Oregon and California, and associated reference material.
https://pubs.usgs.gov/sir/2012/5062/

Streamflow Depletion by Wells – Understanding and Managing the Effects of Groundwater Pumping on Streamflow.
https://pubs.er.usgs.gov/publication/cir1376

FISCAL AND ECONOMIC IMPACT:

Currently, regulation of wells in the Klamath Basin occurs under statewide rules in OAR 690-009, because 690-025-0010 is no longer effective. In the Upper Klamath Basin during 2018, under 690-009, there were 140 wells subject to regulation. During 2015-17, under 690-025-0010, there were 40 wells subject to regulation. Adopting the proposed 690-025-0020, -0025, and -0040 rules would provide that 7 wells will be subject to regulation instead of 140 under OAR 690-009. Costs to regulated well users, in the form of less revenue to individual farmers, ranchers, or small businesses, may result from water curtailment on irrigated acreage. However, the cost to the junior regulated users is offset by the benefit of the regulated water supplying senior water right holders in the basin. The potential magnitude of these additional costs and benefits to regulated well users can't be quantified, because it depends on each specific entity, the amount of water supply available in a water year (a function of rain and snow amounts), whether that entity was able to shift water use to other sources or areas, and whether or not a call is made by a senior water right holder.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) The primary state agency affected by the proposed rules is the Water Resources Department, which is charged with regulating the distribution of water among the various users of surface water and groundwater in accordance with the users' existing rights of record based on a system of priority. The proposed rules do not expand the Department's regulatory authority and are not expected to increase water distribution costs for the Department. The rules are likely

to reduce the Department's water distribution and enforcement costs while they are in effect, as the rules will result in fewer wells being regulated than under the OAR 690-009 rules. Klamath County has estimated there are 115,000 irrigated acres (both surface water and groundwater) in the Upper Klamath Basin. For the 2018-19 tax year, the Klamath County Assessor's office reduced the taxable rate for acres that had water regulated off to 50%, thus reducing the property tax liability for the impacted acres. The City of Chiloquin has invested in acquiring land and intends on drilling a new municipal well. Bly has also acquired grant funding to construct a new municipal well. No other economic effect on state agencies, local governments, or the general public is expected from the proposed rules as compared to the current regulatory framework, except where the local government or member of the public is a holder of a groundwater right that is currently being regulated. In those instances, where the rules result in them not being regulated, they will have the benefit of their water use and the positive economic impacts associated with that water use. This reduction in groundwater regulation may have a negative economic impact on senior water right holders that currently benefit from the regulation of the wells, including the Klamath Tribes and irrigators that are part of the Bureau of Reclamation's Klamath Project to the extent that it reduces the amount of water available to them.

The Department cannot estimate the specific economic impacts because it will depend on each specific entity, the amount of water available in a water year, whether that entity was able to shift water use to other sources or areas, and whether or not a call is made by a senior water right holder.

(2a) Many of the affected wells are owned by individuals or small businesses, the majority of which are agricultural operations. However, the senior surface water right holders stand to benefit from the regulation of wells under the existing rules. These include the Klamath Tribes who call on instream determined claims, and irrigation districts which are part of the Bureau of Reclamation's Klamath Project; which are individual farmers and ranchers and small agricultural businesses. The Department estimates that approximately 1,700 small businesses could be affected by the proposed rules, including well users and surface water users. The proposed rules apply to seven wells at this time.

(2b) The proposed rules do not impose additional reporting, record keeping, or other administrative activities on small businesses affected by the proposed rules as compared to existing regulation under OAR 690-009. The cost to comply with these rules, as with the current OAR 690-009 rule, depends on whether or not a water user is regulated and to what extent that impacts their business operations. The Department cannot estimate that cost of compliance, which will be operator specific, because it will vary depending on water conditions in any given year, whether the business can shift operations to other areas or water sources, and if the senior users call on the water.

(2c) The proposed rules do not impose additional costs of professional services, equipment, supplies, labor and increased administration activities on small businesses affected by the proposed rules as compared to existing regulation under OAR 690-009.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

Two rule advisory committee meetings were convened in Klamath Falls, the first on January 15, 2019 and the second on January 28, 2019. The committee included representatives of groups and entities that either are, or represent, small businesses in the basin. These groups included the Oregon Cattlemen's Association, the Klamath Water Users Association, the Oregon Farm Bureau, and individual farmers and ranchers that own wells.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

RULES PROPOSED:
690-025-0010, 690-025-0020, 690-025-0025, 690-025-0040

REPEAL: 690-025-0010

RULE SUMMARY: These rules were adopted to govern groundwater regulation in the Klamath basin. However, they were only in effect while the Settlement Agreement was in effect. The Settlement Agreement was terminated, therefore, these rules are no longer in effect. This rulemaking repeals these rules that are no longer in effect.

CHANGES TO RULE:

~~690-025-0010~~
~~Untitled~~
~~(1) The following definitions apply solely to OAR 690-025-0010:¶~~
~~(a) "Call Threshold" means the instream flow threshold associated with a Primary or Secondary SIF Measurement Location, to which the Klamath Tribes and the United States Bureau of Indian Affairs may call for regulation of junior water rights under the terms of the Settlement Agreement. The terms "Primary SIF Measurement Location" and "Secondary SIF Measurement Location" have the meanings given in Section 15 of the Settlement Agreement.¶~~
~~(b) "Gaining Reach" means a reach of a perennial stream where streamflow is increasing as a result of groundwater discharge to the stream, as shown in the Upper Basin Wells and Gaining Reaches Map (included as Attachment A to these rules), except that the Department may modify the location of a Gaining Reach for the purposes of OAR 690-025-0010 based on the best available information.¶~~
~~(c) "Irrigation Season" means the period from March 1 to October 31 of every year.¶~~
~~(d) "Off-Project Area" means the area by that name shown in the WUP Regions Map (included as Attachment B to these rules).¶~~
~~(e) "Rate" means the amount of water as expressed in cubic feet per second (cfs).¶~~
~~(f) "Scenic Waterways Act" means ORS 390.805 to 380.925.¶~~
~~(g) "Settlement Agreement" means the Upper Klamath Basin Comprehensive Agreement that took effect April 18, 2014.¶~~
~~(2) OAR 690-025-0010 implements Sections 3.11.3 through 3.11.9 of the Settlement Agreement, which address control of well use in the Off-Project Area when such use affects surface water supplies in the Klamath Basin.¶~~
~~(3) OAR 690-025-0010 only governs the Department's control of well use in the Off-Project Area when the Department determines such use has the potential to cause substantial interference with surface water. OAR 690-025-0010 does not govern:¶~~
~~(a) Applications for the use of groundwater;¶~~
~~(b) Control of well use as a result of interference with another well;¶~~
~~(c) Control of well use in any other part of the Klamath Basin or the state;¶~~
~~(d) Control of well use pursuant to the Scenic Waterways Act or the Department's rules implementing the Scenic Waterways Act, or the enforcement of water permit conditions pertaining to the Scenic Waterways Act; or¶~~
~~(e) Use of wells in the Off-Project Area outside the Irrigation Season.¶~~
~~(4) OAR 690-009 also governs the Department's control of well use that affects surface water supplies. 690-009 applies statewide, but 690-009-0030 authorizes the Oregon Water Resources Commission to adopt local rules governing control of well use when such use has the potential to cause substantial interference with surface water. OAR 690-025-0010 is a local rule adopted pursuant to this authority and to existing statutes governing the control of groundwater.¶~~
~~(5) As a local rule, OAR 690-025-0010 both works in conjunction with and supersedes some parts of OAR 690-009. OAR 690-009 provides a two-step process for control of well use that affects surface water supplies. First, the Department must determine that well use has the potential for substantial interference with a surface water source. OAR 690-009-0040 provides the process for making this determination. OAR 690-025-0010 does not modify this step. Second, if the well is greater than 500 feet from a surface water source, the Department must~~

~~determine that control of the well would provide relief to the surface water supply in an effective and timely manner. OAR 690-025-0010 supersedes this step with respect to the control of well use in the Off-Project Area during the Irrigation Season by providing a detailed process for evaluating whether control of a well in the Off-Project Area will provide relief to the surface water supply in an effective and timely manner. Specifically, 690-025-0010 supersedes 690-009-0050(2). The following sections provide the process for making the effective and timely determination.¶~~

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

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

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

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

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

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

~~(A) A valid call is made by a senior surface water right holder; and¶~~

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

~~(C) The first valid call based on a specific senior water right or Call Threshold (as applicable) is made on or before August 31. If the first valid call based on a specific senior water right or Call Threshold (as applicable) is made after August 31, the Department shall not control the use of a well that is between one-quarter mile and one-half mile of a Gaining Reach during that Irrigation Season. For example, if a senior user makes a valid call on July 15th based on a water right or Call Threshold, as applicable, of 100 cfs, and the Watermaster determines the flow (measured at the appropriate location) is 93 cfs, then the shortfall is 7 cfs. This equates to a 7% shortfall, which under this provision has the result that wells between one-quarter mile and one-half mile of a Gaining Reach shall be controlled to satisfy the call. (In this scenario wells less than one-quarter mile from a Gaining Reach would also be controlled, pursuant to sections (7) and (9)).¶~~

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

~~(A) A valid call is made by a senior surface water right holder; and¶~~

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

~~(C) The first valid call based on a specific senior water right or Call Threshold (as applicable) is made on or before July 31. If the first valid call based on a specific senior water right or Call Threshold (as applicable) is made after July 31, the Department shall not control the use of a well that is between one-half mile and one mile of a Gaining Reach during that Irrigation Season. For example, if a senior user makes a valid call on July 15th based on a water right or Call Threshold, as applicable, of 100 cfs, and the Watermaster determines the flow (measured at the appropriate location) is 87 cfs, then the shortfall is 13 cfs. This equates to a 13% shortfall, which under this provision has the result that wells between one-half mile and one mile of a Gaining Reach shall be controlled to satisfy the call. (In this scenario wells less than one-half mile from a Gaining Reach would also be controlled, pursuant to sections (7), (9), and (10)(a)).¶~~

~~(c) Notwithstanding sections (10)(a) and (10)(b), if a valid call is made by a senior surface water right holder, and~~

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

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

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

(a) Wells located between one-quarter and one-half mile of a Gaining Reach that are continuously cased and continuously sealed to a minimum depth of 500 feet below land surface will be regulated as if they are located between one-half mile and one mile of a Gaining Reach; and¶

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

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

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

(a) The Department shall control a well located within one mile of a spring or stream if use of the well would result in depletion of the flow of a Gaining Reach at a rate greater than 25 percent of the rate of appropriation within 30 days of pumping.¶

(b) The Department shall control wells located within a one-mile radius of a particular spring if the combined use of these wells would result in depletion of the spring flow rate in an amount that is greater than 20 percent within 30 days of pumping.¶

(c) The Department shall make the determinations described in subsections (14)(a) and (14)(b) based on the best available information, which could include employing at least one of the methods set forth in OAR 690-009-0040(4)(d). Prior to making such a determination, the Department shall notify the water right holder(s) subject to the call and the party or parties making the call, and provide them with an opportunity to submit additional information to the Department.¶

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

~~information. For the purposes of measuring distances from individual wells to springs, streams, or Gaining Reaches, as applicable, resulting from the changes described in subsections (a) through (e), the Department will use the most current year of NAIP imagery.¶~~

~~(a) If a replacement or additional well under an existing registration, permit, or certificate is located at a distance greater than one mile from a surface water source, the well may not be regulated without a critical groundwater area determination.¶~~

~~(b) If a riparian restoration action results in movement of the nearest edge of a surface water body to a well to an extent that would change how a well is regulated based on the distance measurement criteria in sections (6) through (14), then for the purposes of sections (6) through (14), the distance prior to the restoration action will continue to apply for that well.¶~~

~~(c) A replacement or additional well under an existing registration, permit, or certificate shall be evaluated for the purposes of sections (6) through (14) based on the distance criterion applicable to the original well; except that for the purpose of the stream relief calculation described in section (13), the replacement or additional well's measured distance, according to the applicable criterion, shall be used.¶~~

~~(d) The Department may determine, based on the best available information, whether a natural change in stream location has caused a material change in the distance of a well to a Gaining Reach or stream. If the Department determines that a material change has occurred, then for the purposes of sections (6) through (14), the new distance shall apply. If the Department determines that there is a material change, the Department shall notify affected persons.¶~~

~~(e) The Department may modify the location of a Gaining Reach for the purposes of OAR 690-025-0010 based on the best available information. The Department shall notify affected persons of a proposed modification and of the Department's decision on the proposed modification.¶~~

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

~~Statutory/Other Authority: ORS 537.505 – 537.795, 540.045~~

~~Statutes/Other Implemented: ORS 537.505 – 537.795, 540.045~~

ADOPT: 690-025-0020

RULE SUMMARY: Defines terms used in OAR 690, Division 25, including sections -0025 and -0040

CHANGES TO RULE:

690-025-0020
Definitions
Notwithstanding OAR 690-008-001, the following definitions apply to OAR 690-0025-0020 to OAR 690-0025-0040, unless the context requires otherwise:¶
(1) "Determined claim" means a claim for surface water as provided in the Findings of Fact and Order of Determination issued on March 7, 2013 and Amended on February 28, 2014 subject to regulation pursuant to ORS 539.170.¶
(2) "Existing rights of record" means authorized groundwater uses, determined claims, groundwater registrations, and surface water rights.¶
(3) "Groundwater registration" means an unadjudicated claim to use groundwater as provided in ORS 537.605 that is registered with the Oregon Water Resources Department.¶
(4) "Groundwater reservoir" or "aquifer" means a body of groundwater having boundaries which may be ascertained or reasonably inferred that yields quantities of water to wells or surface water sufficient for appropriation under an existing right of record. ¶
(5) "Groundwater use authorization" means use of water authorized by a permit, certificate or groundwater registration. ¶
(6) "Hydraulically connected" means water can move between or among groundwater reservoirs and surface water.¶
(7) "Upper Klamath Basin" means the area above and around Upper Klamath Lake that encompasses all water sources that are tributary to Upper Klamath Lake, including groundwater, the Wood River, Williamson River and Sprague River and their tributaries and the Klamath Marsh and its tributaries.¶
(8) "Surface water right" means certificated and permitted water rights, and determined claims, the source of which is surface water, including springs, streams, and rivers.¶
(9) "Well" or "wells" means a well as defined in ORS 537.515(9) that is located in the Upper Klamath Basin and is used to beneficially withdraw water for authorized groundwater uses including domestic, stock, irrigation, industrial, municipal, and aquifer storage and recovery uses.
Statutory/Other Authority: ORS 536.027, ORS 537.525
Statutes/Other Implemented: ORS 539.170, ORS 540.045, ORS 537.525

ADOPT: 690-025-0025

RULE SUMMARY: Outlines that the Department may manage surface water and groundwater uses to protect senior holders of water rights and determined claims in accordance with the users' water rights and determined claims pursuant to these rules, instead of the existing Division 9 rules.

CHANGES TO RULE:

690-025-0025
Distribution of Water between Existing Rights of Record
(1) Whenever impairment of, or interference with, existing water rights to appropriate surface water exists or impends, the Oregon Water Resources Department may regulate the distribution of water among the various users of water from any natural surface or groundwater reservoir in accordance with the users' existing rights of record as authorized by ORS 537.525, ORS 539.170 and ORS 540.045.¶
(2) These rules, OAR 690-0025-0020 to OAR 690-0025-0040, govern the control of wells in the Upper Klamath Basin that produce from a groundwater reservoir that is hydraulically connected to surface water and subject to regulation in the course of distribution of water in accordance with the users' existing rights of record.¶
(3) These rules operate in lieu of OAR Chapter 690, Division 09, and in conjunction with OAR Chapter 690, Division 250, except that these rules govern distribution of groundwater and surface water in the Upper Klamath Basin in lieu of OAR 690-250-0120(2).
Statutory/Other Authority: ORS 536.027, ORS 537.525
Statutes/Other Implemented: ORS 539.170, ORS 540.045, ORS 537.525

ADOPT: 690-025-0040

RULE SUMMARY: Specifies Department finding of the hydraulic connection between surface water and groundwater in the Klamath Basin, and that groundwater use results in stream and spring flow depletion, based on the best available information. Indicates that the Department finds regulation of wells within 500 feet of surface water will result in relief to holders of surface water rights, that the Department shall determine the distance between each well and the source of surface water rights, and that the Department may regulate these wells when a valid call is made by a holder of a senior right or determined claim. Specifies effective date of rules, and that they do not set a precedent.

CHANGES TO RULE:

690-025-0040
Regulation of Hydraulically Connected Wells
(1) In the Klamath Basin, groundwater and surface water are hydraulically connected.¶
(2) Wells that withdraw groundwater in the Klamath Basin reduce groundwater discharge and surface water flow.¶
(3) Notwithstanding that groundwater is hydraulically connected to surface water in the Klamath Basin, the Department has determined that in the Upper Klamath Basin, regulation of wells that are located a horizontal distance equal to or less than 500 feet from a source of surface water rights will result in effective and timely relief to those surface water rights. ¶
(4) The determinations in subsections (1) and (2) are based on the best available information, including but not limited to, water well reports, basin and hydrologic studies, topographic maps, hydrogeologic reports, groundwater and surface water elevation data, groundwater flow models, model simulation results for the Klamath Basin, and any other information that is used in the course of applying generally accepted hydrogeologic methodologies.¶
(5) Before regulating an authorized groundwater use, the Department shall determine the horizontal distance between each well and the source or sources of surface water rights. ¶
(6) The Department may regulate wells that are located a horizontal distance equal to or less than 500 feet from a source of surface water rights whenever a valid call for surface water is made and the Department is regulating in accordance with the users' existing rights of record. Under this rule, the Department will not regulate wells located a horizontal distance greater than 500 feet from a source of surface water.¶
(7) Groundwater regulation in the Upper Klamath Basin before March 1, 2021, will occur pursuant to OAR 690-0025-0020 to OAR 690-0025-0040. After March 1, 2021, OAR 690-0025-0020 to OAR 690-0025-0040 will no longer be in effect and groundwater regulation in the Upper Klamath Basin will occur under OAR 690-009, unless the Commission adopts new rules governing groundwater regulation in the Upper Klamath Basin.¶
(8) Notwithstanding present conformance of these rules with ORS 537.780(2)(a), these rules do not establish a precedent that precludes different or additional regulation of groundwater as may be established in future rulemakings consistent with the authorities of the Water Resources Commission.
Statutory/Other Authority: ORS 536.027, ORS 537.525
Statutes/Other Implemented: ORS 539.170, ORS 540.045, ORS 537.525

AMENDED STATEMENT OF NEED AND FISCAL IMPACT

Need for Rule(s):

In the Klamath Basin, significant amounts of groundwater discharges to surface water, such as springs, streams, and rivers. Pumping wells capture some of this water, reducing the amount of surface water. Surface water sources provide water to holders of surface water rights and determined claims. Surface water and groundwater are managed based on a system of prior appropriation where junior water right holders (those with newer water rights) are shutoff to meet the call of a senior water right holder (older water rights) in times of insufficient supply to meet all rights. Similarly, junior groundwater rights can be regulated off to provide water to senior water rights, including surface water rights where there is evidence of hydraulic connection. In the 2000s through present, significant data were collected in the basin and several reports documented hydraulic connection between surface water and groundwater in the basin. As regulation of surface water rights began in the basin in 2013, efforts to find a compromise to regulation began to include groundwater. As a result, the 2014 Upper Klamath Basin Comprehensive Agreement (UKBCA), negotiated by a broad group of stakeholders and governmental entities, addressed water management in the Off-Project area of the Klamath Basin, including groundwater regulation. Provisions of the UKBCA addressing the control of groundwater use were incorporated into OAR 690-0025-0010 rules, with the provision that if the agreement was terminated, the rules would no longer be effective. In December 2017, the agreement was terminated, making the OAR 690-0025-0010 rules no longer in effect. As a result, this rulemaking is needed to repeal the rules OAR 690-025-0010 that are no longer in effect following termination of the UKBCA. Regulation under the existing OAR 690-009 statewide rule has resulted in litigation, prompting these proposed basin specific interim rules. As a result, this rulemaking proposes to adopt OAR 690-025-0020, -0025, and -0040 to establish procedures for the control of groundwater uses to protect senior surface water rights in the Upper Klamath basin, while further engagement is conducted in the area to develop a longer term approach for water management in the area. These proposed rules are intended to be in effect until April 2021 when more comprehensive rules are expected to be adopted after significant engagement and outreach with individuals in the basin.

Amended Fiscal and Economic Impact:

Reasons for amendment: The amendments in this section addresses inaccuracies related to how the decrease in regulation of groundwater users will affect senior water right users. The proposed rules will result in fewer groundwater users being regulated off than in the past four irrigation seasons which may result in an increased fiscal impact to senior surface water users. Corrections show deleted text in strikethrough and added text in bold.

Currently, regulation of wells in the Klamath Basin occurs under statewide rules in OAR 690-009, because 690-025-0010 is no longer effective. In the Upper Klamath Basin during 2018, under 690-009, there were 140 wells subject to regulation. During 2015-17, under 690-025-0010, there were 40 wells subject to regulation. Adopting the proposed 690-025-0020, -0025, and -0040 rules would provide that 7 wells will be subject to regulation instead of 140 under OAR 690-009. Costs to regulated well users, in the form of less revenue to individual farmers, ranchers, or small businesses, may result from water curtailment on irrigated acreage. ~~However, the cost to the junior regulated users is offset by the benefit of the regulated water supplying senior water right holders in the basin.~~ **In addition, senior water users may experience fiscal impacts associated with a possible reduction in surface water resulting from decreased regulation of groundwater users.**

~~The potential magnitude of these additional costs and benefits to regulated well users can't be quantified, because it depends on each specific entity, the amount of water supply available in a water year (a function of rain and snow amounts), whether that entity was able to shift water use to other sources or areas, and whether or not a call is made by a senior water right holder.~~ **The costs born by regulated groundwater users cannot be quantified because the costs resulting from regulation depend on the situation of each specific regulated entity which in turn is affected by unpredictable factors such the timing and magnitude of the regulatory action, and weather conditions and available precipitation during the irrigation season. Similarly, the costs associated with possible decreased streamflow that may occur as a result of decreased regulation of groundwater users may not be quantified because the Department does not presently know how much less water will remain instream as a result of**

decreased regulation of groundwater, does not know what specific instream resources could be harmed, or what the fiscal value of those instream resources is.

Statement of Cost of Compliance:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) The primary state agency affected by the proposed rules is the Water Resources Department, which is charged with regulating the distribution of water among the various users of surface water and groundwater in accordance with the users' existing rights of record based on a system of priority. The proposed rules do not expand the Department's regulatory authority and are not expected to increase water distribution costs for the Department. The rules are likely to reduce the Department's water distribution and enforcement costs while they are in effect, as the rules will result in fewer wells being regulated than under the OAR 690-009 rules. Klamath County has estimated there are 115,000 irrigated acres (both surface water and groundwater) in the Upper Klamath Basin. For the 2018-19 tax year, the Klamath County Assessor's office reduced the taxable rate for acres that had water regulated off to 50%, thus reducing the property tax liability for the impacted acres. The City of Chiloquin has invested in acquiring land and intends on drilling a new municipal well. Bly has also acquired grant funding to construct a new municipal well. No other economic effect on state agencies, local governments, or the general public is expected from the proposed rules as compared to the current regulatory framework, except where the local government or member of the public is a holder of a groundwater right that is currently being regulated. In those instances, where the rules result in them not being regulated, they will have the benefit of their water use and the positive economic impacts associated with that water use. This reduction in groundwater regulation may have a negative economic impact on senior water right holders that currently benefit from the regulation of the wells, including the Klamath Tribes and irrigators that are part of the Bureau of Reclamation's Klamath Project to the extent that it reduces the amount of water available to them.

The Department cannot estimate the specific economic impacts because it will depend on each specific entity, the amount of water available in a water year, whether that entity was able to shift water use to other sources or areas, and whether or not a call is made by a senior water right holder.

(2a) Many of the affected wells are owned by individuals or small businesses, the majority of which are agricultural operations. ~~However, the senior surface water right holders stand to benefit from the regulation of wells under the existing rules.~~ **It is not presently clear how much decreased regulation of groundwater users will affect senior surface water rights, and therefore the Department cannot estimate whether small businesses owned by the Klamath Tribe will suffer a significant adverse impact. Small businesses that may be impacted include those owned by** ~~These include~~ the Klamath Tribes who call on instream determined claims, and irrigation districts which are part of the Bureau of Reclamation's Klamath Project, which are individual farmers and ranchers and small agricultural businesses. The Department estimates that approximately 1,700 small businesses could be affected by the proposed rules, including well users and surface water users. The proposed rules apply to seven wells at this time.

(2b)The proposed rules do not impose additional reporting, record keeping, or other administrative activities on small businesses affected by the proposed rules as compared to existing regulation under OAR 690-009. The cost to comply with these rules, as with the current OAR 690-009 rule, depends on whether or not a water user is regulated and to what extent that impacts their business operations. The Department cannot estimate that cost of compliance, which will be operator specific, because it will vary depending on water conditions in any given year, whether the business can shift operations to other areas or water sources, and if the senior users call on the water.

(2c)The proposed rules do not impose additional costs of professional services, equipment, supplies, labor and increased administration activities on small businesses affected by the proposed rules as compared to existing regulation under OAR 690-009.

Describe how small businesses were involved in the development of these rule(s)?

Two rule advisory committee meetings were convened in Klamath Falls, the first on January 15, 2019 and the second on January 28, 2019. The committee included representatives of groups and entities that either are, or represent, small businesses in the basin. These groups included the Oregon Cattlemen's Association, the Klamath Water Users Association, the Oregon Farm Bureau, and individual farmers and ranchers that own wells.

Documents Relied Upon, and where they are available:

Ground-Water Hydrology of the Upper Klamath Basin, Oregon and California, and associated reference material.
https://pubs.usgs.gov/sir/2007/5050/

Groundwater Simulation and Management Models for the Upper Klamath Basin, Oregon and California, and associated reference material.
https://pubs.usgs.gov/sir/2012/5062/

Streamflow Depletion by Wells – Understanding and Managing the Effects of Groundwater Pumping on Streamflow.
https://pubs.er.usgs.gov/publication/cir1376

Was an Administrative Rule Advisory Committee consulted? Yes or No?
If not, why not?

YES

Public Hearing #1 (Official record is hearing recording): February 21, 2019			
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/21/19	Bruce Topham/Flying T. Ranch	Testifying in opposition, No evidence of hydrologic connectivity, Department should inspect wells, Results of models are not demonstrated in the field	See Attachment A: Overall, the Klamath Basin exemplifies a well-connected regional aquifer system where groundwater makes up a considerable part of the hydrologic cycle of springs, streams and rivers. Gannett et al. (2007). With all the assembled data from historical reports, stream discharge measurements, seepage runs, and spring flows within the Upper Klamath Basin, it is estimated that approximately 1.8 million acre-feet of groundwater discharges annually to springs, streams, and rivers. A peer-reviewed groundwater flow model (Gannett et al., 2012) was used in prior years to estimate the impact to surface water from pumping wells in the Upper Klamath Basin. No groundwater flow model is contemplated for regulation under the proposed rules.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/21/19	Erika Norris, speaking for Virginia Topham/Flying T. Ranch	**Filed written testimony and was spoken for on the record** Life and heritage being threatened by Department, cannot conduct business with Department rules changing, history with surface water adjudication, groundwater has never been adjudicated yet last year well was called, don't know what will happen after 2 year period, do not trust Department, no evidence of hydrologic connection, results of models are not demonstrated in the field, feel guilty until proven innocent, ramifications for this political decision	The Department's proposed rules are supported by substantial evidence as is required by statutes governing the Commission's rulemaking. The factual findings are important for explaining the technical basis for the Department's proposed methods for regulating groundwater and surface water in the Upper Klamath Basin. See Attachment A. Overall, the Klamath Basin exemplifies a well-connected regional aquifer system where groundwater makes up a considerable part of the hydrologic cycle of springs, streams and rivers. Gannett et al. (2007) With all the assembled data from historical reports, stream discharge measurements, seepage runs, and spring flows within

			the Upper Klamath Basin, it is estimated that approximately 1.8 million acre-feet of groundwater discharges annually to springs, streams, and rivers. A peer-reviewed groundwater flow model (Gannett et al., 2012) was used in prior years to estimate the impact to surface water from pumping wells in the Upper Klamath Basin. No groundwater flow model is contemplated for regulation under the proposed rules.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/21/19	Lisa Brown/ WaterWatch of Oregon	**Filed written testimony and spoke on the record** Unable to see how the Agency has authority to adopt the rules because they fail to protect senior water right holders, not more complicated than this, rules fail to regulate wells which would provide effective and timely relief, Oregon has a duty to protect instream water rights Supports Department to conduct a 2 year process to develop robust rules, but oppose rules because of failure to protect senior water rights and adverse impact aquatic ecosystems and species (redband trout, sucker fish), extensive data went into USGS-OWRD groundwater study of Basin supports connection between surface water and groundwater and sets context for regulation, the Notice of Proposed Rulemaking "Need for Rules" is incorrect and inconsistent with proposed rules, the "Fiscal and Economic Impact" incorrect and inconsistent with proposed rules, serious concern for testimony at February 21st hearing regarding Tribes, should be disregarded if informing rules, urge Department to impose and enforce strict standards during next 2 years of discussion	The Department believes it is proposing a method for regulating that meets its statutory obligations as well as allowing the Department to exercise its discretion to determine that regulation will benefit senior users within the current season of use. The Department is not proposing selective regulation. The Department amended the fiscal impact portion of the Notice of Proposed Rulemaking on March 28, 2019, to address inaccuracies related to how the decrease in regulation of groundwater users will affect senior water right users.

Date	Individual/Organization	Comment Summary	Department Response
2/21/19	Kevin Newman/Sprague River Water Resource Foundation	Irrigation water is critical, history with surface water, instream flows must be corrected, groundwater only lifeline to sustain family business, personally invested in wells, believe due process must occur before regulation (BIA/lawsuit), the Department cannot regulate off of a flawed model without site specific information and due process, the model does not recognize or net consumptive use when irrigator's wells helped keep rivers running, accuracy matters because of impact on livelihoods, those with lived experience know river levels and wells, while rules aren't perfect support Department's approach to back off regulation and take necessary step to build trust over two year period, provides needed relief to basin irrigators, was reason to dismiss lawsuit, continue to have concerns about Department authority and not fair to regulate 7 wells, but appreciate that rules say they don't create precedent	The Department has provided extensive process through this rulemaking and has solicited input from its Rules Advisory Committee and from public comment in its rulemaking hearings. In addition, the Department's regulatory orders are subject to judicial review. The Department believes it is proposing a method for regulating that meets its statutory obligations. See Attachment A. Overall, the Klamath Basin exemplifies a well-connected regional aquifer system where groundwater makes up a considerable part of the hydrologic cycle of springs, streams and rivers. Gannett et al. (2007) With all the assembled data from historical reports, stream discharge measurements, seepage runs, and spring flows within the Upper Klamath Basin, it is estimated that approximately 1.8 million acre-feet of groundwater discharges annually to springs, streams, and rivers. A peer-reviewed groundwater flow model (Gannett et al., 2012) was used in prior years to estimate the impact to surface water from pumping wells in the Upper Klamath Basin. No groundwater flow model is contemplated for regulation under the proposed rules.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/21/19	Roger Nicholson/Fort Klamath Critical Habitat Landowners	**Filed written testimony and spoke on the record** Irrigation water is critical to business, surface water rights put at risk per Department's quantification of instream flows for BIA, personally invested in wells as supplemental source of water, relied on Division 9 rules, concerned wells were shut off without due process, concerned about hydrologic connectivity modeling, concerned about rules declaring scientific facts, appreciate Department tempered rules by stipulating they will not establish precedent yet all the more reason to leaving controversy out of rule, prefers the proposal he submitted to RAC, but	The Department has provided extensive process through this rulemaking and has solicited input from its Rules Advisory Committee and from public comment in its rulemaking hearings. In addition, the Department's regulatory orders are subject to judicial review. The Department believes it is proposing a method for regulating that meets its statutory obligations. See Attachment A. Overall, the Klamath Basin exemplifies a well-connected regional aquifer system where groundwater makes up a considerable part of the hydrologic cycle of springs, streams and rivers. Gannett et al. (2007)

		support Department's overall approach of backing off regulation to provide 2 year resolution period, need to strengthen 1 mile rule under Division 9 rules	With all the assembled data from historical reports, stream discharge measurements, seepage runs, and spring flows within the Upper Klamath Basin, it is estimated that approximately 1.8 million acre-feet of groundwater discharges annually to springs, streams, and rivers.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/21/19	Hannah Secoy, speaking for Susan Topham	**Filed written testimony and was spoken for on the record** Even if rules are temporary set dangerous precedent with hydrologic connectivity, Department has done studies that concluded the opposite is true, these rules are about politics not science to further diminish agriculture, groundwater and surface water should be regulated separately, if connected then well regulations are no longer needed, DEQ cases have been settled on opposite science and rules could make settlements moot, Department ignored RAC comments and concerns of the community, reject rules entirely or at least part about hydrologic connectivity	The Department's proposed rules are supported by substantial evidence as is required by statutes governing the Commission's rulemaking. The factual findings are important for explaining the technical basis for the Department's proposed methods for regulating groundwater and surface water in the Upper Klamath Basin. The Department has provided extensive process through this rulemaking and has solicited input from its Rules Advisory Committee and from public comment in its rulemaking hearings. The Department intends to solicit more input in the future as long-term management solutions are identified and developed. See Attachment A. Overall, the Klamath Basin exemplifies a well-connected regional aquifer system where groundwater makes up a considerable part of the hydrologic cycle of springs, streams and rivers. Gannett et al. (2007) With all the assembled data from historical reports, stream discharge measurements, seepage runs, and spring flows within the Upper Klamath Basin, it is estimated that approximately 1.8 million acre-feet of groundwater discharges annually to springs, streams, and rivers.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/21/19	David Mosby/ Bar-Y Ranch	History with surface water (referenced BIA), personally invested in wells and believes groundwater is important supplemental source of water, concerns about how Department regulated wells last summer without prior due process to	The Department has provided extensive process through this rulemaking and has solicited input from its Rules Advisory Committee and from public comment in its rulemaking hearings. In addition, the Department's regulatory orders are subject to

		irrigators and reliance on hydrologic modeling with little ground-truthing supporting assumptions and predictions, rules touch on issues that are controversial, appreciate Department stating rules are not precedent setting yet all the more reason to leave controversial science out of rules, participated in RAC but did not feel recommendations were heard, appreciate Department's approach to back off regulation for 2 year period, provides relief to basin irrigators and provides necessary opportunity for Department to gain trust of irrigation community, continued concern for Department authority and scientific issues, urge Commission to adopt proposed rules. Referred to study of groundwater hydrology of Upper Klamath Basin by USGS in 2007 – summary of selected aquifer test – does not seem representative of scientific study.	judicial review. The Department believes it is proposing a method for regulating that meets its statutory obligations.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/21/19	Tom Mallams/OR Cattlemen's Association and private groundwater irrigator	**Filed document entitled "The Klamath Basin Water Rights Adjudication" and spoke on record(s)** Strongly oppose rule as written in its entirety, 2 year delay is appealing, but in long term will hurt Oregon. Will be submitting written comments and submitted Trojan Horse editorial already. Referred to 1990 letter from Department stating groundwater users would not be a party to surface water proceedings, regulation of wells represents a lack of due process for private landowners, cities, and industry in the area, RAC objected to this interim rule and recommendations were not reflected in posted rule, RAC was held because required through rules process, all Department has to do is test well instead of spending millions on litigation to see if model really works, lack of site-specific science incorporated into Departments practices, using controversial science will destroy multi-generational	The Department's proposed rules are supported by substantial evidence as is required by statutes governing the Commission's rulemaking. The factual findings are important for explaining the technical basis for the Department's proposed methods for regulating groundwater and surface water in the Upper Klamath Basin. The Department has provided extensive process through this rulemaking and has solicited input from its Rules Advisory Committee and from public comment in its rulemaking hearings. The Department intends to solicit more input in the future as long-term management solutions are identified and developed. See Attachment A. Overall, the Klamath Basin exemplifies a well-connected regional aquifer system where groundwater makes up a considerable part of the hydrologic cycle of springs, streams and rivers. Gannett et al. (2007) With all the assembled data from historical reports, stream discharge

		enterprises, feel guilty until proven innocent despite communication with the Department about its modeling outcomes and have providing information the Department requested in the past and it has been ignored, there is little trust, science is out there and needs to be looked at by Department and incorporated into model, interim rules are supposed to be for the Upper Klamath Basin yet rules state Klamath Basin – in RAC mtg Department says all of Klamath Basin involved, challenged USGS studies against what is happening with wells on the ground, challenged historic river flows against what is happening with wells on the ground, opens up closed cases with DEQ issues by saying hydrologic interconnected, believe this is a statewide issue if not stopped here	measurements, seepage runs, and spring flows within the Upper Klamath Basin, it is estimated that approximately 1.8 million acre-feet of groundwater discharges annually to springs, streams, and rivers. A peer-reviewed groundwater flow model (Gannett et al., 2012) was used in prior years to estimate the impact to surface water from pumping wells in the Upper Klamath Basin. No groundwater flow model is contemplated for regulation under the proposed rules.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/21/19	Brandon Topham	Observed RAC, overall attendees opposed the rules, different stakeholders have different objections, irrigators believe hydrologic connection is blatantly false, 50-50 Report encompasses broad statements from Department while report more defines the geographic areas within the Basin and matters to geology (cites examples), Department does not know what is happening in this area – in their defense it is complicated, supports aquifer testing, believes it is impossible to make one computer model for an entire area, ultimately what is happening today does not impact long term, eventually we are going to have to compromise with the tribes, difficult to do, would love to irrigate for next two years, but if approved substantiate claim that water is interconnected	The Department proposes a basin scale approach over the single-well approach. See Attachment A. Overall, the Klamath Basin exemplifies a well-connected regional aquifer system where groundwater makes up a considerable part of the hydrologic cycle of springs, streams and rivers. Gannett et al. (2007) With all the assembled data from historical reports, stream discharge measurements, seepage runs, and spring flows within the Upper Klamath Basin, it is estimated that approximately 1.8 million acre-feet of groundwater discharges annually to springs, streams, and rivers. A peer-reviewed groundwater flow model (Gannett et al., 2012) was used in prior years to estimate the impact to surface water from pumping wells in the Upper Klamath Basin. No groundwater flow model is contemplated for regulation under the proposed rules.

Public Hearing #2(Official record is hearing recording): February 26, 2019			
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/26/19	Nathan Jackson/OR Cattlemen's Association	Participated in RAC, supportive of Department's approach to limit regulation of groundwater wells while draft permanent rules, Division 25 proposed rules include unnecessary factual findings, Department may use to prevent challenge to groundwater regulation in future, changes to Aquifer and Hydraulically Connected conflict with other regulations and broaden Department jurisdiction, rules extend to impending rather than existing interference and broaden Department jurisdiction, rules make expansive generalizations about hydraulic connection, the proposed definitions, findings, conclusions are unnecessary, will withdraw opposition to rules if Department removes objectionable provisions or provides legally binding assurances that that such provisions will not be relied upon in future, during permanent rulemaking organization will advocate for scientific support regarding interference of individual wells	The factual findings are important for explaining the technical basis for the Department's proposed methods for regulating groundwater and surface water in the Upper Klamath Basin. The Department's explanation of the technical methods it proposes to regulate groundwater provide transparency and are consistent with statutes governing the Commission's actions in this case. See Attachment A. Overall, the Klamath Basin exemplifies a well-connected regional aquifer system where groundwater makes up a considerable part of the hydrologic cycle of springs, streams and rivers. Gannett et al. (2007) With all the assembled data from historical reports, stream discharge measurements, seepage runs, and spring flows within the Upper Klamath Basin, it is estimated that approximately 1.8 million acre-feet of groundwater discharges annually to springs, streams, and rivers.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/26/19	Chairman Don Gentry/ Klamath Tribes	Concern about protecting treaty resources, have participated in adjudication, Department should recognize their responsibility to protect treaty rights/resources, do not support interim rules as proposed, they are not protective of adjudicated rights to this point and does not fulfill state responsibility, in agreement with current science that there is a connection with wells and surface water will be addressed through their proposed edits, protection of their rights also protect fish and other species important to the Tribe	The Department believes it is proposing a method for regulating that meets its statutory obligations as well as it allows the Department to exercise its discretion to determine that regulation will benefit senior users within the current season of use.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/26/19	Brad Parrish/Klamath Tribes	**Filed written testimony and spoke on the record**	The Department believes it is proposing a method for regulating that meets its statutory obligations as well

		Rules will result in loss of flow to adjudicated senior water rights, RAC proposal to allow for domestic use while protecting senior rights was not utilized, Department has statutory obligation to senior right holders (ORS 537.525), water is important to redband trout and ESA listed sucker specifies 690-025-0020 (2) (9) edits; 690-025-0040 (1) (6) (7) edits and additional language	as allow it to exercise its discretion to determine that regulation will benefit senior users within the current season of use. More engagement with the water user community will be necessary to find long-term management solutions in the Upper Klamath Basin. The Department does not believe that adoption of the proposed rules will lead to over allocation of the groundwater resource. The Department encourages all water users to continue to work with it as it considers long-term strategies for the future.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/26/19	Conrad Fisher/Water Climate Trust	4th generation, written water policy in the past, see wells continuously running, concerned for equity/water access, does not comply with law, it is the government that allows water to be distributed that make us fight with each other, 6 recommendations: 1) measure water, 2) protect senior instream water rights (future generations), 3) conversation, 4) dialog between state and public advocates, 5) protect human right to water and right to fish, 6) precautionary principal (water users should have to prove to the public that they are not harming water users)	The Department believes it is proposing a method for regulating that meets its statutory obligations as well as it allows it to exercise its discretion to determine that regulation will benefit senior users within the current season of use. The factual findings are important for explaining the technical basis for the Department's proposed methods for regulating groundwater and surface water in the Upper Klamath Basin. The Department has provided extensive process through this rulemaking and has solicited input from its Rules Advisory Committee and from public comment in its rulemaking hearings. The Department intends to solicit more input in the future as long-term management solutions are identified and developed.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/26/19	Paul Wilson/Klamath Tribes	Enforcement of senior water rights is not for financial benefits, difficult to call water, answering the call for stewardship to ancestral lands, need to have more communication between tribes and ranchers, slippery slope to give state authority to communicate between us	The Department encourages all water users to continue to work with it, and among themselves, as it considers long-term strategies for the future.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/26/19	Del Fox/Irrigator	Without pumping would not have water, disagree with rules as written, especially references to	The Department proposes a basin scale approach over the single-well approach. The factual findings

		hydrologically connection, if you don't measure you cannot regulate it, has had personal wells tested (Swan Lake-Pine Flat), also limiting to 500ft for 2 years is a fools game, delays a problem when we can work together across stakeholders, we don't need more rules	are important for explaining the technical basis for the Department's proposed methods for regulating groundwater and surface water in the Upper Klamath Basin. The Department encourages all water users to continue to work with it as it considers long-term strategies for the future. See Attachment A. Overall, the Klamath Basin exemplifies a well-connected regional aquifer system where groundwater makes up a considerable part of the hydrologic cycle of springs, streams and rivers. Gannett et al. (2007) With all the assembled data from historical reports, stream discharge measurements, seepage runs, and spring flows within the Upper Klamath Basin, it is estimated that approximately 1.8 million acre-feet of groundwater discharges annually to springs, streams, and rivers.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/26/19	Steve Hartsell/Rancher	Concern rules set precedent on how long term groundwater management is applied to Basin, but appreciate 2 years of flexibility that hopefully leads to development to long term approach to groundwater management and stability	OAR 690-025-0040 states the rules do not set precedent; the Department encourages all water users to continue to work with it as it considers long-term strategies for the future.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/26/19	Tom Mallams/OR Cattlemen's Association and private groundwater irrigator	**Filed document entitled "The Klamath Basin Water Rights Adjudication" and spoke on record(s)** Testimony given last week still stands; his comments and Nathan Jackson's don't match, Cattlemen's Association will provide written rules, do not agree with 1 ounce of rules, while 2 year hiatus/500 ft sounds nice this is bait and switch, rules set precedent in future litigation, predictions/track record of Department (examples: dam removal was supposed to be basin specific, but is now statewide), predict this rule will go forward in its entirely and in 2 years go back to 1 miles that	The Department's proposed rules are supported by substantial evidence as is required by statutes governing the Commission's rulemaking. The factual findings are important for explaining the technical basis for the Department's proposed methods for regulating groundwater and surface water in the Upper Klamath Basin. The Department has provided extensive process through this rulemaking and has solicited input from its Rules Advisory Committee and from public comment in its rulemaking hearings. The Department intends to solicit more input in the future as long-term management solutions are identified and developed.

		we cannot live with, hydrological connection cannot be proven and is hard to challenge – cannot allow into rules, DEQ using same type of model and this language opens a door with DEQ, called rules a Trojan horse/1990 letter as lack of due process, RAC does not like rules, considered guilty until proven innocent – have provided information and Department has ignored it all, science has to make determination in rules, but these rules are not appropriate	
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/26/19	Hollie Cannon/Wood River District Improvement Company	**Filed written testimony and spoke on the record** Board wants to go on record as support and looks forward to working with all parties to develop permanent rules	The Department proposes a basin scale approach over the single-well approach. The Department has provided extensive process through this rulemaking and has solicited input from its Rules Advisory Committee and from public comment in its rulemaking hearings. The Department intends to solicit more input in the future as long-term management solutions are identified and developed. The Department encourages all water users to continue to work with it as it considers long-term strategies for the future.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/26/19	Bill Gallagher/Rancher	This is about politics not about water, drilled wells personally, have had wells tested, conservative people cannot overcome OR politics	The Department encourages all water users to continue to work with it as it considers long-term strategies for the future.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/26/19	Margaret Jacobs/ Irrigator	Department should not be regulating entire AG community on hydrologic modeling, need site-specific information, and giving ranchers due process. More information is needed to account for connectivity, one of 10 families that agreed to dismiss lawsuit for rules, while rules are not perfect, support Department's plan to back off regulation and provide opportunity for discussion, hope Department will listen to community	The Department proposes a basin scale approach over the single-well approach. The Department has provided extensive process through this rulemaking and has solicited input from its Rules Advisory Committee and from public comment in its rulemaking hearings. In addition, the Department's regulatory orders are subject to judicial review. The Department encourages all water users to continue to

			work with it as it considers long-term strategies for the future.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/26/19	Jerry Jones/Irrigator	**Filed written testimony and spoke on the record** Refers to Federal Indian Law history to demonstrate the Department is mixing up western water law with tribal rights to try to extend Indian claims to private land. Water rights cannot be separated from time immemorial rights. The state would do well to abolish all its rules regarding well regulation on behalf of the tribes.	The Department believes it is proposing a method for regulating that meets its statutory obligations as well as it allows it to exercise its discretion to determine that regulation will benefit senior users within the current season of use. More engagement with the water user community will be necessary to find long-term management solutions in the Upper Klamath Basin. The Department encourages all water users to continue to work with it as it considers long-term strategies for the future.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/26/19	Eric Duarte/Irrigator	**Filed written testimony (Sprague River Resource Foundation) and spoke on the record** Told story about young son inquiring about impact of water on aquatic life beside fish, he understands there is a lot more to this, we all have to get together and figure this out… Irrigation water is critical to grow feed for cattle, surface water is practically unusable now, as a result of Department's inaccurate quantification of instream flows for BIA, members personally invested in wells to supplement water needs, filed suit over Division 9 rules, specific concerns highlighted in lawsuits, overarching concern is that irrigators are entitled to due process before being regulated, do not think Department can regulated agriculture community on flawed hydraulic model without site-specific data or due process, members dismissed law suit to work with Department on new rules over next 2 years, notes current status is not precedent setting, urges Commission to revise Division 25 rules based on	The Department has provided extensive process through this rulemaking and has solicited input from its Rules Advisory Committee and from public comment in its rulemaking hearings. In addition, the Department's regulatory orders are subject to judicial review. The Department's explanation of the technical methods it proposes to regulate groundwater provide transparency and are consistent with statutes governing the Commission's actions in this case. The Department encourages all water users to continue to work with it as it considers long-term strategies for the future. See Attachment A. Overall, the Klamath Basin exemplifies a well-connected regional aquifer system where groundwater makes up a considerable part of the hydrologic cycle of springs, streams and rivers. Gannett et al. (2007) With all the assembled data from historical reports, stream discharge measurements, seepage runs, and spring flows within the Upper Klamath Basin, it is estimated that approximately 1.8 million acre-feet of groundwater

		Brooks/Mosby/Nicholson comments attached, even if don't revise rules based on member feedback support approach of backing off regulation to provide 2 year period to resolve legal, factual and scientific disputes, gives relief to irrigators and provides Department with opportunity to build trust, serious reservations about Department authority and scientific assertions, requests site-specific testing of 7 wells. Edits enclosed.	discharges annually to springs, streams, and rivers. A peer-reviewed groundwater flow model (Gannett et al., 2012) was used in prior years to estimate the impact to surface water from pumping wells in the Upper Klamath Basin. No groundwater flow model is contemplated for regulation under the proposed rules.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/26/19	Willa Powless/Klamath Tribes	Needs more discussion from both side, tribes' rights have always held them have not been granted to us, water is impacting our other resources (basket making), need to consider future water rights too	The Department encourages all water users to continue to work with it as it considers long-term strategies for the future.

Written Comments (Official record is respective written comment): March 4, 2019

Date	Individual/Organization	Comment Summary	Department Response
2/4/19	Mark Johnson/Klamath Water Users Association	Concern for definitions of Determined Claim, Upper Klamath Basin, and uncertainty over scope of rules (Upper Klamath v. Klamath Basin)	The Department is correcting the date and geographic scope attributed to the Amended and Corrected Findings of Fact and Order of Determinations within the final proposed rules.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/12/19	Lee Traynham/ Wood River District Improvement Co	District has invested in 6 wells based on Division 25 rules, experienced harm under Division 9 rules, thus supports changes to this process over court	The Department encourages all water users to continue to work with it as it considers long-term strategies for the future.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/14/19	Mike LaGrande/ Wood River District Improvement Co	Division 9 rules harmed him, yet Division 25 rules will harm him less, hopeful about permanent rules in 2021	The Department encourages all water users to continue to work with it as it considers long-term strategies for the future.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/17/19	Anthony and Mary Booker	Look forward to working on permanent rules with Department	The Department encourages all water users to continue to work with it as it considers long-term strategies for the future.

Date	Individual/Organization	Comment Summary	Department Response
2/17/19	Michael Harding	Look forward to working on permanent rules with Department	The Department encourages all water users to continue to work with it as it considers long-term strategies for the future.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/17/19	Steve and Suzanne Cornell	Look forward to working on permanent rules with Department	The Department encourages all water users to continue to work with it as it considers long-term strategies for the future.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/17/19	Steve Cornell	Look forward to working on permanent rules with Department	The Department encourages all water users to continue to work with it as it considers long-term strategies for the future.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/19/19	Ann SeCoy	Department is not demonstrating respect for community when change scientific assumptions in calculating the amount of water ranchers use, models do not reflect reality and harm our freedoms and livelihood, rules are not science but politics – Department has an obligation to protect natural resources, society and be equitable in their administration	The Department's proposed rules are supported by substantial evidence as is required by statutes governing the Commission's rulemaking. The Department's determination that groundwater and surface water are connected in the Upper Klamath Basin is supported by research that has been subjected to scientific peer review. The factual findings are important for explaining the technical basis for the Department's proposed methods for regulating groundwater and surface water in the Upper Klamath Basin. The Department has provided extensive process through this rulemaking and has solicited input from its Rules Advisory Committee and from public comment in its rulemaking hearings. The Department intends to solicit more input in the future as long-term management solutions are identified and developed.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/19/19	Hollie Cannon/Wood River District Improvement Co	**Filed written testimony and spoke on the record** Complying with permits/Division 9 rules harmed district, Department needs to do a better job of developing knowledge of the connectivity of groundwater and surface water and	The Department has provided extensive process through this rulemaking and has solicited input from its Rules Advisory Committee and from public comment in its rulemaking hearings. The Department intends to solicit more input in the future as long-

		communicating to the landowner the impact of each individual well to surface water, without individual calculations feels like blanket regulation, District wants to work with Department over courts	term management solutions are identified and developed. The Department encourages all water users to continue to work with it as it considers long-term strategies for the future. See Attachment A. Overall, the Klamath Basin exemplifies a well-connected regional aquifer system where groundwater makes up a considerable part of the hydrologic cycle of springs, streams and rivers. Gannett et al. (2007) With all the assembled data from historical reports, stream discharge measurements, seepage runs, and spring flows within the Upper Klamath Basin, it is estimated that approximately 1.8 million acre-feet of groundwater discharges annually to springs, streams, and rivers. A peer-reviewed groundwater flow model (Gannett et al., 2012) was used in prior years to estimate the impact to surface water from pumping wells in the Upper Klamath Basin. No groundwater flow model is contemplated for regulation under the proposed rules.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/21/19	Joan Amaral Sees	RAC members stressed need for individual testing before regulating – all wells do not impact surface water in the Basin, do not agree that surface water and groundwater are hydrologically connected, recognizes constitutional right to litigate	The Department's explanation of the technical methods it proposes to regulate groundwater provides transparency and are consistent with statutes governing the Commission's actions in this case. See Attachment A. Overall, the Klamath Basin exemplifies a well-connected regional aquifer system where groundwater makes up a considerable part of the hydrologic cycle of springs, streams and rivers. Gannett et al. (2007) With all the assembled data from historical reports, stream discharge measurements, seepage runs, and spring flows within the Upper Klamath Basin, it is estimated that approximately 1.8 million acre-feet of groundwater discharges annually to springs, streams, and rivers. A peer-reviewed groundwater flow model (Gannett et al., 2012) was used in prior years to estimate the impact to surface water from pumping wells in the

			Upper Klamath Basin. No groundwater flow model is contemplated for regulation under the proposed rules.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/21/19	Roger Nicholson/Rancher/President Fort KIamath Critical Habitat Landowners	**Filed written testimony and spoke on the record** Irrigation water is critical to business, surface water rights put at risk per Department's quantification of instream flows for BIA, personally invested in wells as supplemental source of water, relied on Division 9 rules, concerned wells were shut off without due process, concerned about hydrologic connectivity modeling, concerned about rules declaring scientific facts, appreciate Department tempered rules by stipulating they will not establish precedent yet all the more reason to leaving controversy out of rule, prefers the proposal he submitted to RAC, but support Department's overall approach of backing off regulation to provide 2 year resolution period, need to strengthen 1 mile rule under Division 9 rules	The Department has provided extensive process through this rulemaking and has solicited input from its Rules Advisory Committee and from public comment in its rulemaking hearings. In addition, the Department's regulatory orders are subject to judicial review. The Department believes it is proposing a method for regulating that meets its statutory obligations. See Attachment A. Overall, the Klamath Basin exemplifies a well-connected regional aquifer system where groundwater makes up a considerable part of the hydrologic cycle of springs, streams and rivers. Gannett et al. (2007) With all the assembled data from historical reports, stream discharge measurements, seepage runs, and spring flows within the Upper Klamath Basin, it is estimated that approximately 1.8 million acre-feet of groundwater discharges annually to springs, streams, and rivers.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/21/19	Susan Topham	**Filed written testimony and was spoken for on the record** Even if rules are temporary set dangerous precedent with hydrologic connectivity, Department has done studies that concluded the opposite is true, these rules are about politics not science to further diminish agriculture, groundwater and surface water should be regulated separately, if connected then well regulations are no longer needed, DEQ cases have been settled on opposite science and rules could make settlements moot, Department ignored RAC comments and concerns of the community, reject rules entirely or at least part about hydrologic connectivity	The Department's proposed rules are supported by substantial evidence as is required by statutes governing the Commission's rulemaking. The Department's determination that groundwater and surface water are connected in the Upper Klamath Basin is supported by research that has been subjected to scientific peer review. See Attachment A. Overall, the Klamath Basin exemplifies a well-connected regional aquifer system where groundwater makes up a considerable part of the hydrologic cycle of springs, streams and rivers. Gannett et al. (2007) With all the assembled data from historical reports, stream discharge measurements, seepage runs, and spring flows within the Upper Klamath Basin, it is estimated that

			approximately 1.8 million acre-feet of groundwater discharges annually to springs, streams, and rivers. The factual findings are important for explaining the technical basis for the Department's proposed methods for regulating groundwater and surface water in the Upper Klamath Basin. The Department has provided extensive process through this rulemaking and has solicited input from its Rules Advisory Committee and from public comment in its rulemaking hearings. The Department intends to solicit more input in the future as long-term management solutions are identified and developed.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/19/19	Tom Mallams	**Filed document entitled "The Klamath Basin Water Rights Adjudication" and spoke on record(s)**	
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/19/19	Virginia Topham	**Filed written testimony and was spoken for on the record** Life and heritage being threatened by Department, cannot conduct business with Department rules changing, history with surface water adjudication, groundwater has never been adjudicated yet last year well was called, don't know what will happen after 2 year period, do not trust Department, no evidence of hydrologic connection, results of models are not demonstrated in the field, feel guilty until proven innocent, ramifications for this political decision	The Department's proposed rules are supported by substantial evidence as is required by statutes governing the Commission's rulemaking. The factual findings are important for explaining the technical basis for the Department's proposed methods for regulating groundwater and surface water in the Upper Klamath Basin. See Attachment A. Overall, the Klamath Basin exemplifies a well-connected regional aquifer system where groundwater makes up a considerable part of the hydrologic cycle of springs, streams and rivers. Gannett et al. (2007) With all the assembled data from historical reports, stream discharge measurements, seepage runs, and spring flows within the Upper Klamath Basin, it is estimated that approximately 1.8 million acre-feet of groundwater discharges annually to springs, streams, and rivers.

Date	Individual/Organization	Comment Summary	Department Response
2/25/19	Brad Parrish/Klamath Tribes	**Filed written testimony and spoke on the record** Rules will result in loss of flow to adjudicated senior water rights, RAC proposal to allow for domestic use while protecting senior rights was not utilized, Department has statutory obligation to senior right holders (ORS 537.525), water is important to redband trout and ESA listed sucker specifies 690-025-0020 (2) (9) edits; 690-025-0040 (1) (6) (7) edits and additional language	The Department believes it is proposing a method for regulating that meets its statutory obligations as well as it allows it to exercise its discretion to determine that regulation will benefit senior users within the current season of use. More engagement with the water user community will be necessary to find long-term management solutions in the Upper Klamath Basin. The Department does not believe that adoption of the proposed rules will lead to over allocation of the groundwater resource. The Department is committed to continuing to develop policies that are scientifically-based but that also serve all water users in the basin. The Department encourages all water users to continue to work with it as it considers long-term strategies for the future.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/26/19	Jerry Jones	**Filed written testimony and spoke on the record** Refers to Federal Indian Law history to demonstrate the Department is mixing up western water law with tribal rights to try to extend Indian claims to private land. Water rights cannot be separated from time immemorial rights. The state would do well to abolish all its rules regarding well regulation on behalf of the tribes.	The Department believes it is proposing a method for regulating that meets its statutory obligations as well as it allows it to exercise its discretion to determine that regulation will benefit senior users within the current season of use. More engagement with the water user community will be necessary to find long-term management solutions in the Upper Klamath Basin. The Department encourages all water users to continue to work with it as it considers long-term strategies for the future.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
2/27/19	Leland Hunter	Look forward to working on permanent rules with Department	The Department encourages all water users to continue to work with it as it considers long-term strategies for the future.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
3/2/19	Rob Wallace	Look forward to working on permanent rules with Department	The Department encourages all water users to continue to work with it as it considers long-term strategies for the future.

Date	Individual/Organization	Comment Summary	Department Response
3/4/19	Eric Duarte/Sprague River Resource Foundation	**Filed written testimony and spoke on the record** Told story about young son inquiring about impact on water on aquatic life beside fish, he understands there is a lot more to this, we all have to get together and figure this out… Irrigation water is critical to grow feed for cattle, surface water is practically unusable now, as a result of Department's inaccurate quantification of instream flows for BIA, members personally invested in wells to supplement water needs, filed suit over Division 9 rules, specific concerns highlighted in lawsuits, overarching concern is that irrigators are entitled to due process before being regulated, do not think Department can regulated agriculture community on flawed hydraulic model without site-specific data or due process, members dismissed law suit to work with Department on new rules over next 2 years, notes current status is not precedent setting, urges Commission to revise Division 25 rules based on Brooks/Mosby/Nicholson comments attached, even if don't revise rules based on member feedback support approach of backing off regulation to provide 2 year period to resolve legal, factual and scientific disputes, gives relief to irrigators and provides Department with opportunity to build trust, serious reservations about Department authority and scientific assertions, requests site-specific testing of 7 wells. Edits enclosed.	The Department has provided extensive process through this rulemaking and has solicited input from its Rules Advisory Committee and from public comment in its rulemaking hearings. In addition, the Department's regulatory orders are subject to judicial review. The Department's explanation of the technical methods it proposes to regulate groundwater provide transparency and are consistent with statutes governing the Commission's actions in this case. The Department encourages all water users to continue to work with it as it considers long-term strategies for the future. See Attachment A. Overall, the Klamath Basin exemplifies a well-connected regional aquifer system where groundwater makes up a considerable part of the hydrologic cycle of springs, streams and rivers. Gannett et al. (2007) With all the assembled data from historical reports, stream discharge measurements, seepage runs, and spring flows within the Upper Klamath Basin, it is estimated that approximately 1.8 million acre-feet of groundwater discharges annually to springs, streams, and rivers. A peer-reviewed groundwater flow model (Gannett et al., 2012) was used in prior years to estimate the impact to surface water from pumping wells in the Upper Klamath Basin. No groundwater flow model is contemplated for regulation under the proposed rules.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
3/4/19	Bureau of Indian Affairs	Client has time immemorial rights in Basin, request Department be more explicit in the interim rule about what steps it intends to take – including any new modeling or information gathering efforts	The Department has provided extensive process through this rulemaking and has solicited input from its Rules Advisory Committee and from public comment in its rulemaking hearings. The Department

		and public involvement or input – during this period to determine whether regulation of a given well will provide timely and effective relief to senior water right owners in the Basin. Hopes this process will move quickly, so that impacts to senior water users are lessened.	intends to solicit more input in the future as long-term management solutions are identified and developed. The Department encourages all water users to continue to work with it as it considers long-term strategies for the future.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
3/4/19	Nora Koenig	Concerned about the process, RAC recommendations were not added into the proposed rules, there is documented proof that once wells were drilled more water available for downstream users, have not heard Department say at end of 2 years they will have a manageable plan to help upper basin irrigators, modeling error rates means it is not a good tool for managing a system, need proof that call on junior holders for senior holders resulted in a beneficial use, in meantime economic, social and heritage of upper river basin is not considered, CA does not view surface water and groundwater as connected, connectivity is not a blanket statement, tribes claim rights are not being met but some may never be because call is too high, need scientific proof in actual testing and independent review of testing	The Department has provided extensive process through this rulemaking and has solicited input from its Rules Advisory Committee and from public comment in its rulemaking hearings. The Department intends to solicit more input in the future as long-term management solutions are identified and developed. The Department encourages all water users to continue to work with it as it considers long-term strategies for the future. The Department's explanation of the technical methods it proposes to regulate groundwater provide transparency and are consistent with statutes governing the Commission's actions in this case. See Attachment A. Overall, the Klamath Basin exemplifies a well-connected regional aquifer system where groundwater makes up a considerable part of the hydrologic cycle of springs, streams and rivers. Gannett et al. (2007) With all the assembled data from historical reports, stream discharge measurements, seepage runs, and spring flows within the Upper Klamath Basin, it is estimated that approximately 1.8 million acre-feet of groundwater discharges annually to springs, streams, and rivers. A peer-reviewed groundwater flow model (Gannett et al., 2012) was used in prior years to estimate the impact to surface water from pumping wells in the Upper Klamath Basin. No groundwater flow model is contemplated for regulation under the proposed rules.

Date	Individual/Organization	Comment Summary	Department Response
3/4/19	Troy Brooks	Personally invested in wells, well inspected previously by Department – said found not substantially interfering with surface water and regulation would not provide timely and effective relief, now would be 1 of 7 regulated over next two years, drafted edits addressing scientific assertions and site specific testing (SRRF submission), urge Commission to adopted Division 25 edits, if not then cannot support rules that would regulate family business	The Department has provided extensive process through this rulemaking and has solicited input from its Rules Advisory Committee and from public comment in its rulemaking hearings. In addition, the Department's regulatory orders are subject to judicial review. The Department's explanation of the technical methods it proposes to regulate groundwater provide transparency and are consistent with statutes governing the Commission's actions in this case. The Department encourages all water users to continue to work with it as it considers long-term strategies for the future. See Attachment A. Overall, the Klamath Basin exemplifies a well-connected regional aquifer system where groundwater makes up a considerable part of the hydrologic cycle of springs, streams and rivers. Gannett et al. (2007) With all the assembled data from historical reports, stream discharge measurements, seepage runs, and spring flows within the Upper Klamath Basin, it is estimated that approximately 1.8 million acre-feet of groundwater discharges annually to springs, streams, and rivers. A peer-reviewed groundwater flow model (Gannett et al., 2012) was used in prior years to estimate the impact to surface water from pumping wells in the Upper Klamath Basin. No groundwater flow model is contemplated for regulation under the proposed rules.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
3/4/19	Shane Smith	Reduced regulation of wells that are hydraulically connected threaten aquatic ecosystems culturally significant to tribes and recreation	The Department believes it is proposing a method for regulating that meets its statutory obligations as well as it allows it to exercise its discretion to determine that regulation will benefit senior users within the current season of use.

Date	Individual/Organization	Comment Summary	Department Response
3/4/19	Rex Cozzalio	Computer modeling are known deficient, enforcement of rules causes harm without compensation, Department should prove individual impacts prior to regulation	See Attachment A. Overall, the Klamath Basin exemplifies a well-connected regional aquifer system where groundwater makes up a considerable part of the hydrologic cycle of springs, streams and rivers. Gannett et al. (2007) With all the assembled data from historical reports, stream discharge measurements, seepage runs, and spring flows within the Upper Klamath Basin, it is estimated that approximately 1.8 million acre-feet of groundwater discharges annually to springs, streams, and rivers. A peer-reviewed groundwater flow model (Gannett et al., 2012) was used in prior years to estimate the impact to surface water from pumping wells in the Upper Klamath Basin. No groundwater flow model is contemplated for regulation under the proposed rules.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
3/4/19	Jacqui Krizo	Terrorizing neighborhood by making them all guilty until proven innocent, do not have actual scientific proof yet impacting ability to water crops on their land, did not take RAC recommendations regarding well testing, interim rules need to go away	See Attachment A. Overall, the Klamath Basin exemplifies a well-connected regional aquifer system where groundwater makes up a considerable part of the hydrologic cycle of springs, streams and rivers. Gannett et al. (2007) With all the assembled data from historical reports, stream discharge measurements, seepage runs, and spring flows within the Upper Klamath Basin, it is estimated that approximately 1.8 million acre-feet of groundwater discharges annually to springs, streams, and rivers.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
3/4/19	Jerome Rosa, Executive Director with OR Cattlemens Association	Participated in RAC, supportive of Department's approach to limit regulation of groundwater wells while draft permanent rules, Division 25 proposed rules include unnecessary factual findings, Department may use to prevent challenge to groundwater regulation in future, changes to Aquifer and Hydraulically Connected conflict with other regulations and broaden Department	The Department's proposed rules are supported by substantial evidence as is required by statutes governing the Commission's rulemaking. The factual findings are important for explaining the technical basis for the Department's proposed methods for regulating groundwater and surface water in the Upper Klamath Basin. The Department has provided extensive process through this rulemaking and has

		jurisdiction, rules extend to impending rather than existing interference and broaden Department jurisdiction, rules make expansive generalizations about hydraulic connection, the proposed definitions, findings, conclusions are unnecessary, will withdraw opposition to rules if Department removes objectionable provisions or provides legally binding assurances that that such provisions will not be relied upon in future, during permanent rulemaking organization will advocate for scientific support regarding interference of individual wells	solicited input from its Rules Advisory Committee and from public comment in its rulemaking hearings. The Department's explanation of the technical methods it proposes to regulate groundwater provide transparency and are consistent with statutes governing the Commission's actions in this case. The Department intends to solicit more input in the future as long-term management solutions are identified and developed.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
3/4/19	Mary Anne Cooper and Jon Moxley, Oregon Farm Bureau	Clients cannot operation without secure access to irrigation water, agriculture contributes to state economy, significant disagreement about how Department has chosen to apply its scientific models in the Basin - should not codify findings in rules, changed definition of hydraulically connected, made determination water is hydraulically connected, expanded Department's regulation authority to impending interference, removed effective and timely requirement, changes are unnecessary, unacceptable and will result in new litigation, if Department goal is to reduce conflict in basin while resolving disputes the rule should simply set the max distance for regulation to 500 ft of surface waters	The proposed rules do not represent a change in the way that the Department conjunctively manages groundwater and surface water in the Upper Klamath Basin. The Department's explanation of the technical methods it proposes to regulate groundwater provide transparency and are consistent with statutes governing the Commission's actions in this case.
Date	**Individual/Organization**	**Comment Summary**	**Department Response**
3/4/19	Lisa Brown, Water Watch	**Filed written testimony and spoke on the record** Unable to see how the Agency has authority to adopt the rules because they fail to protect senior water right holders, not more complicated than this, rules fail to regulate wells which would provide effective and timely relief, Oregon has a duty to protect instream water rights	The Department believes it is proposing a method for regulating that meets its statutory obligations as well as it allows it to exercise its discretion to determine that regulation will benefit senior users within the current season of use. The Department is not proposing selective regulation. The Department amended the fiscal impact portion of the Notice of

		Supports Department to conduct a 2 year process to develop robust rules, but oppose rules because of failure to protect senior water rights and adverse impact aquatic ecosystems and species (redband trout, sucker fish), extensive data went into USGS-OWRD groundwater study of Basin supports connection between surface water and groundwater and sets context for regulation, the Notice of Proposed Rulemaking "Need for Rules" is incorrect and inconsistent with proposed rules, the "Fiscal and Economic Impact" incorrect and inconsistent with proposed rules, serious concern for testimony at February 21st hearing regarding Tribes, should be disregarded if informing rules, urge Department to impose and enforce strict standards during next 2 years of discussion	Proposed Rulemaking on March 28, 2019, to address inaccuracies related to how the decrease in regulation of groundwater users will affect senior water right users.