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Via Email and US Mail

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Re: Comments of Upper Klamath Landowners on the Oregon Water Resources Department's Proposed Groundwater Allocation Rules

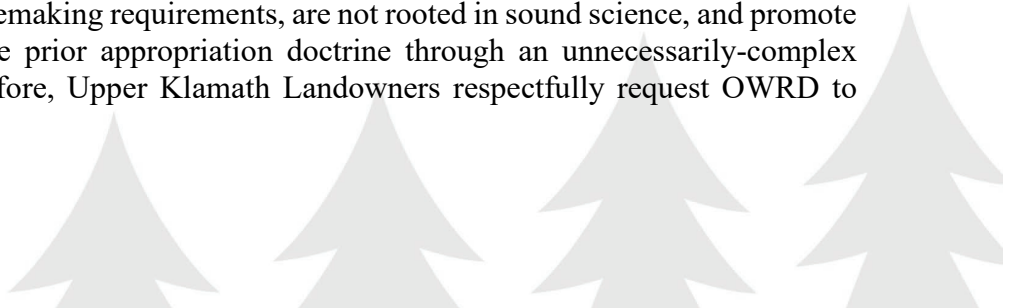
I. BACKGROUND

Sprague River Resource Foundation, Inc., Fort Klamath Critical Habitat Landowners, Inc., Water for Life, Inc., Productive Timberland LLC, the Mosby Family Trust, and Sprague River Cattle Company (together, "Upper Klamath Landowners") offer the following comments opposing the Oregon Water Resources Commission and Department's (collectively, "OWRD") proposed Groundwater Allocation rules.

Modifying the administrative criteria for the approval of new groundwater rights, or the curtailment of existing rights, is of the utmost concern in the Upper Klamath Basin where surface water appropriations have been severely curtailed as a result of instream water rights. For many members of Upper Klamath Landowners, existing groundwater rights are the last remaining tool to make productive use of farm and rangeland. Restricting the use of these vital property rights would come at significant cost to Upper Klamath Landowners, possibly forcing many to go out of business entirely.

Given the significance of OWRD's Groundwater Allocation rules, Upper Klamath Landowners urge OWRD to take all possible steps to ensure that the proposed rules not apply to pre-existing groundwater rights and that they are rooted in sound science, due process, and the utmost respect for senior groundwater rights under the prior appropriation doctrine. Additionally, it is important that any Groundwater Allocation rules be capable of consistent application, rather than apply arbitrarily wherever OWRD deems necessary.

Unfortunately, the Groundwater Allocation rules as currently drafted violate due process in many respects, fail basic rulemaking requirements, are not rooted in sound science, and promote inconsistent application of the prior appropriation doctrine through an unnecessarily-complex administrative scheme. Therefore, Upper Klamath Landowners respectfully request OWRD to



revise its proposed Groundwater Allocation rules to bring them into conformity with law and science as explained in these comments.

II. UPPER KLAMATH LANDOWNERS' INTERESTS

Upper Klamath Landowners are the owners of real property¹ in the Upper Klamath Basin² in Klamath County, Oregon. Upper Klamath Landowners' properties enjoy appurtenant surface and ground water rights for irrigation and stock watering. Some of Upper Klamath Landowners' surface water rights have been provisionally recognized in the Klamath Basin Adjudication as having a priority date of 1864. Other Upper Klamath Landowners hold water rights that were adjudicated in the prior adjudication of the Wood River, with pre-1909 priority dates, while some hold water rights that were issued by OWRD after 1909. Within the last few years, Upper Klamath Landowners have all been issued written shut-off orders for their surface water rights, which have resulted from calls to fulfill senior instream water rights held by the United States and have, in many cases, required them to cease all irrigation and stock water use from the Wood River, Williamson River, Sprague River, and/or their tributaries (*e.g.* Fort Creek, Crooked Creek, Sand Creek, Whiskey Creek).

The shut-off orders inhibiting Upper Klamath Landowners' use of their surface water rights have forced many to solely rely on existing groundwater rights to feed and water their livestock, where possible. Unfortunately, OWRD has a history of trying to regulate these groundwater rights in a manner that violates due process. In 2018, OWRD attempted to regulate 140 wells in the Upper Klamath Basin in favor of instream water rights based on a technical memo dated April 26, 2018, purporting to determine the impact of groundwater pumping on streamflows. The regulation orders sent to affected water right holders were dated and issued a day later, on April 27, 2018, but did not even include the technical memo. Counsel for affected landowners filed ten lawsuits against OWRD challenging this groundwater regulation on the basis that OWRD's regulation orders denied the water right holders due process of law. *See Sprague River Cattle Company v. Byler*, Marion County Circuit Court, No. 18CV201167; *Jacobs v. Byler*, Marion County Circuit Court, No. 18CV26118; *Duane Martin Ranches, L.P. v. Byler*, Marion County Circuit Court, No. 18CV26120; *Newman v. Byler*, Marion County Circuit Court, No. 18CV26124; *Duarte v. Byler*, Marion County Circuit Court, No. 18CV26125; *Miller v. Byler*, Marion County Circuit Court, No. 18CV26130; *Melsness v. Byler*, Marion County Circuit Court, No. 18CV2615; *Wilks Ranch Oregon, LTD. v. Byler*, Marion County Circuit Court, No. 18CV26122; *Edwards v. Byler*, Marion County Circuit Court, No. 18CV28865; *Brooks v. Byler*, Marion County Circuit Court, Case No. 18CV26126. OWRD settled those cases by paying the petitioners' attorney fees and costs and agreeing to consider adopting new groundwater regulation rules.

Following those settlements, OWRD then adopted the Division 25 rules, attempting to regulate groundwater use by existing water right holders in the Off-Project Area of the Klamath Basin if the wells met certain pre-determined criteria established in the rule. OWRD sent shut-off notices to six (6) well owners in the Upper Klamath Basin based on the Division 25 rules. Again,

¹ Commentor Water for Life, Inc., is not itself a landowner or an entity comprised of landowners, but rather serves to represent the interests of water right holders, including water right holders in the Upper Klamath Basin.

² The "Upper Klamath Basin" constitutes the Klamath Basin upstream of Upper Klamath Lake.

one of the affected water right holders filed a lawsuit. *See Brooks v. OWRD*, Marion County Circuit Court, No. 19CV27798. In a final judgment, the Marion County Circuit Court ruled: (1) that OWRD acted without statutory authority because the Division 25 rules effectively declared a critical groundwater area but did not follow the statutory requirements under ORS 537.730-742; (2) the Division 25 rules did not provide adequate due process to existing water right holders prior to regulating off groundwater use; and (3) OWRD’s regulation order violated the plaintiffs’ due process rights under the Fourteenth Amendment of the U.S. Constitution. OWRD did not appeal this ruling and, thus, does not dispute that the agency committed these serious legal violations in attempting to regulate existing water right holders’ use of their wells without providing due process.

Application of OWRD’s Groundwater Allocation rules, as proposed, is poised to result in additional due process violations, while ignoring Oregon’s water law and rulemaking statutes. Given OWRD’s past unlawful attempts to regulate groundwater rights, OWRD must ensure that it not make the same mistakes again. Therefore, for the reasons explained below, Upper Klamath Landowners encourages OWRD to make significant modifications to the proposed Groundwater Allocation rules.

III. COMMENTS

A. Legal Background.

In Oregon’s water code, ORS 537.535—.746 regulates the use and appropriation of groundwater. First, ORS 537.535—.630 provide a process for obtaining groundwater rights. Next, ORS 537.665—.720 provide a process for adjudicating groundwater rights. Finally, ORS 537.775—.780 provide OWRD authority to control the distribution of groundwater under existing rights.

ORS 537.775 states that, absent a determination of a critical groundwater area, any order imposing conditions upon wells interfering with other wells or surface water supplies “*shall provide to each party all water to which the party is entitled, in accordance with the date of priority of the water right*” (emphasis added). ORS 537.777 provides OWRD the authority to regulate wells to “secure the equal and fair distribution of ground water in accordance with the rights of the various ground water users.” Finally, ORS 537.780 requires that any determination of impairment, substantial interference, or undue interference between a well and a surface water source be based on substantial evidence.

ORS 183.335 provides rulemaking procedures that must be followed by Oregon agencies, including OWRD, when adopting rules. It requires, among other things, that any rulemaking notice include a caption identifying the subject matter of the intended action, a statement summarizing the subject matter and purpose of the intended action in sufficient detail to inform persons whose interests may be affected, and a statement of the need for the rule and how the rule is intended to meet that need. The purpose of these rulemaking procedures is to provide an opportunity for public participation in the rulemaking process. “The policies of an agency in a democratic society must be subject to public scrutiny. Published standards are essential to inform the public. Further, they

help assure public confidence that the agency acts by rules and not from whim or corrupt motivation. In addition, interested parties and the general public are entitled to be heard in the process of rule adoption under the Administrative Procedures Act.” *Sun Ray Drive-In Dairy, Inc. v. Oregon Liquor Control Comm'n*, 16 Or. App. 63, 71, 517 P.2d 289, 293 (1973). Where rulemaking notices fail to follow the requirements of ORS 183.335, rules may be invalidated pursuant to ORS 183.400.

The due process clause of the Fourteenth Amendment to the United States Constitution provides: “nor shall any State deprive any person of life, liberty, or property, without due process of law.” In evaluating due process claims, “[t]he first issue is whether the state has deprived a person of a liberty or property interest within the meaning of the Due Process Clause. If it has, the second is what process is due.” *Stogsdill v. Board, of Parole*, 342 Or. 332, 336 (2007), citing *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005). When a state deprives a person of property without due process, it can be subject to liability for a “taking” without just compensation in violation of the Fifth Amendment of the United States Constitution. See *Klamath Irrigation v. United States*, 129 Fed. Cl. 722, 730 (2016) (citations omitted). A water right in Oregon is a “vested property interest which cannot be divested without due process of law.” *Skinner v. Jordan Valley Irr. Dist.*, 137 Or. 480, 491, *opinion modified on other grounds on denial of reh’g*, 137 Or. 480 (1931) (citations omitted). Therefore, actions by OWRD which restrict use of a persons’ water rights, or which result in encumbrances in one’s property, implicate due process. *Connecticut v. Doehr*, 501 U.S. 1, 12, 111 S. Ct. 2105, 2113, 115 L. Ed. 2d 1 (1991) (“even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection”). When such property restrictions or encumbrances are levied by a state without supplying a party with a meaningful procedural opportunity to protect their rights, due process is violated. *Id.*

B. The Proposed Groundwater Allocation Rules Violate ORS 183.335 Rulemaking Procedures.

OWRD’s Groundwater Allocation rules violate the most basic requirements of ORS 183.335. The procedural mandates of ORS 183.335 require that OWRD accurately describe the intent and subject matter of any rules to allow interested persons to comment. “[I]nterested parties and the general public are *entitled* to be heard in the process of rule adoption under the Administrative Procedures Act.” *Sun Ray*, 16 Or. App. at 71. Nevertheless, the caption and statement of need for OWRD’s proposed groundwater allocation rules erroneously asserts that the rules will only affect the “allocation of new groundwater rights,” whereas the rules themselves appear to *also affect* the distribution of *existing* groundwater rights under rule divisions 9 and 10. This misleading caption and statement of need will dissuade interested persons (i.e., existing groundwater right owners) from commenting, despite the rules seeming to have a very real effect on existing rights. This alone would render the rules unlawful pursuant to ORS 183.400.

During the development of the groundwater allocation rules OWRD tried to assure stakeholders that the rules would only affect new groundwater applications, not existing rights. Nevertheless, the rules continued to propose amendments to division 9, as well as definitions referenced in division 10, in a manner which seemingly could affect existing groundwater rights.

Upper Klamath Landowners repeatedly submitted comments informing OWRD of the proposed rules' effect on existing rights. As will be explained in more detail in these comments, the current version of the proposed rules attempts to quell those concerns related to division 9 but Upper Klamath Landowners fear that the rules still fail to actually prevent impacts to existing rights. Meanwhile, the proposed rules ignore how the amendment of various definitions will affect existing division 10 rules.

It is legal error for OWRD to adopt the proposed groundwater allocation rules without informing *existing* water right owners of the potential effect of the rules. Misleadingly stating that the rules will only affect *new* groundwater right applications, when existing rights may also be affected, prohibits meaningful participation in the rulemaking process. Therefore, Upper Klamath Landowners request that OWRD modify the rules to eliminate any impacts to existing groundwater rights or, alternatively, modify the rulemaking notice to clearly state that the proposed groundwater allocation rules will affect new and existing groundwater rights and explain what those effects will be.

C. The Proposed Rules Create Confusing and Arbitrary Limitations on Future Groundwater Appropriations.

The proposed groundwater allocation rules create confusing and arbitrary limitations on future groundwater appropriations that OWRD should reconsider.

The proposed groundwater allocation rules are unnecessarily convoluted. Cross references between various definitions, divisions, and individual rules require water right holders to conduct an exhaustive review and analysis to determine a rules' intended scope and meaning. For instance, the definition of "declined excessively" states, among other things, that an excessive decline includes a decline which is determined to "substantially interfere with a surface water source as defined in OAR 690-008-0001(10)." To determine whether the definition of "declined excessively" is met in any situation, one then must turn to the definition of "substantial interference." However, the definition of "substantial interference" contains its *own* cross references. That is, one cannot determine if the "substantial interference" definition is satisfied unless one turns to the definition of "potential for substantial interference" in ORS 690-009-0020(6). *That definition* then requires an analysis of streamflow depletion as described in OAR 690-009-0040 or OAR 690-009-0060. Thus, to obtain the definition of "declined excessively," one would need to turn to *at least* three different rules, two additional definitions, and a streamflow depletion analysis process. It should not be that difficult for water right holders, or water right permit applicants, to determine what "declined excessively" means.

The convoluted nature of the proposed rules only serves to amplify their arbitrary restrictions on new groundwater rights. The rules' attempt to create a one-size-fits-all process for determining whether *any* Oregon aquifers have "reasonably stable groundwater levels." If an aquifer does not fit within these arbitrarily prescribed limits, new appropriations are prohibited. Moreover, even if data is insufficient to show whether aquifers have reasonably stable groundwater levels, the proposed rules require that OWRD *assume* that groundwater levels are not stable, again prohibiting new appropriations.

It is unsound policy to try to create a unified standard for determining a groundwater reservoir's capacity to support new appropriations. Every aquifer in Oregon is different, and while some may not have the capacity to support new appropriations, that is not true of all aquifers. There are many factors that can cause an aquifer to decline, while still sustainably supporting new groundwater allocations. OWRD should not limit future appropriations of water based on arbitrary drawdown limitations for all groundwater basins in the state. Instead, a systematic study of Oregon's groundwater systems should be completed before rules restrict appropriations on an arbitrary basis. The proposed rules should be delayed or rejected until those studies can occur.

D. Amendments to Division 9 May Have a Real, But Uncertain, Effect on Existing Water Rights Without Regard for Sound Policy, Science, or Due Process.

Upper Klamath Landowners understand the proposed groundwater allocation rules to have the potential to be used for regulating existing groundwater rights pursuant to division 9. While OWRD has repeatedly assured that existing rights will not be impacted, the rules themselves create an indiscernible regulatory scheme that Upper Klamath Landowners fear will harm existing groundwater users.

OWRD's amendments to division's 8 and 9 create a, yet again, unnecessarily convoluted regulatory scheme. In division 8, the definition of "substantial interference," "substantially interfere," and "unduly interfere" are materially changed. This alone has a substantial effect on division 9, and would purportedly still pertain to the regulation of new *or existing* rights which may "substantially interfere" with a surface water source. In the definitions section of division 9, the definition of "potential for substantial interference" itself turns to the division 8 definition of "substantial interference." Next, proposed OAR 690-009-0040 creates a process for determining hydraulic connection and the potential for substantial interference between a groundwater right and surface water source.

The proposed groundwater allocation rules attempt to bifurcate the analysis of hydraulic connection and potential for substantial interference for new groundwater rights versus existing groundwater rights. Proposed ORS 690-009-0050 declares that, for controlling or regulating groundwater rights, OWRD shall apply the 1988 version of ORS 690-009-0040, which is readopted as ORS 690-009-0060. However, that 1988 version still references certain terms which have been redefined in the proposed groundwater allocation rules. In other words, by changing certain definitions, including that for substantial interference and potential for substantial interference, it appears that OWRD is changing how it analyzes substantial interference between *existing* groundwater rights and surface water rights. Thus, the incredibly-confusing bifurcated regulatory analysis proposed in the groundwater allocation rules fails to insulate existing groundwater rights from the proposed rule changes.



Unfortunately, it is very difficult to understand the new bifurcated process OWRD is proposing for division 9. Upper Klamath Landowners therefore raise the following objections³ to the entire division 9 process, and urge OWRD to reject any modifications to division 9 at this time.

1. The Proposed Division 9 Rules Do Not Protect Groundwater Users' Due Process Rights to a Contested Case Hearing.

One glaring omission from the proposed changes to division 9 is any protection of due process rights. As explained above, the Court in the *Brooks* case very explicitly held that OWRD could not regulate a groundwater user—even a junior user—based on a determination of “substantial interference” without first providing the groundwater user an opportunity to contest OWRD’s findings. The Court explained:

Everyone agrees that water rights are property rights. Everybody agrees that the extent, if at all, to which the junior water right holder can use theirs is dependent on whether the senior people are satisfied.

But nevertheless, I think there is still some kind of property right in that junior water right holder. And in particular, the Plaintiff's argument is the basis on which you are interfering with our rights is a finding that we are interfering with the surface water rights. And you made that finding without us having an opportunity to put on evidence and cross-examine your witnesses and talk specifically about our well.

And I agree with the Petitioners that telling them they can go to the Court of Appeals and argue that there wasn't substantial evidence in the record is not a very good due process substitute for the reasons that were articulated. They're stuck with a limited kind of record from a rulemaking proceeding that doesn't include calling witnesses and cross-examine, and they're stuck with an extremely differential standard of review, the substantial evidence standard, as opposed to having an opportunity to put on evidence and so forth.

And I would also add that even if they, I guess, enter the second claim for relief, which I'll confess to not having looked at very much since it wasn't an issue. But even if they get this Court to review for substantial evidence and they would have the opportunity to make a record and call witnesses and cross-examine, but it's still a substantial evidence review standard. So I believe also that the Petitioners' due process rights were violated by regulating them off their well based on this administrative rule.

Troy & Tracy Brooks v. OWRD (“*Brooks v. OWRD*”), Marion County Circuit Court Case No. 19CV27798 (Feb. 10, 2020) (Transcript Volume 1 of 1 at 33).

³ These objections were previously raised by Upper Klamath Landowners during the development of the proposed groundwater allocation rules, and are being raised again here because OWRD did not address the objections described.

The holding of the Court was that neither ORS 183.482 nor ORS 183.484, including “substantial evidence” review before the Circuit Court with the opportunity to develop a record, were sufficiently protective of groundwater users’ due process rights. Therefore, the Court found that the Brooks’s due process rights were violated by OWRD’s substantial interference finding. Despite this explicit holding that a finding of substantial interference and subsequent groundwater regulation triggers due process rights, OWRD has not acknowledged this issue in the present proposed rules.

The proposed Division 9 rules require OWRD to make affirmative findings of hydraulic connection, substantial interference, and timely and effective relief prior to regulating groundwater rights which are at least 500 feet from a surface water source.⁴ Nonetheless, the rules provide no due process for groundwater users to address and challenge these findings by presenting contrary evidence, calling or cross-examining witnesses, taking discovery, etc. This is a very substantial omission in the proposed rules. If OWRD applies the proposed Division 9 rule without allowing for such due process, *Brooks v. OWRD* tells us that such an order would violate groundwater users’ due process rights. The proposed groundwater allocation rules should be rejected for this reason.

2. The Proposed Division 9 Rules Must Require Site-Specific, Reasonably Certain Scientific Proof of Substantial Interference.

Upper Klamath Landowners retained a professional engineer and water modeling expert with decades of groundwater modeling experience to review the proposed Division 9 rules. The opinion reached by Upper Klamath Landowners’ expert, and shared here, is that the proposed Division 9 rules take too-simplistic an approach to determining “substantial interference.” By doing so, the proposed rules give OWRD a green light to order sweeping groundwater regulations based on oversimplified and downright incorrect assumptions about hydraulic connectivity and interference. This too presents a due process issue, as the proposed rules seem intentionally designed to allow OWRD to deprive groundwater users of their property rights without even demonstrating the type of “reasonable scientific certainty” which must precede such a deprivation, largely shifting such a burden onto the groundwater users. *See, e.g., State v. Sampson*, 167 Or. App. 489, 505, 6 P.3d 543, 555 (2000); *State v. Trujillo*, 271 Or. App. 785, 794, 353 P.3d 609, 615 (2015); *Z R Z Realty Co. v. Beneficial Fire & Cas. Ins. Co.*, No. 9708-06226, 1999 WL 34001829, at *4 (Or. Cir. Oct. 15, 1999). Therefore, OWRD must modify the proposed Division 9 rules by better defining the tools OWRD must use when making determinations under Division 9, and identifying the evidentiary standard which must be satisfied.

The proposed Division 9 rules do little-to-nothing to identify the analytical process OWRD must follow to determine substantial interference and, ultimately, issue groundwater controls. Instead, the rules rely on generalized statements that any determination must be based on the application of “generally accepted hydrogeologic principles” or the “best available information.” What constitutes these principles or the best available information is largely left to the agency’s discretion. No limiting factors are placed on OWRD’s ability to make its substantial interference

⁴ As explained in the following section, this requirement presents its own due process concerns which must be addressed.

determination. Most glaringly, the proposed Division 9 rules leave the door open for OWRD to determine substantial interference without any consideration of site-specific factors, or the *actual* effect of a given well on a given surface water source. Ultimately, what the proposed Division 9 rules appear to authorize is for OWRD to regulate groundwater uses based on assumptions of substantial interference, without regard for actual site-specific hydrogeological conditions. Under the proposed rules there is no guarantee that OWRD will go beyond simple assumptions and simple conceptual models to analyze whether substantial interference will occur. This can allow OWRD to adopt a simplified analysis in a complex, multi-layer aquifer system for the purpose of justifying groundwater controls. Ultimately, this results in a burden-shifting analysis, where the proposed rules put the burden on the groundwater user to demonstrate why controls are not justified, rather than keeping the burden on OWRD for demonstrating why controls are justified. This presents a due process issue, allowing OWRD to regulate groundwater uses without having to first demonstrate with reasonable scientific certainty that such regulation is necessary to alleviate substantial interference.

Ultimately, to respect groundwater users' due process rights OWRD must have the burden of proving that a given well will interfere with a given surface water source, based on a reasonable scientific certainty, before it issues a control for the groundwater use. Satisfying this burden cannot be accomplished without relying on site-specific data. To remedy this issue within the proposed rules, the rules must recognize that OWRD needs to use site-specific data to develop a site-specific "conceptual model" of the aquifer system in question, and then decide what tools, data analyses, and models should be applied to analyze the physical system in question and assess if their conceptual model is accurate. Only then may OWRD determine if there is substantial interference.

3. The Proposed Division 9 Rules Must Better Define "Effective and Timely Manner."

While the requirement that groundwater controls provide relief in an effective and timely manner is vital to the Division 9 rules, the definition of "effective and timely manner" is amorphous, incapable of consistent application, ripe for abuse, and, like the above section indicates, allows for unlawful groundwater regulation.

The proposed definition of "effective and timely manner" "means that regulation will result in the addition of *any* water to the surface water source during the *relevant* time period." (Emphasis added). This language could allow OWRD to arbitrarily determine what constitutes "any water" or "the relevant time period." There is no limiting factor in this definition to prevent completely arbitrary agency action, including where the agency determines that regulation would result in even a molecule of additional water reaching the surface water source during the "relevant time period." The definition is therefore incapable of providing *any assurances* to groundwater users that OWRD will not regulate groundwater uses on indefensible grounds.

This definition of "effective and timely manner" is particularly concerning because the Division 9 rules allow OWRD to look infinitely into the future to determine whether substantial interference will result between a groundwater use and senior surface water use, and in many instances the rules allow OWRD to assume that substantial interference does result simply by a

well's proximity to surface waters. And, as OWRD staff explained during the development of the groundwater allocation rules, if *any* groundwater use is projected far enough into the future, it will *always* result in interference with surface water sources.

The effective and timely manner standard is crucial to provide a limitation on OWRD's authority to regulate groundwater users based on this assumption that groundwater uses *always* effect surface water sources *eventually*. Without it, there will be no bounds on OWRD's discretion to control any groundwater use which will eventually affect a senior surface water right, no matter the *time* or *scope* of such an impact. For this reason, the definition of "effective and timely manner" must be made more precise. Specifically, it should be confined to significant and quantifiable "additional water" and it must be water that would be available within the specific season of use of the surface water right at issue.

The proposed rules attempt to create some sidebars to the "effective and timely manner" definition by stating that OWRD shall determine "effective and timely manner" "on the basis of the best available information."⁵ But, as stated in the above section, what constitutes the best available information is largely left to the agency's discretion. So yet again, the proposed Division 9 rules fail to acknowledge that site-specific conditions must control any analysis, including the analysis of whether groundwater regulations will result in effective and timely relief. Therefore, OWRD should modify the rules to require adherence to standard industry practice for analyzing *site-specific* groundwater systems. This requires using site-specific data to develop a site-specific "conceptual model" of the groundwater aquifer system in question, deciding what tools, data analyses, and models should be applied to analyze the groundwater aquifer system in question to test the conceptual model for accuracy, and then using the data, model and tools to assess if there would be "effective and timely" relief from the groundwater controls.⁶

⁵ Use of the term "considering the best available information" seems to excuse OWRD from any obligation to gather information; that language should be stricken and replaced with "considering site-specific information". The definition of "best available information" can then be changed to the definition of "site-specific information" by eliminating the reference to models and other information.

⁶ Rules within the Oregon Department of Environmental Quality provide examples OWRD may follow to resolve the lack of specificity within the proposed Division 9. For example, DEQ uses a specific metric such as the 7-day average of the daily maximum (7dAM) water temperature to assess if surface water exceeds a state water temperature standard such as 17.8 C, for salmonid rearing on some rivers. The temperature standard (340-041) is specific to the water body, time of year and threatened and endangered species present in each water body. The numerical values of the temperature standard are based on the threatened and endangered species present and their life stages. The current understanding of the 7dAM statistic is that it's based on fish habitat needs, while also acknowledging that one- or two-day spikes in water temperature may not be an issue for fish habitat purposes, and yet when a 7-day average of these daily maximum water temperatures exceeds the standards there is more concern for fish habitat and the stream is listed under the Clean Water Act 303(d) list, and DEQ then develops a Total Maximum Daily Load (OAR 340-042) and Water Quality Management Plan. DEQ even has a published Internal Management Directive (IMD) (<https://www.oregon.gov/deq/Filtered%20Library/IMDTemperature.pdf>) for Temperature Water Quality Standard Implementation. The Division 9 rules need similar approaches to groundwater management, where specific definitions for hydraulic connection, substantial interference, and "effective and timely" are defined, perhaps even on a basin specific-basis, specific groundwater goals need to be develop for each basin, and a published IMD should be developed by OWRD on how groundwater-surface water systems will be analyzed and where simplified assumptions may be appropriate and where site-specific data and models are more appropriate. There should be a published IMD by OWRD on data quality objectives for groundwater data and a regular call (as DEQ does for surface water quality data)

To summarize, OWRD must establish limiting factors within the definition of “effective and timely manner” to correctly balance and regulate interference between surface and groundwater uses. The definition must contain a standard which will ensure that any groundwater control makes a measurable difference in surface water flows within some reasonable period of time (e.g., within an irrigation season). Without limiting factors, the “effective and timely” standard does nothing to prohibit OWRD from arbitrarily regulating all groundwater uses due to some amorphous “future” surface water interference based on projections looking infinitely into the future. Moreover, the rules should recognize that any analysis must be based on site specific information, not oversimplified assumptions which may have limited, or no, applicability to the aquifer systems present in Oregon. Upper Klamath Landowners strongly urges OWRD to reject the proposed groundwater allocation rules for this reason.

4. The Proposed Division 9 Rules Should Eliminate Arbitrary Classifications.

The existing Division 9 rules contain arbitrary distinctions between OWRD’s regulatory duties depending upon a well’s distance from a surface water source. If wells are within 500 feet of a surface water source (regardless of the depth or complexity of the aquifer system at issue), OWRD is not required to determine whether regulation of that well would provide relief to the surface water source in an effective and timely manner. For wells over 500 feet (but within one mile) of a surface water source, OWRD *would* need to determine whether regulation of the well would provide timely and effective relief to the surface water source. For wells over a mile from a surface water source, OWRD may only regulate them through a critical groundwater area designation. Likewise, under OAR 690-009-0060 all wells located less than ¼ mile from a surface water source that produce water from an unconfined aquifer shall be *assumed* to be hydraulically connected to a surface water source.

The proposed Division 9 rules keep these same distinctions. Once again, wells within 500 feet of a surface water source can be regulated regardless of the time it takes to provide relief to the surface water, while wells over 500 feet from a surface water source can only be regulated if such regulation would provide effective and timely relief.⁷ And, the regulation of wells within a ¼ mile of surface water sources is made immensely easier because OWRD can *assume* a hydraulic connection between the groundwater and surface water sources.

Ft. Klamath *et al.* strongly urges OWRD to require that *any* regulation of groundwater users under Division 9 only occur after notice and opportunity for a hearing if (1) the well at issue is *actually connected* to a surface water source, and (2) such action would provide effective and timely relief to senior water rights within a surface water source.⁸ This will ensure that all

for groundwater data from the community and users before a science-based basin study is undertaken and groundwater wells are regulated. These science-based processes and objectives are missing from Division 9 rules.

⁷ This very relaxed standard for wells within 500 feet of a surface water source is similar to that declared unlawful in the *Brooks* case, as it exceeds OWRD’s statutory authority.

⁸ Ft. Klamath *et al.* do not take issue with the Division 9 rules’ statement that wells over one mile from a surface water source may only be controlled through a critical groundwater area designation, and believe that this one-mile threshold should be retained. Nonetheless, even those wells over one mile from a surface water source, which can only be

groundwater users are treated fairly, and will require that OWRD not regulate groundwater users on account of arbitrary assumptions regarding the effect of wells in proximity to surface water sources.

5. The Proposed Division 9 Rules Fail to Define Very Critical Terms.

There are additional terms used in the proposed division 9 rules that are either undefined, or so broadly defined that they are incapable of consistent application. For instance, the proposed division 9 rules do not contain a threshold standard for when an interference between a well and surface water source rises to the level of “substantial” interference. Largely, the term “substantial” seems to have little-to-no actual meaning in the rule, despite being a very critical part of the statutory scheme. *See, e.g.*, ORS 537.780. Failing to give the term “substantial” real affect in the proposed groundwater allocation rules is legal error.

The proposed rules also do not define “generally accepted hydrogeologic principles.” Currently, the division 9 rules require OWRD to use generally accepted hydrogeologic principles. But what these principles are is undetermined, and they may even extend to staff’s comment that essentially any groundwater use has some effect, however tiny, upon surface water. OWRD can and must extract and identify the specific principles it wishes to make into Oregon law through rulemaking from the sources it has cited. It is an independent violation of due process of law to make “law” that can only be guessed at by reference to sources outside the Oregon Administrative Rules.

Additionally, the definition of “hydraulic connection” lacks any time or magnitude component. “[S]aturated conditions . . . that allow water to move” could refer to one molecule moving over 20,000 years, or appreciable flows that can actually impact users. At the least, the regulatory definition should be changed to require a measurable quantity of water to move between groundwater and surface within a single irrigation season. Because these terms are so ill defined, the proposed groundwater allocation rules should be rejected.

E. The Proposed Groundwater Allocation Rules Silently Modify Recent Critical Groundwater Area Rules.

In 2023 OWRD adopted new rules governing the designation of critical groundwater areas. Under those rules, the Commission may adopt rules designating critical groundwater areas where groundwater levels have declined excessively, where there is a pattern of substantial interference, or where groundwater supplies are overdrawn, among other circumstances. The proposed groundwater allocation rules amend these various terms. The definition of “declined excessively” would be changed substantially, as would the definitions of “substantial interference” and “overdrawn.” This will modify the meaning of the critical groundwater area rules in unintended ways.

regulated through a critical groundwater area, should only be regulated where controls would provide effective and timely relief.

At no point in the rulemaking notice does OWRD acknowledge the effect of these definition changes on the existing division 10 rules. This leaves the public uninformed, and does not allow interested parties to meaningfully participate in the development of OWRD's rules. This also adds to the confusing nature of these rules. Earlier in these comments Upper Klamath Landowners described the circular analysis that would need to occur just to determine whether certain aquifer conditions met the definition of "declined excessively." Under the proposed groundwater allocation rules, that circular analysis would need to occur under division 10 whenever OWRD designates a critical groundwater area on the basis that groundwater levels have declined excessively.⁹

The modification of the definition of "substantial interference" may have the biggest effect on division 10. By redefining "substantial interference" in division 8 as currently proposed, OWRD would be authorized to designate critical groundwater areas where two wells simply interfere with one another, even if the aquifer in general is being utilized sustainably. This seems incompatible with the legislative intent of the critical groundwater area tool.

It appears to be an ill-considered effect of the proposed groundwater allocation rules that they will substantially modify division 10. Therefore, Upper Klamath Landowners urge OWRD to ensure that division 10 is not changed by the groundwater allocation rules. Failure to do so would violate rulemaking procedures, and could result in unlawful critical groundwater area designations in the future.

IV. CONCLUSION

Upper Klamath Landowners respectfully request that OWRD revisit its proposed groundwater allocation rules consistent with the foregoing.

Sincerely,



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NGS/kh
Cc: client

⁹ This could result in very duplicative analysis, as patterns of substantial interference can trigger critical groundwater area designations, but so can groundwater levels which have declined excessively which, as defined in the proposed groundwater allocation rules, includes aquifers where there is substantial interference. This makes little sense.