

## HARTT Laura A \* WRD

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**From:** Susan L Smith <susanlsmithor@gmail.com>  
**Sent:** Thursday, June 13, 2024 4:07 PM  
**To:** HARTT Laura A \* WRD  
**Subject:** Comments on proposed groundwater allocation rule

Dear Commissioners,

I am Susan Lea Smith. I have taught, practiced and written about water law since 1980, when I became part of the second generation of lawyers litigating Arizona v. California.

Since joining the Willamette University law faculty in 1989, my focus has been on sustainability. I have had the pleasure of accompanying the Oregon Water Resources Commission on its decades-long journey to adapt Oregon's prior appropriation system to assure Oregon manages our water resources in an integrated and sustainable manner while respecting senior appropriative water rights.

In my opinion, the ground water allocation rulemaking is a perfect example of how to adapt Oregon water law to honor prior appropriative rights and assure that future generations have access to water resources.

When ground water levels are dropping so that existing wells have to be redrilled, we are failing to honor prior appropriative ground water rights AND are using ground water unsustainably. When an area is over appropriated to the point that appropriative surface water rights are being called, and we are giving out new ground water permits that will intercept ground water that should be supplying over appropriated streams, we are failing to honor senior surface water rights AND contributing to depletion of surface water resources to which tribes and farmers are entitled endangering both fish and farmers. These are the problems that the ground water allocation rulemaking seeks to solve. The proposed rule is necessary for integration of hydrologically connected groundwater and surface water as well as managing our water in a sustainable manner.

There are grave costs to allowing new ground water permits to be issued under such circumstances. Water consultants who profit from such permits and late-comer agricultural users may suggest that after all, a new permit is just a hunting license for water whose holder patiently waits their turn in line for water. But in the circumstances addressed by this proposed rule, there is no water. Instead, new ground water allocation permit holders seek to cut in line, relying of the difficulty enforcing the priority system against junior water right holders.

Furthermore, even if they couldn't cut in line, we are allowing new ground water permits holders to make investments based unrealistic expectations about water availability, which discouraged these new owners from purchasing senior water rights that justify the investments they are, and their lenders, are making. They also discourage investments in water conservation by senior water right holders and the new ground water permittees. Fake new ground water rights also bring disrepute to the prior appropriation system.

One area where new ground water rights have been permitted is the Klamath Basin. Farmers distressed over the loss of their irrigation water have turned to ground water extraction to keep their historical acreage under cultivation. This practice injures the senior tribal water rights upon which the fish of the Klamath River basin depend, but there is virtually no prospect of effective enforcement against this illegal extraction. It also prevents farmers from making pragmatic adjustments of their cultivation practices, to avoid irrigation or dramatically reduce water use, especially in light of the changes that are occurring to our climate.

OWRD properly assured these farmers that this rule is not retroactive and will not affect already issued ground water permits. But eventually the folly of relying on diminishing ground water resources will become clear, even to the agriculture community in the basin. Allocating water beyond the recharge provided by nature leads to fish kills, well

failures, subsidence, and will exacerbate tensions and conflict, not solve the heartbreaking problem of Klamath farmers. Certainly, additional ground water permits should not be issued in the basin.

Some rightly argue that new water users find it difficult to purchase senior rights and this locks in inefficient economic uses of water. However, the fix for that problem lies in the Commission revisiting the water transfer regulations and seeking to encourage a viable water rights market in Oregon.

Similarly, some complain that domestic users are allowed to cut in line and use overly generous amounts of water. While that is true, OWRD estimates that is only 3% of our water resources. In my opinion, the Legislature should revisit the amount of domestic water allowed as well as the use of exempt water for sizable livestock herds. However, that is a complaint that should be made to the Legislature, not the Commission.

I should mention that I served on the Rulemaking Advisory Committee for the ground water allocation rulemaking. Based on personal observation, I can assure the Commission that staff did a fabulous job of responding to the concerns and interests expressed by all of the stakeholders. The proposed rule is infinitely better than the original draft.

Naysayers about the process or substance of the proposed rule simply have financial interests in protecting loopholes in the current water availability determination process. They really don't like the prior appropriation system or the idea of managing water resources sustainably, if it affects their pocketbook. Their criticisms reflect opposition to the Commission's policy decisions reflected in the rule. The Commission should expect them to litigate, but I believe they will not prevail.

This rule is a credit to the Commission's commitment to assure our water resources are managed sustainably using prior appropriative rights. I commend the Commission for proposing this rule and hope that it will not make any significant changes.

Best regards,  
Susan Lea Smith