



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

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Rule Coordinator
Oregon Water Resources Department,
725 Summer St. NE, Suite A
Salem, OR 97301-1271
rule-coordinator@wrд.state.or.us

**RE: Draft rules for regulation of groundwater in the Klamath Off-Project area
(OAR 690-25-0010)**
Sent Via: email to rule-coordinator@wrд.state.or.us

Dear Rule Coordinator:

Thank you for the opportunity to comment on the draft rules for “REGULATION OF GROUNDWATER IN THE OFF-PROJECT AREA DURING THE IRRIGATION SEASON FOR SENIOR SURFACE RIGHTS IN THE KLAMATH BASIN” (DRAFT OAR 690-25-0010). As we expressed in extensive statements to the Water Resource Commission at the May 29, 2014 meeting, WaterWatch has serious concerns with the premise of this rulemaking process which is to enact rules consistent with a settlement that was negotiated in private, was not inclusive and had no stated purpose of affecting regulation for instream water rights held in trust by the Oregon Water Resources Department (WRD) for the people of Oregon (which in fact the rules do). This and other specific concerns are discussed below.

Relevant Background

In July, 2013, Senators Wyden and Merkley, (then) Governor Kitzhaber and U.S. Representative Walden convened the Klamath Basin Task Force to address water, power and cost issues associated with forging solutions in the Klamath Basin. WaterWatch was invited to participate on the Task Force, but was not allowed to participate in the Task Force’s Water Subcommittee—

despite requesting specifically to participate in this Water Subcommittee.¹ WaterWatch, and others, were told they could not participate in the Water Subcommittee because it was solely for parties to the Klamath Basin adjudication to work out a settlement agreement pertaining to their water rights. (Then) Director Ward's May 29, 2014 Staff Report to the Commission correctly describes parties to the negotiation in stating that "irrigators in the upper basin met with the Klamath Tribes and the United States. . ." (Staff Report, Agenda Item F, May 29, 2014, p. 1).

It was within this limited Water Subcommittee that the Upper Basin Comprehensive Agreement (Agreement) was negotiated, purportedly as a settlement between adjudication parties as to how water between them would be regulated—specifically how junior groundwater wells (would be regulated based on calls made under the Klamath Tribes' senior instream rights. The Agreement includes negotiated specifics for how such regulation would occur, as well as a number of other settlement provisions.

At the May 29, 2014 meeting, (then) Director Ward sought direction from the Commission to develop local rules governing groundwater regulation *consistent with the Agreement*. WaterWatch raised the concern that because of the purportedly limited scope of the Agreement, such a rulemaking should not impact the state's ability to regulate for state instream water rights or state Scenic Waterways. After extensive discussion, the Director assured the Commission that WRD could do a rulemaking consistent with the Agreement that would also ensure no diminishment of regulation of state instream water rights and state Scenic Waterway flows.

This assurance did not come to pass because, while the draft rules state that they do not govern control of wells pursuant to the Scenic Waterways Act (DRAFT OAR 690-25-0010(3)(d)), the rules do not similarly exempt regulation for state instream water rights and would in fact reduce the state's ability to regulate in favor of those rights. While not a comprehensive list, key specific impacts to regulation in favor of state held instream water rights are discussed further below.

Comments

1. WRD should not undertake a rulemaking to implement a private settlement that reduces its ability to regulate in favor of state held instream water rights.

It is improper for WRD to undertake a rulemaking to establish rules "consistent with" an Agreement negotiated in private, without an appropriate balance of parties present, and purportedly intended only to settle water right regulation issues between the negotiating parties. To be clear, it's certainly appropriate for the Klamath Tribes and the irrigators to make whatever settlement they desire regarding regulation of *their own water rights* between them. However, it is clearly improper for WRD to then extend that private settlement to regulation of instream water rights held by the state in trust for the people of Oregon, as it has done here. While WaterWatch appreciates the improvements to the proposed rules made throughout the Rules Advisory Committee process, we remain concerned that: a) the premise of the rulemaking was improper; and b) the rules would reduce the state's ability to regulate in favor of state held instream water rights in various ways (several of which are detailed below).

WaterWatch suggests the following subsection be added to OAR 690-25-0010(3) to address these problems:

¹ The Hoopa Valley Tribe and Oregon Wild, also members of the Task Force, were likewise excluded from Water Subcommittee work.

“Control of well use for the benefit of state instream water rights.”

This addition would address the central problem here—that the Department embarked on a rulemaking to implement a private settlement and has improperly imported the negotiated compromise of that private settlement into future regulation for state instream water rights in the Off-Project area.

2. The draft rules improperly limit WRD’s ability to regulate wells (determined to have the potential for substantial interference with surface water) in favor of state held instream water rights if certain thresholds of impact are not met.

The draft rules allow regulation in favor of a senior surface water right (including a state held instream water right) of a groundwater well between one-quarter mile and one-half mile away only if the rate of shortfall of water validly called is equal to or greater than 5% of the amount of the senior water right call (or call threshold which is a term specific to the Klamath Tribes’ rights). DRAFT OAR 690-25-0010(10)(a)(ii). In other words, if the shortfall below a state held instream water right less than 5%, WRD will not regulate junior groundwater wells in favor of the instream water right. That limitation does not exist in the currently applicable Division 9 rules (OAR 690-009), and represents a diminishment of the WRD’s ability to protect the instream water rights it holds in trust for the people of Oregon. We are aware of no Oregon statutory authority that would allow for or provide authorization for a rule that contemplates allowing junior groundwater use under these circumstances to injure a senior state instream water right by up to 5%.

A more extreme restriction applies to use of wells greater than one-half mile and up to and including one mile away. There the deficit below the senior surface water right (including a state held instream water right) must be 10% before WRD would regulate in favor of the surface water right. DRAFT OAR 690-25-0010(10)(b)(ii). This diminishes the state’s ability to regulate in favor of the instream water rights it holds in trust for the people of Oregon. Again, we are aware of no statutory authority under Oregon law that would allow this proposed reduction in regulation in favor of the senior instream water right.

3. The draft rules improperly limit WRD’s ability to regulate wells (determined to have the potential for substantial interference with surface water) in favor of state held instream water rights if calls are not made by certain dates.

The draft rules allow for regulation in favor of a senior surface water right (including a state held instream water right) of a groundwater well between one-quarter mile and one-half mile away only if a valid call is made before July 31, and in favor of a senior surface water right (including a state held instream water right) wells greater than one-half mile and up to and including one mile of a gaining reach only if a valid call is made before August 31. These date limits are apparently based on a system where the concern was ensuring that calls made for irrigation rights would be timely and effective (*i.e.* provide relief before the end of the irrigation season). However, that system should not be imposed on state held instream water rights which are year-round rights. While in most instances, state held instream water rights will be missed (and therefore, as we understand it, called) prior to these date limits, there is no basis to impose the limitation on the state’s ability to regulate in favor of the instream water rights it holds in trust for the people of Oregon.

4. The draft rules could allow impacts to state held instream water rights through addition or relocation of wells.

The draft rules specify that if a replacement or additional well is relocated, evaluation (and regulation) will occur based on the original location of the well. DRAFT OAR 690-25-0010(15)(c). This means that if a replacement well or additional well is relocated closer to a stream than the original well such that the location changes which regulation standard applies (for example, a well is relocated from >1 mile to within 500' of a stream), then the new well will be regulated to a lesser standard than its location would otherwise dictate. While some of the injury that could occur from such moves would likely be captured in the injury analysis performed by WRD in transfer proceedings, it appears such analysis would not be capable of preventing the additional injury in all circumstances. This provision thus reduces WRD's ability to regulate in favor of state instream water rights.

5. The draft rules improperly limit WRD's ability to regulate wells (determined to have the potential for substantial interference with surface water) in favor of state held instream water rights by requiring the well to impact a mapped "gaining reach."

The draft rules only allow for regulation if the affected reach is a "gaining reach." DRAFT OAR 690-25-0010(7)-(10). "Gaining reach" is defined by reference to a map developed as part of the Agreement, with allowance for WRD to modify the location of gaining reaches based on best available information. DRAFT OAR 690-25-0010(1)(b). While the concept of "gaining reach" may be appropriate in the context of regulation in favor of state held instream water rights, it is not clear how this map was developed or whether it is appropriate for this task.

6. The draft rules improperly limit WRD's ability to regulate wells (determined to have the potential for substantial interference with surface water) in favor of state held instream water rights based on a formula negotiated in a private settlement that may allow significant impacts.

The draft rules allow regulation in favor of a senior surface water right (including a state held instream water right) of a groundwater well greater than 500 feet from a gaining reach only if, based on a formula, "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." DRAFT OAR 690-25-0010(13). Specifically, the formula prevents WRD from regulating a well if the formula shows that the 30-day pumping impact to a stream would not show relief after a subsequent 90-day idle period greater than or equal to 0.10 cubic feet per second.

This formula reduces the state's ability to regulate in favor of state instream water rights because even if there would be a significant impact to streamflow (and the instream water right) at 30-days, WRD could not regulate unless shutting down the well would show the specified recovery. WRD should be regulating against injury to the state instream water rights that is occurring in the first 30-days, not only if a certain recovery is reached after a 90-day idle period. Again, we are aware of no Oregon statutory authority to limit regulation in favor of senior instream water rights as proposed in this rule.

Additionally, the rules do not specify which model will be used, who will run it, how it can be accessed or reviewed, or how it will be updated.

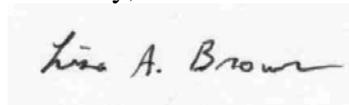
7. If the rules are not amended to exempt state instream rights, at a minimum, the rules should require that groundwater regulation reverts to OAR 690-009 where calls are not made or cannot be made under instream rights held by the Klamath Tribes.

The draft rules provide that if the Agreement terminates, groundwater regulation in the Off-Project Area will be in accordance with OAR 690-009. DRAFT OAR 690-25-0010(16). Unless the rules are amended to state that they do not govern control of wells for the benefit of state instream water rights, at a minimum, this language should be more broad. This section should be amended by adding the following sentence:

“Additionally, if in any stream reach, the Klamath Tribes do not make a call under an instream right or call threshold, or if there is no instream right held by the Klamath Tribes for that reach, groundwater regulation in that reach shall be in accordance with OAR 690-009.”

Thank you for the opportunity to comment on the draft Klamath groundwater regulation rules.

Sincerely,

A handwritten signature in black ink that reads "Lisa A. Brown". The signature is written in a cursive style and is centered within a light gray rectangular box.

Lisa A. Brown
Staff Attorney