



# Oregon

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TO: Division 512 Harney Basin Rules Advisory Committee

FR: Oregon Water Resources Department Division 512 Rulemaking Team

DT: October 25, 2024

RE: THIRD DRAFT - Proposed Guidance for Voluntary Agreements Among Groundwater Users from the Same Groundwater Reservoir

## Background

This memorandum outlines criteria the Oregon Water Resources Department (Department) has determined to be consistent with ORS 537.745 and provides guidance to the Oregon Water Resources Commission (Commission) for consideration when approving voluntary agreements among groundwater users from the same groundwater reservoir.

## General Applicability

Voluntary agreements may be entered into in areas with critical groundwater area designations and those without. In either case, the agreement must be consistent with the intent, purposes and requirements of the Ground Water Act of 1955, in particular ORS 537.525 (policy considerations), 537.730 to 537.740 (pertaining to critical groundwater area designation), and 537.780 (Commission authority).

## Authority

The Commission has authority to approve or reject voluntary agreements. The Department may provide advice to the Commission. Under ORS 536.037(1)(d), the Department may participate in any proceeding. The Commission can explicitly delegate authority to the Department to act as the Commission's staff in making a recommendation to approve or reject a voluntary agreement, including amendments, to the Commission. The Commission also can delegate its authority to approve or reject voluntary agreements, including amendments, to the Department. These guidelines outline agreement terms that the Department would consider adequate for supporting an agreement approval/rejection recommendation to the Commission as well as a Department's decision to approve/reject an agreement when the Commission has delegated that authority.

## Groundwater Users

### INITIAL PARTIES

(1) Parties of a voluntary agreement may include

- (a) individuals, corporations, associations, firms, partnerships, limited liability companies, joint stock companies, public and private municipal corporations, political subdivisions, the state, and any agencies thereof, the federal government and any agencies thereof and federally recognized Indian tribes; and
- (b) districts, corporations, or political subdivisions organized for public purposes.

## MINIMUM PARTICIPATION LEVEL

The minimum level of participation in a voluntary agreement must consist of water right holders whose total rights represent at least 30% of the total allocated Permissible Total Withdrawal (PTW) or Target for Voluntary Reduction (TVR).

An approved agreement must result in a reduction of water use sufficient to meet the permissible total withdrawal or target for voluntary reduction for the groundwater reservoir, or portion thereof, subject to the agreement.

## Groundwater Rights

Groundwater rights eligible to participate in a voluntary agreement are limited to current, valid water rights that can prove beneficial use within 5 years prior to the time the agreement is approved. The following conditions also apply:

- No point of appropriation which has exceeded its decline condition may be used to pump water under a voluntary agreement.
- Only lands listed as a place of use on a valid water right may be included in a voluntary agreement.
- Only wells listed as a point of appropriation on a valid water right may be included in a voluntary agreement.
- The maximum volume of water available to the parties within a voluntary agreement is the sum of the total duty allocated to all valid rights participating in the agreement.

## Groundwater Reservoir

### BOUNDARIES DEFINED

An approved agreement must define the groundwater reservoir, or portion thereof, the agreement is intended to cover. For a designated CGWA, the groundwater reservoir may be defined as the entire CGWA, one or more subareas within the CGWA, or a portion thereof.

Any groundwater points of appropriation proposed to be included in an agreement must be within the boundaries of the area covered by the agreement.

### MAP

(1) An approved agreement must be accompanied by a map depicting all places of use and points of appropriation for the water rights included in the agreement.

(2) An approved agreement must contain a list of the water rights of record that provide the basis for water use on all authorized places of use within the geographic scope of the agreement.

## Groundwater Use

### PERMISSIBLE TOTAL WITHDRAWAL (PTW)

“Permissible total withdrawal” or “PTW” means the total amount of groundwater that the Department determines can be withdrawn on an annual basis within a specified geographic area or subarea.

- The unit of measurement for the permissible total withdrawal is acre-feet.
- If a voluntary agreement is within a critical groundwater area or subarea where a permissible total withdrawal has been set by rule, the Department must use the PTW as the primary criterion for evaluation when considering whether to approve the voluntary agreement.

#### TARGET FOR VOLUNTARY REDUCTION (TVR)

“Target for Voluntary Reduction” or “TVR” means the total amount of groundwater that the Department determines should be withdrawn from an area on an annual basis.

- The unit of measurement for the target for voluntary reduction is acre-feet.
- If a voluntary agreement is within a critical groundwater area or subarea where a target for voluntary reduction (TVR) has been set, then the Department must use the TVR as the primary criterion for evaluation when considering whether to approve the voluntary agreement.

If a voluntary agreement is within an area or subarea where no permissible total withdrawal or target for voluntary reduction has been set, the Department may set a target for voluntary reduction, based on the best available evidence, for the purpose of determining whether to approve the voluntary agreement.

#### AGREED WATER USE LIMIT

The “Agreed Water Use Limit” is the maximum total volume of water that the parties agree can be pumped annually under the agreement. A voluntary agreement must specify an agreed water use limit and the total water use by all parties may not exceed this value.

Water use reductions may be implemented over a period of years by reducing the agreed water use limit each year until the PTW or TVR is met. The schedule for water use reductions must be specified in the voluntary agreement and should demonstrate a commitment to achieving stable water levels within a reasonable timeframe.

#### RATE AND DUTY

Notwithstanding this provision, the Director may determine, pursuant to ORS 537.735(3)(d), that a higher rate would result in more efficient water use. However, based on historical precedent and convention, a rate in excess of 1/60<sup>th</sup> cubic foot per second per acre would not be considered. The use of a higher rate shall be discontinued whenever the Department determines, based on a valid call, that regulation of a groundwater well is necessary to satisfy a senior water right.

#### OVERUSE

“Overuse” means use above the volume or rate of the approved voluntary agreement.

Overuse is a basis for a finding that the parties are not substantially complying with the agreement. The Department may recommend termination of the agreement consistent with [“Agreement Termination” (a)].

At no time will under use result in an increase to the agreed water use limit.

## USE FROM UNAUTHORIZED WELLS

Parties to a voluntary agreement may only withdraw water from wells listed as authorized points of appropriation (POA) on water rights participating in the voluntary agreement. Withdrawal of water from any other well by any party may be a basis for a finding that the parties are not substantially complying with the agreement. The Department may recommend termination of the agreement consistent with [“Agreement Termination” (a)].

### **Duration**

The agreement will include the period of time over which groundwater use will be reduced.

- (1) If a voluntary agreement is within a critical groundwater area or subarea where a permissible total withdrawal has been set by rule, voluntary water use reductions to match the PTW should be implemented within a reasonable timeframe.
- (2) If a voluntary agreement is within a critical groundwater area or subarea where a target for voluntary reduction has been set, voluntary water use reductions to match the TVR should be implemented within a reasonable timeframe.
- (3) If a voluntary agreement is within an area or subarea the Department has set a target for voluntary reduction, the period of time for voluntary reduction to match the TVR cannot exceed the duration of the agreement.

### **Reporting and Monitoring**

#### ANNUAL STATEMENT OF PLACE OF USE

No later than January 5<sup>th</sup> of each year, the parties to the agreement must provide the Department with:

- (1) a map depicting lands subject to irrigation during the upcoming irrigation season. The total number of acres, when multiplied by the approved duty, may not exceed the annual agreed water use limit.
- (2) a list of every well to be pumped during the irrigation season;
- (3) contact information, including telephone and email address, for owners of every well to be pumped during the irrigation season.

Failure to provide an annual statement of place of use in a timely manner may be a basis for a finding that the parties are not substantially complying with the agreement. The Department may recommend termination of the agreement consistent with [“Agreement Termination” (a)].

#### MONITORING

- (1) All parties to the agreement must maintain functional totalizing flow meters of a type approved by the Department and must report water use to the Department monthly.
- (2) Any agreement recommended by the Department to the Commission for approval must include an acknowledgment that Department staff may, with reasonable notice, enter the

property of a party for the purposes of water level measurement, collecting flow meter readings, and ensuring that the flow meters are properly functioning. Failure to maintain functional flow meters or provide reasonable access is a basis for termination of the agreement [“Agreement Termination” (a)].

(3) Prior to the Department recommending a voluntary agreement for approval to the Commission, the watermaster must visit each participating landowner’s property to verify wells authorized for use under the voluntary agreement and the existence and functioning of totalizing flow meters.

### **Agreement Modification Prior to Commission Approval**

This document provides the minimum requirements for the Department to recommend a voluntary agreement be approved by the Commission. The Commission may require additional agreement terms prior to approval if the Commission determines that the terms are reasonably necessary to ensure that the goals of the agreement will be achieved. The Commission also may delegate its authority to require and/or approve additional agreement terms prior to voluntary agreement approval to the Department.

### **Agreement Amendment After Commission Approval**

The Commission has the authority to approve or reject amendments to approved voluntary agreements. The Commission also may delegate this authority to the Department.

#### **CHANGED CONDITIONS**

Voluntary agreements may be subject to amendment if the Commission (or Department if authority has been delegated) determines changed conditions have made the continuance of the agreement a detriment to the public welfare, safety and health. The parties then may agree to amend the agreement to the satisfaction of the Commission (or Department if authority has been delegated) as an alternative to termination [“Agreement Termination” (b)].

#### **ADDITIONAL PARTIES**

Voluntary agreements may be amended to add parties to the agreement. Additional holders of water rights of record within the subarea or area of an existing voluntary agreement may join the voluntary agreement. New parties must comply with all provisions of the voluntary agreement. In addition:

- (1) A prospective party must notify the Department and the existing parties to the agreement of their intent to join the agreement by December 31 prior to the year in which they wish to join.
- (2) The watermaster must visit the prospective party’s agricultural operation to verify wells authorized for use under the voluntary agreement and the existence and functioning of totalizing flow meters.
- (3) All existing parties to the agreement and the Commission (or Department if authority has been delegated) must consent to the addition of any new party.
- (4) The Department will adjust the PTW or TVR as needed to reflect the updated participation.

The portion of the PTW available to the voluntary agreement will be the total amount of water the participants are collectively entitled to. Changes to the total number of participants in the agreement may change the total amount of water the voluntary agreement is entitled to.

#### **PARTY TERMINATION**

With approval of the Commission (or Department if authority has been delegated), voluntary agreements may be amended to remove parties who request removal as long as the minimum participation level remains intact. Any party terminating their involvement in the agreement will become subject to any existing groundwater control measures pertaining to the geographic location of their water right.

The Department will adjust the PTW or TVR as needed to reflect the updated participation. The portion of the PTW available to the voluntary agreement will be the total amount of water the participants are collectively entitled to. Changes to the total number of participants in the agreement may change the total amount of water the voluntary agreement is entitled to.

#### **WATER RIGHT TRANSACTIONS**

Voluntary agreements must be amended and approved by the Commission (or Department if authority has been delegated) and all parties to the agreement if any water right subject to the agreement is modified by a water right transaction in a way that changes the amount of water available to the agreement or changes the places of use subject to the agreement. Such transactions include, but are not limited to, changes to the place of use, changes to the points of appropriation, or splitting of a right. All parties to the agreement must be notified of the need to amend the agreement.

#### **Agreement Approval**

Any agreement that meets the requirements of this document, may be recommended by the Department to the Commission for approval. If the Commission has delegated its approval authority to the Department, then any agreement that meets the requirements of this document may be approved by the Department.

#### **Agreement Termination**

Any agreement approved by the Commission may be terminated by the lapse of time as provided in the agreement, by consent of all parties to the agreement, or by the Commission if the Commission finds, after investigation and a public hearing upon at least 30-days' notice, that:

- (a) The agreement is not being substantially complied with by the parties thereto or
- (b) Changed conditions have made the continuance of the agreement a detriment to the public welfare, safety and health or contrary to the intent, purposes and requirements of the Ground Water Act of 1955.

The Department also may recommend the Commission consider termination of an approved agreement based on (a) or (b) above. If the Commission has delegated its termination authority to

the Department, then the Department may consider termination of an approved agreement based on (a) or (b) above.

The Commission's termination of an approved voluntary agreement is an order in an other than contested case.

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