WaterWatch of Oregon
Protecting Natural Flows in Oregon Rivers

November 2, 2026

VIA EMAIL

Kelly Meinz, EIT
Water Policy Analyst
725 Summer St NE Suite A
Salem, OR 97301
Email: kelly.a.meinz@water.oregon.gov

Re: Exempt Use Rules – 10/22/26 Drafts and 10/27/26 Meeting

Dear Kelly:

Thank you again for the opportunity to serve on the rules advisory committee (RAC) for the exempt use rulemaking.

Along with WaterWatch's prior oral and written comments, please consider the following further comments from WaterWatch regarding the October 22, 2026, draft rules, and discussions during the October 27, 2026, RAC meeting.[1]

General Comments

1. Appurtenancy. The rules should expressly address, for each exempt use, or for exempt uses generally, the extent to which water appropriated under an exemption needs to be used where it is appropriated. The current drafts do that for irrigation of lawns and commercial and non-commercial gardens (requiring the water to be used "on the lands from which [it] is appropriated but leave the question open as to other exempt uses. Allowing other exempt users to sell the water they appropriate for any use at any location – which seems to be the current Department policy – creates too much potential for abuse and exploitation. A major commercial/industrial water user – a data center, for example – could contract with numerous small exempt well owners and avoid Oregon's water use permitting system.[2] That cannot be what the legislature intended under the exempt use

[1] For convenience, these comments also repeat some earlier comments that have not been fully addressed.

[2] According to the Oregon Water Policy and Innovation Service report (2026), the Facebook data center in Prineville uses about 200,000 gallons of water per day. A user that size could meet its water needs with 40 exempt commercial wells selling water to it.

statutes. If the Department believes otherwise, it should at least make that clear in its rules for the sake of transparency.

2. Storage. WaterWatch agrees with the agency's conclusion that the statutory exemptions for various water uses do not authorize water storage. Storage is not a "use" of water. Several RAC members spoke to the desirability of storing water appropriated under an exemption, or to the practical need for it, but the rules cannot authorize what the statutes do not, even if some people believe it's a good idea. If the Department nevertheless allows storage of water appropriated under an exemption, WaterWatch supports the Department's proposal to limit the storage to the one-day limit of the exemption. The Department should also limit the size of the storage container to the same amount to help ensure compliance. In no event should the rules allow storage in a pond or reservoir. As noted in our prior comments, ponds and reservoirs create significant environmental impacts that need to be addressed in the permitting system.

3. Measurement and Reporting of Water Use. The rules should make at least some movement toward requiring measurement and reporting of exempt water uses. As noted in prior comments, the Department has authority to do this under ORS 537.545(4). Measurement and reporting are essential to ensuring compliance with the limits on exempt use and to adequately informing the Department and the public on the extent of exempt use and its impacts. To ease whatever hardships that may impose, the Department could explore a phased approach and/or cost-share programs.

4. Reporting of Location, Purpose and Character of Use. ORS 537.545(4) gives the Department broad authority to require reporting of water use under exemptions. The Department should use that authority, and this rulemaking, to gather detailed information about the nature and extent of exempt use. In particular, the Department should require reporting on the location, general purpose and specific uses of water under exemptions where it does not already have that information, particularly in the case of older exempt wells. Better information on the nature and extent of exempt use will lead to better management of exempt uses as water becomes increasingly scarce.

Specific Comments

Division 340

1. 690-340-0010(1)(b)(A). For reasons including those discussed in general comment 1 above, WaterWatch supports the proposed changes to make clear that water appropriated under the exemption for lawns and gardens may be used only "on the lands from which [it] is appropriated." WaterWatch also supports the language limiting the total area that can be irrigated in a single year to one half acre.

2. 690-340-0010(1)(b)(B). WaterWatch supports limiting domestic use for a single residence to an amount that could reasonably be put to beneficial use without waste. However, the

amount proposed – 4,000 gallons per day – seem overly generous relative to the amount of water used for most single-family residences in Oregon. WaterWatch agrees the Department has authority to set a limit below 15,000 gallons per day as a "bright line" rule to ensure beneficial use without waste.

3. 690-340-0010(1)(d). WaterWatch supports limiting combined use under the commercial/industrial exemption and the commercial garden exemption to no more than 5,000 gallons per day.

4. 690-340-0010(1)(d). Consistent with general comments, the rules should expressly limit the commercial/industrial exemption to beneficial use on the lands where the water is appropriated. WaterWatch believes that was the intent of the exemption, not appropriation for sale to end users for any use at any location. Rules on the commercial/industrial exemption also should clarify what is not considered commercial use, including use for mining, recreation and/or stockwatering, which are defined as separate categories of use. *See, e.g.*, OAR 690-300-0010 and OAR 690-500-0020. Exclusion of stockwatering is important even though it has its own exemption because the exemption currently is limited to 12,000 gallons per day for some confined animal feeding operations, and may be in the future, such that users subject to the limit should not be able to "stack" that exemption limit and the limit for commercial/industrial use and thereby use 17,000 gallons per day for stockwatering without a permit.

5. 690-340-0010(5). WaterWatch appreciates the change from "Commission" to "Department" to make clear that the Department has delegated authority to require measurement, reporting and other information. This subsection also should be revised to delete the words "estimates of" before "the quantity of water used" to make clear the Department may require precise measurement and reporting of water use, not just "estimates of" water use.

Division 300

6. 690-300-0010(6). For the reasons given in specific comment 4, "Commercial Water Use" should be defined to exclude separately defined water uses that some may argue are "commercial," including uses for mining, recreation (which may be part of a commercial operation) and/or stockwatering. Doing that is particularly important because the Department proposes to specifically exclude certain irrigation use, possibly implying that no other uses that could be called "commercial" are excluded.

7. 690-300-0010(15). WaterWatch agrees with comments at the last RAC meeting that defining specific "related accessory uses" for inclusion in "domestic water use" may be fraught with peril. For example, is any "swimming pool" included? Also, for example, what is a "small" "water feature." Including specific uses without more definition might inadvertently authorize uses that are not really "domestic" uses.

8. 690-300-0010(18). WaterWatch supports express exclusion of storage from the definition of "Emergency Fire-fighting Use." As discussed above, an exemption for a "use" is not an exemption from the requirement to obtain a permit to store water.

9. 690-300-0010(29). For reasons given in specific comment 4, "Industrial Water Use" should be defined to exclude separately defined water uses that some may argue are "industrial" but are defined as distinct uses, including use for mining and/or stockwatering. Doing that is particularly important because current proposals would change the definition of "Industrial Water Use" to specifically exclude certain irrigation use, possibly implying that no other uses that could be called "industrial" are excluded.

Thank you for considering these further comments.

Sincerely,

Brian Posewitz

Brian Posewitz
Staff Attorney

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October 12, 2026

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Oregon Water Resources Department
725 Summer St. NE, Salem, OR 97301
Kelly.a.meinz@water.oregon.gov

Re: 2026 Exempt Uses RAC; September 28th, 2026 RAC Meeting Comments

To whom it may concern,

Central Oregon LandWatch ("LandWatch") provides these initial comments in writing following the September 28, 2026 Exempt Uses RAC meeting.

LandWatch is an Oregon non-profit, public interest organization of about 1000 members. Its offices are located in Bend, Oregon. LandWatch's mission is to defend and plan for Central Oregon's livable future, and it has advocated for the preservation of natural resources in Central Oregon for over 30 years.

In addition to verbal comments and questions during the September 28th meeting, please accept these comments on the rule divisions covered in the first meeting.

I. OAR 340-0010(1)

There were substantive questions raised during the first RAC meeting about the legislative intent behind the proposed changes—including questions about the total daily limits for exempt uses—and appurtenancy. Following OWRD's response to those questions, LandWatch will submit additional comments on those topics.

LandWatch strongly supports making it clear in rule that exempt uses cannot be "stacked" to allow for daily maximum amounts that exceed any one exempt use daily limit.

II. OAR 340-0010(6)

LandWatch strongly supports the language proposed to clarify that beneficial use without waste applies to exempt uses.

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III. OAR 340-0010(9)

LandWatch would like more clarity from the Department on whether water storage generally is allowed under an exempt use.

IV. OAR 690-340-0010(5)

To improve rule clarity, LandWatch recommends changing the language in this section to make clear that the "Department" has the authority to require other information from the landowner regarding an exempt use. While we appreciate OWRD's explanation during the RAC meeting that the Commission has delegated this authority to the Department, the rules should make it clear to the public that the Department has this authority (see proposed rule language below).

Further, during the first RAC meeting there was a lot of discussion about the importance of measurement in ensuring compliance with daily limits and for informing a broader understanding about water use within a geographic area. Measurement and reporting are essential to good water management, and ensuring this data collection occurs should be a top priority for the Department in any effort to modernize and adapt the state's water management framework. Further, OWRD already has the authority to require measurement and reporting by exempt wells (ORS 537.545(4)).

LandWatch strongly supports further consideration of rule changes that would help the Department collect data on exempt uses. One option is to revise the rule language in this subsection to require landowners to provide specific information about exempt uses, as outlined in the proposed language below.

> "The ~~Commission may~~ Department shall require other information from the landowner regarding an exempt use including, but not limited to, estimates of the quantity of water used; diversion location; place of use; or photographs showing the scale of the project and the immediate area above, below and surrounding a reservoir."

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Thank you for considering these comments and please do not hesitate to reach out if you have any questions.

Sincerely,



Jeremy Austin
Wild Lands & Water Program Director
Central Oregon LandWatch
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Bend, OR 97703

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November 2, 2026

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Re: 2026 Exempt Uses RAC; October 27th, 2026 RAC Meeting Comments

To whom it may concern,

Central Oregon LandWatch ("LandWatch") provides these initial comments in writing following the October 27, 2026, Exempt Uses RAC meeting.

LandWatch is an Oregon non-profit, public interest organization of about 1000 members. Its offices are located in Bend, Oregon. LandWatch's mission is to defend and plan for Central Oregon's livable future, and it has advocated for the preservation of natural resources in Central Oregon for the last 40 years.

In addition to verbal comments and questions during the October 28th meeting, and written comments provided on October 7th, please accept these comments on the rule divisions covered in the second RAC meeting.

General Comments

I. General Comments on Measurement

LandWatch appreciates the RAC discussion related to the need for measurement and reporting of exempt uses. During the last meeting, the Department identified legitimate challenges to collecting exempt use data. We appreciate and understand the challenges discussed, including those that would emerge should new rules require measurement for all existing exempt wells. However, this rulemaking effort provides an opportunity to explore and discuss stepwise approaches to improving the general understanding of exempt water use, beginning the important process of scaling up data collection to better inform water management decisions.

Several ideas have been floated to that end, including requiring measurement and reporting when a home sells, when lands are partitioned, when new exempt wells are put in, or where new exempt uses are "stacked." All of these have some merit and warrant further discussion. As such,

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we recommend the Department provide some time in the final RAC meeting to explore what approaches to phasing in measurement could be feasible as part of this rulemaking effort.

Division 340

I. OAR 340-0010(1)(c)

LandWatch recommends the Department adopt 1,000 gallons as the peak daily use for any single residence. This is more than enough water to meet indoor domestic uses without waste.

In 2018, a single family in Bend on average used ~330 gallons of water per day.[1] The City of Bend states that 60% of household water use is outdoor use (i.e. irrigation).[2] Using those numbers, the average single family in Bend uses ~130 gallons of water indoors each day (this assumes that 60% of the average family's water use is outdoor). 1,000 gallons a day would allow for exempt domestic uses up to ~8 times the average indoor water use of a single family in Bend.

Importantly, the rules as drafted would allow for a single domestic use to be used in combination with outdoor watering of a lawn, non-commercial, or commercial garden of up to one half acre with up to 3,000 gallons a day. In other words, a rural household with an exempt well could have up to 4,000 gallons of water a day for indoor and outdoor uses. This would allow for around ~12 times the average total daily water use of a single family in Bend.

Further, 5,000 gallons is the peak daily limit for an industrial or commercial water use (340-0100(1)(d)) in combination with a half-acre commercial garden (340-0100(1)(b)). Does a single domestic residence require more water for indoor uses than industrial or commercial water uses?

The RAC also discussed the potential to address a peak daily use for a single residence in a different subsection, with language specifying that this limit comes from the Departments authority to regulate waste. If the Department determines that defining a peak daily limit is better suited under a different subsection, we similarly recommended that rule language include 1,000 gallons per day as the peak daily use for any single residence.

[1] City of Bend. 2021. Integrated Water System Master Plan. (See Table 2-1 and 2-2).
[2] https://bendoregon.gov/departments/public-works/water-services/education-tours/educational-program-our-water-system/

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II. OAR 340-0010(9)

LandWatch generally supports the proposed draft language in this subsection, including specifying that water may be "retained in a cistern or a tank" as opposed to a pond, and that "any amount in excess of these limits is unlawful use of water."

Division 300

I. OAR 300-0010(6)

LandWatch recommends that the Department add a definition of "landscape maintenance." This will help provide the public with a clear understanding of the difference between irrigation and landscape maintenance.

II. OAR 300-0010(15)

LandWatch generally agrees with comments made during the RAC meeting about including some examples of accessory uses, while also recognizing that the list is not comprehensive. However, we recommend removing a "small water landscape feature" unless the Department can specify the quantity that defines "small.". As written, it's too vague and may give support to water landscape features of any size. We also recommend removing "fire protection" since emergency fire-fighting use is covered under subsection (18).

As such, LandWatch recommends the Department consider the following language in this subsection:

> "Domestic Water Use" means the use of water for human consumption, household purposes, domestic animal consumption that is ancillary to residential use of the property, or related accessory uses. Related accessory uses include but are not limited to: washing personal vehicles and other personal equipment, and filling a swimming pool once per year. ~~a small water landscape feature,~~ ~~and fire protection~~

III. OAR 300-0010(29)

Same comments as OAR 300-0010(6), above.

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Conclusion

Thank you for considering these comments and please do not hesitate to reach out if you have any questions.

Sincerely,



Jeremy Austin
Wild Lands & Water Program Director
Central Oregon LandWatch
2843 NW Lolo Dr St. 200
Bend, OR 97703

Outlook

Addressing Tribal Nations in associated rulemaking documents

From Keri Handaly [redacted]
Date Wed 10/28/2026 7:08 PM
To MEINZ Kelly A * WRD <kelly.a.meinz@water.oregon.gov>
Cc LANE Mindy J * WRD <mindy.j.lane@water.oregon.gov>; HARTT Laura A * WRD <laura.a.hartt@water.oregon.gov>

Dear Kelly,

I am submitting my thoughts expressed during the RAC #2 meeting in more detail to aid the finalization of the Fiscal Impact and Racial Equity documents.

As I noted in the meeting, I have most frequently seen these documents merged and sometimes include environmental justice. Frequently, the Federally recognized Oregon Tribes are referenced in these documents in a manner that diminishes their sovereignty and confuses the reader in a manner that conflates Tribal Nations when discussing vulnerable populations who comprise categories such as minority races, low-income households, persons living with disabilities, etc. Of course, this is confusing given that any Indigenous person could be one or more of these categories and may or may not be a member (enrolled) in an Oregon Federally recognized Tribe. As such, it would be helpful and preferred to place references to Tribal Nations in their own section.

Thus, I feel there is an ongoing need for these types of rulemaking documents to include **a separate section headed as "Tribal Nations"** and contain any and all facts related to OWRD's notice of an invitation for consultation on the issue. As a matter of formality, it would be nice to include an ORS reference such as: https://oregon.public.law/statutes/ors_182.164 and https://oregon.public.law/rules/oar_690-051-0060 There are consultation policies for State agencies on file with LCIS, but I did not see one for OWRD, if there is one, that could also be cited. By providing a separate section to discuss addressing Tribal Nations, you are recognizing Tribal sovereignty as a political and governmental organization rather than including them in other sections that are less appropriate.

I also recommend a statement such as, If a Tribal Nation elects to serve on a RAC, this does not diminish or replace Tribal rights to a government to government consultation, which may be requested at any time.
Other information that could be included in this section (depending on the rulemaking or project) include specific Tribal history and connections to the area, fiscal impacts to the Tribe, and potential benefits to the Tribe from the rulemaking. Or, for example, in a statement of need where future water availability is in question, but is a reserved right per various Treaties between the US and Tribal Nations, as well as the instream water rights necessary to sustain Tribal First Foods such as salmon, steelhead, lamprey and eulachon.

You might include a statement such as: The intent of this rulemaking is to clarify rules such that groundwater well owners can retain non-permitted domestic uses in a manner that does not waste or overburden the groundwater supply, while also providing enforceability, if needed. As such, no fiscal or negative impacts are anticipated to Tribal Nations.

Please let me know if you have any questions or would like to discuss further.

Sincerely,
Keri Morin Handaly, Environmental Policy Analyst
Office of Ceded Lands

Outlook

RE: RAC Meeting Number 2 Meeting Material and NEW Zoom Link

From Leah Cogan [redacted]
Date Mon 11/2/2026 4:13 PM
To MEINZ Kelly A * WRD <Kelly.A.MEINZ@water.oregon.gov>

Good afternoon Kelly,

I appreciate the opportunity to participate in the Exempt Use rulemaking on behalf of the Oregon Water Utility Council (OWUC) to share perspectives related to municipal and quasi-municipal water suppliers, and I would like to clarify some of the points I raised at the last meeting and why we believe the addition of OAR 690-340-0010(9) could lead to some unintended negative consequences. I hope we will continue discussing this at the next meeting as well.

Although only a few OWUC members use groundwater under an exemption, several members provide technical assistance and maintenance support to small water systems that operate under exemptions. Communications with these small group domestic systems indicate that some have water tanks or cisterns that hold a volume in excess of their maximum daily demands or the daily use limits, and this infrastructure is often important for maintaining safe system pressures. (These group domestic users do not pump more than the statutory limit of groundwater in day.) However, even if a system does not use more than the statutory daily exemption limit, it is often necessary to have a larger tank to avoid drawing the tank down below a level where water pressures would drop, triggering a boil water notice. As other RAC members mentioned, systems often also include storage for fire flows, particularly if instantaneous pumping rates are low, which may be a separate issue to be addressed.

The design of the system and the inclusion of a tank or cistern is an engineering decision that has not previously been regulated by OWRD, but rather is subject to Oregon Health Authority (OHA) regulations for drinking water safety. If these same systems held groundwater rights, there would be no OWRD restriction on the size of the tanks that their engineers determine are necessary for public health. I appreciate OWRD staff's assurances that the proposed addition of OAR 690-340-0010(9) is not an indication that the agency is planning to begin imposing limits on municipal and quasi-municipal tank storage volumes as part of a future "bulge in the system" rulemaking. As noted at the RAC meeting, these structures are not classified as "storage" requiring a separate storage water right. However, by treating water tanks as "storage" that needs to be restricted and regulated, the proposed new rule essentially creates a new definition of storage that raises concerns for public water suppliers about future reinterpretations that would restrict the design of their water infrastructure.

Statute allows the use of groundwater for certain purposes without requiring a water right. From an engineering perspective, this requires construction of a water system capable of supplying groundwater for the authorized purpose, which may include the installation of a water tank or cistern sized appropriately for the system. Setting new limits on tank volumes in rule that are not found in statute and are not consistent with engineering recommendations is likely to restrict the ability of some small group domestic systems to continue providing clean and safe drinking water to their communities, frustrating the purpose of the exemption. Many of the proposed changes in this rulemaking are related to aligning with changes in statute, while others are related to improving clarity and consistency in the rules. The proposed addition of OAR 690-340-0010(9) does not implement any new legislation and creates less consistency in the treatment of temporary system storage for exempt and non-exempt water users. We remain concerned about unintended impacts on public health and drinking water safety for small

systems that can least afford to make costly infrastructure changes to comply with the new rule if adopted.

OWRD conducted extensive and robust public outreach and engagement around the proposed exempt uses, water distribution, and enforcement rulemakings and did a great job of compiling a summary of the comments received and describing the path forward. The idea of limiting water tank volumes was not raised at any of the open houses or presented in any of the supporting materials, so the issues I raised at the RAC meeting may have come as a surprise. Because the proposed addition was not discussed during the scoping for this rulemaking, there may be other unintended consequences beyond the issues that I have identified, and the right people may not be in the room to raise those concerns. (Not an OWUC issue, but as I noted in the meeting, nearly two dozen State Parks also have water systems operating under exemptions that may be affected.) Therefore, we strongly encourage OWRD to reach out to OHA about impacts to small systems, to conduct more scoping with affected systems, and to gather more information about engineering constraints before moving forward on rules related to retaining water in tanks and cisterns. In the meantime, we recommend striking OAR 690-340-0010(9) from the proposed rules.

I look forward to talking further at the next meeting.

Thank you,

Leah Cogan
Water Resources Analyst
[redacted]

From: MEINZ Kelly A * WRD <Kelly.A.MEINZ@water.oregon.gov>
Sent: Tuesday, October 20, 2026 4:42 PM
Subject: RAC Meeting Number 2 Meeting Material and NEW Zoom Link

Good Afternoon, RAC members,

Our next meeting will be on October 27, 2026, from 9 AM to 12 PM. This meeting will be hybrid, with an in-person option at our Salem offices. **If you plan to attend in person, please let me know by the end of the day Friday, October 23, 2026.**

We have changed the Zoom meeting to a webinar; please register again using this new link: https://us02web.zoom.us/webinar/register/WN_ckDvkQ8wTkmz3Ch36aV-2Q.

I will update the calendar invite with the new link.

RAC Meeting Materials
The documents attached to this email include:

1. Meeting Agenda
2. RAC Meeting Number 1 Summary
3. OAR 690-340-0010 Draft Rules RAC Number 2 Track Changes
4. OAR 690-340-0010 Draft Rules RAC Number 2 Clean
5. OAR 690-300-0010 Draft Rules RAC Number 2 Track Changes
6. OAR 690-300-0010 Draft Rules RAC Number 2 Clean
7. Draft Statement of Need
8. Draft Fiscal Impact Statement

9. Draft Racial Equity Statement

If you have any questions, please let me know.

Take care,

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Outlook

Exempt well storage

From Wade Flegel [redacted]
Date Mon 11/2/2026 12:10 PM
To FRITZ-OGREN Kim L * WRD <Kim.L.FRITZ-OGREN@water.oregon.gov>; MEINZ Kelly A * WRD <Kelly.A.MEINZ@water.oregon.gov>

Kim and Kelly,

I am submitting comments on the draft rules discussion page 4 item # 9 concerning water storage. In our discussion draft rules had set storage at 4000 gallons. In talking with our County Fire Department, for new construction of private residence outside of the fire protection district a minimum of 5000 gallons of storage is required.

Some also water livestock with the same exempt well as their residence and with power shut offs, which our area has multiple shut offs in the summer, the storage should be set at a size that can be justified by need. 10,000 gallons storage should not be unlawful.

Thank you for taking this into consideration,
Wade Flegel

Sent from my iPad

WATER LEAGUE

Engaging the public in water stewardship.

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Grants Pass, OR
97526

[redacted]

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November 2, 2026

Kelly Meinz, Water Policy Analyst
Kim Fritz-Ogren, Administrator, Field Services Division

Oregon Water Resources Department
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Salem, OR 97301-1271

Water League submits comments on the *Exempt Use of Water Rulemaking* process, following the October 28, 2026, RAC meeting.

As always, we appreciate the opportunity to share our thoughts.

Thank you,

Christopher Hall
Executive Director

Water League Comments on OWRD's Selective Appurtenancy Policy and Efforts to Promulgate This Policy in Rule

By Christopher Hall, Water League – November 2, 2026

Introduction

All water within the state from all sources of water supply belongs to the public.[1] The exempt use of Water means a person has the privilege or is at liberty to use water when they comply with the exempt use statutes.[2] Exempt use closely follows the 19th century customary appropriation of water, where a person would put water to use first, and then by doing so, claim an exclusive right to appropriate and use that specific amount of water at a specific place, if their seniority permitted. In 1909, when Oregon adopted its water code, it reversed this appropriation logic for large-scale water uses: a person first had to apply for a right to use water before they could put water to use. If Oregon permitted that application request, then the person could begin using the water; indeed, they had to prove beneficial use of the water along the terms of the water right permit to receive a permanent certificate, which would vest in the person in perpetuity.[3] Oregon only required applications, permitting, and certificating for large-scale water use requests. The state did not bother requiring the same for small-scale water uses, and so those minor uses came to be understood as being exempt from needing a water right permit, hence the term *exempt use of water*.

Little changed for small-scale water users when Oregon adopted its water code in 1909, and to this day, when a person wishes to put groundwater to use, they drill a well, with minor compliance requirements, and put the water to beneficial use. The very act of doing so

[1] Oregon Revised Statutes § 537.110 (2025).
[2] Oregon Revised Statutes §§ 537.141, 537.545 (2025).
[3] Joseph L. Sax, The Constitution, Property Rights and the Future of Water Law, Western Water Policy Project Discussion Series Paper No. 2, Boulder: Natural Resources Law Center, University of Colorado School of Law, 1990. (When we say "in perpetuity," we qualify it along the lines of how Sax discusses federal cases, which limit the extent of private property claims related to water rights, and are conditioned on a number of factors that the state may restrict to prevent impairing the public health, safety, and welfare, and ecosystems – without violating the constitutional taking clause.)

constitutes the right to appropriate that water.[4] Putting water to use before having the right to appropriate, or more precisely, putting water to use constituting the right to appropriate, stems from the Doctrine of Discovery, which permitted settlers to stake claims for land, mineral deposits, and water; take flora and fauna; and extirpate Indigenous people who were in the way. Through various doctrines and acts, the U.S. government authorized settlers, who moved out West, to lay claim to potentially valuable natural features they "discovered,"[5] and then trek to the nearest government office to register their claims. That is how much of the West got settled.

Exempt use of water is a more fundamental, if not archaic, legal custom than the modern water right permitting process. Were Oregon to change how the state interprets the appurtenancy laws, beginning with the implementation of little known policies, and then promulgating them as administrative rules related to exempt use, would be a good place to start to ensconce a new interpretation of the appurtenancy laws at the fundamental, proto-law level that is characterized by vestiges of how the West was settled. Based on recent comments by OWRD staff and their actions in the field managing exempt use of water, we surmise that OWRD is inadvertently undermining the appurtenancy laws, the effect of which will empower the privatization of water use management.

Water right transfers apply only to the modern water right certificated process. Oregon does not provide for a way to transfer exempt uses of water because exempt use authorizations are not a scarce asset (read: *economic scarcity*). However, were Oregon to evolve its governance and management related to water right transfers, it would best start by effecting appurtenancy changes regarding exempt use of water first, especially if it wanted to brace itself against significant challenges by pointing to an exempt use precedent. At this time, OWRD is pointing to a policy of selective application of the appurtenancy laws that it wants to harden related to the exempt use of water.

[4] Oregon Revised Statutes § 537.545(2) (2025).
[5] We place the term "discovered" in quotes to not forget that Indigenous peoples had been living in Oregon for longer than 18,000 years, that they were well aware of the lands, minerals, and waters, and their disinterest in exploiting, monetizing, and capitalizing on them the way Europeans did is not justification for claims of discovery. Furthermore, we note that Europeans determined that they had to extirpate the Indigenous peoples to stake their claims to their "discoveries" as they did to flora and fauna.

The following comments discuss the problem associated with using exempt domestic, commercial, and industrial uses of water to circumvent the law of appurtenancy. (When we use the term commercial in these comments, we also mean domestic and industrial uses.) We chose commercial use as the general term because that is the term OWRD most uses related to this topic.

As a point of order, we note as many before have said: we would have written shorter comments had we more time. The short RAC timeline, with set deadlines, compresses what would otherwise be a more fulsome airing of the effort to bring into light the selective appurtenancy policy that forms the basis of this rulemaking process. Water League looks forward to resolving our concerns in as much time as it takes to fully and openly air OWRD's selective appurtenancy policy.

Selective Appurtenancy: From Policy to Rulemaking

OWRD floated what at first appeared to be a trial balloon during the September 28, 2026, exempt use Rules Advisory Committee (RAC) meeting, selectively eroding the appurtenancy laws and construing the exempt commercial, industrial, and domestic uses of water as a means to justify bulk water sales off the premises to which the water is appurtenant.[6] As we stated during the September 28, 2026, RAC meeting, that was the first time we have heard of such a theory. Water truckers unlawfully using exempt use wells to fill up their tankers on private properties in southwest Oregon have always been understood as scofflaws, especially since the vast majority service water to the balance of unlawful cannabis grows that the state prohibited cities from servicing, when it enacted HB 4061 in 2022. We have since come to understand that instead of enforcing against these operators, OWRD has been implementing a policy on an ad hoc basis to

[6] Oregon Water Resources Department, "RAC 1: Exempt Use Rulemaking - Division 340 and 300," YouTube video, 2:59:28, posted October 3, 2026. (View: 00:53:12–00:55:04: OWRD conflates the type of water use with the premises by saying that appurtenancy refers not to the premises, but instead, to the type of use. In so doing, OWRD theorizes it can permit exempt domestic or commercial use water to be piped or hauled to another property, so long as the use stays the same use, which is a meaning that OWRD attributes to "appurtenant." 01:00:43–01:02:18: OWRD reframes appurtenancy as attaching to the purpose of use (not the premises), using bottled water, microbrewing, and winemaking to otherwise describe bulk water as a consumer product and thereby justify it leaving the premises to which the water is otherwise appurtenant. 01:46:35–01:48:31: OWRD treats bulk water hauling as an exempt commercial use, reasoning that loading the truck is the on-premises commercial activity, implying where and what the bulk water is actually used for is made irrelevant by the act of loading the truck.)

allow persons on private properties to use their exempt use wells to sell bulk water. The results of one such example are quite lamentable and demonstrate the chaos of OWRD's ad hoc internal policy that contravenes ORS 537.705 *Ground water appurtenant; change in use, place of use or point of appropriation*.[7]

We take this moment, before delving into a discussion on appurtenancy and critiquing what we know about OWRD's selective appurtenancy policy, to discuss the bigger picture problem of how we found out about the policy and why OWRD may have a problem of not openly displaying its policies to the public. When we say "what we know about," we mean that we would be astounded to be told it was our fault for not knowing all the details, as if there were an agency webpage, similar to the ones required by the Governor's order, to be more forthcoming about rulemaking.[8] The Governor's letter to state agencies on rulemaking concludes, "Thank you for your ongoing efforts to meet the needs of Oregonians through transparent customer service." While we understand that state agency policies are not as high an order as agencies' rules, and therefore, transparency requirements for policies are not as strict as those for rules, we believe that a lack of transparency on policies can lead to grave concerns with regard to certain topics, especially when policies on such topics are only meted out to the extent that agencies must balance unwanted public awareness with protecting the policies against such awareness. OWRD's selective appurtenancy policy has the air of such an entrenched policy, the full facts, history, purpose, and long-term policy goals of which are minimized to prevent destabilizing the policy were a full public airing over a prolonged period to occur. Again, we note the different standard Oregon holds for rules and rulemaking, which the law requires prolonged and full transparency, and for policies, which do not.

Some policies become so formulated and mature that agencies have no other option but to promulgate them as rules – whether they want to or not. Such policies can languish for years

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[7] Caleb Kinser and Jessica Kinser, "Timeline and Witness Statement: Commercial Water Hauling from Exempt Domestic Wells in Jackson County, Oregon, including OWRD Interference Complaint Memorandum," October 25, 2026. (Water League learned of the accounts alleged in this statement on October 21, 2026.)

[8] Tina Kotek, Governor, "Governor's Rulemaking Expectation," letter to Agency Leaders, February 19, 2025; see also: State of Oregon, Department of Administrative Services, Governor's Rulemaking Expectation - Implementation Guidance, memorandum from Berri Leslie, State Chief Operating Officer, to Agency Rulemaking Coordinators, March 21, 2025; see also: State of Oregon, Department of Administrative Services, Rulemaking Expectations – Resources (Salem, OR: Department of Administrative Services, 2025).

under the radar before agencies open up rules and give the policies the sunlight that the governor's letter on rulemaking discusses. The politics around when a policy becomes a rule sometimes result in agencies using euphemisms and vague terms to omit the possibility of falling under the definition of a rule, when they do not want certain policies promulgated as rules.[9] The definition of a rule is:

> (9) "Rule" means any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency.[10]

OWRD's selective appurtenancy policy related to exempt use of water undermines one of the most fundamental doctrines in the West, much less Oregon water law, so we are not surprised that OWRD has not been more forthcoming about that policy until now, when rulemaking on exempt uses has been opened. On this matter, we note that rules can go two ways: agencies can include language that ensconces policies into promulgated rules, or they can exclude language that protects policies from being diminished by such rules. OWRD's exempt use of water rulemaking uses both approaches: staff recommend selectively applying appurtenancy requirements on irrigation and reuse of water, but reject the same for domestic, commercial, and industrial uses of water.

For example, in the most recent revision of Division 340, in which it says upfront that it lists only certain exemptions whose scope, attributes, or requirements need clarification, OWRD retained a 1994 stockwater use type with no language other than the words "Stockwater use."[11] The stockwater use type clarifies nothing, and the silence on the topic of appurtenancy, in contrast to the irrigation water use type, which has an appurtenancy requirement, exemplifies how OWRD appears to be planning for future challenges to its selective appurtenancy policy on the basis that had the agency intended to apply the appurtenancy laws to the six other water use

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[9] Christopher Hall, "Water League Comments on the State's 2026 Guidance for Voluntary Agreements Among Groundwater Users from the Harney Basin Groundwater Reservoir," Water League, June 1, 2026.
[10] Ore. Rev. Stat. § 183.310(9) (2025).
[11] Oregon Water Resources Department, Draft Rules for Discussion: OWRD Exempt Use Rulemaking, Track Change Draft Rules for RAC Meeting #2, OAR 690-340-0010 (Salem, OR: Oregon Water Resources Department, October 27, 2026). [1]

types listed in ORS 537.545, then it would have done so. Water League rejects this political calculation – not in general, as silence is often justified in statutes, rules, and case law – but in this specific rulemaking situation where silence serves to undermine the appurtenancy laws.

Related to OWRD's statements in the September 28, 2026, RAC #1, and in response to OWRD's request for comments following that meeting, Water League suggested rule language in Division 340 to ensure consistent compliance with the appurtenancy law, ORS 537.705. Surprisingly, OWRD rejected the comment on the basis that "The suggested language would be a major policy change for domestic, stockwater and commercial/industrial exempt uses."[12] Water League's comment suggested reiterating appurtenancy language verbatim from ORS 540.510(1)(a) (also in ORS 537.705) and adding a new definition for the term *premises* to Division 300:

> We suggest clarifying the term appurtenant by revising 690-340-0010(1) to say: "(1) All water used in this state for any purpose shall remain appurtenant to the premises upon which it is used. As defined in OAR 690-300-0010(39), "Premises," as used in OAR chapter 690, division 340, means the property boundary within which the exempt use well is located or the contiguous tax lots for which a single well system supplies water for an exemption."[13]

Reiterating statutory language in rule verbatim, as the first part of our proposal does, is a common practice throughout OWRD's rules; second, Water League's proposed definition for *premises* reiterates existing language in Division 340-0010(1)(d), but applies that standard generally, across all water use types listed in ORS 537.545. If complying with such proposal "would be a major policy change," then OWRD's internal policy relating to selective application of the appurtenancy laws must unreasonably, if not substantially, contravene ORS 537.705 and ORS 540.510(1)(a). Furthermore, unwinding however many violations of those laws that OWRD has approved under its policy may be too much of a hole for the Field Services Division to get out of on its own.

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[12] Oregon Water Resources Department, 2025–26 Exempt Use Rulemaking Rules Advisory Committee Meeting Summary: September 28, 2026 (Salem: Oregon Water Resources Department, compiled October 20, 2026). [6]
[13] Water League, Water League Comments on Exempt Use of Water RAC #1, submitted by Christopher Hall (Grants Pass, OR: Water League, October 7, 2026). [8]

During the RAC #2 meeting, OWRD explained why they cannot afford to place the description of appurtenancy and the proposed definition of premises upfront in Division 340, saying [**emphasis added**]:

> **The concern with adding a broad general statement is that we would be creating a bit of a legal and practical conundrum** for instances where we know that, say, a domestic well has gone dry and therefore a neighbor is helping a neighbor out, and they're filling up a water truck and then sending it over to their, their neighbors. **And so generally, yes, appurtenancy applies to exempt uses, but the agency maintains some discretion for the sort of practical aspect.** Similarly, there are times for stock water purposes, and depending on where your cows are, you might, you know, from your well, need to fill up a tank and bring it to a trough for your stock. **And so having a very strict definition of *premises* may not actually be helpful.** And so for, for those reasons, while appurtenancy is a concept generally applies, like that need for some practical flexibility, how this is going...**this would create a major policy change. It's really *strict* in a way that I didn't feel was practical and helpful.**[14]

OWRD supplied two minor, if not sentimental, examples of needing to side-step the appurtenancy laws (neighborly help and livestock watering from a well to a trough), but did not engage on the much more serious problem of the unaccountable larger-scale domestic, commercial, and industrial bulk water trucking operations pumping off exempt use wells. We reject minimizing the unlawful scope of OWRD's selective appurtenancy policy, which favors commercial bulk water truck industry operations, by appealing to the need for slight "harmless" infractions. If OWRD wants to let neighbors supply water to neighbors in times of emergency, or ensure that ranchers can fill tanks in the back of their trucks, then they should propose legislation similar to ORS 540.510(3) (which explicitly carves out for municipal uses of water on nonappurtenant lands) and carve out those minor exceptions. Were such a law to be proposed, tailored specifically to minor domestic deliveries under 200 gallons and to ranchers filling their

[14] Oregon Water Resources Department, "RAC 2: Exempt Use Rulemaking, Division 340 and 300," video, October 27, 2026. [00:12:19 to 00:13:48]

livestock troughs, Water League would support it; however, were it to include a broader effort to undermine the appurtenancy laws as they apply to exempt uses, we would vigorously oppose it. Surely there is a bill in the 2027 session that could accommodate adding a minor revision permitting domestic deliveries under 200 GPD and ranchers filling their livestock troughs.

The definition of premises that Water League proposed, "the property boundary within which the exempt use well is located or the contiguous tax lots for which a single well system supplies water for an exemption," which we quoted above, means that the premises are the site where the well is located, whether that is one or more contiguous tax lots serviced by a single well system. This definition closely aligns with ORS 537.705, which states that "All water used in this state for any purpose shall remain appurtenant to the premises upon which it is used." To be clear, the statute does not mean that wherever water is used, it is appurtenant; nor does it mean that OWRD can exercise its discretion in contravention of the law in the same way that it can interpret its rules that it writes.[15] Notably, Water League is asking OWRD to *include* rule language to ensure conformance with ORS 537.705 and 540.510(1)(a), which is quite different from deliberately omitting rule language to protect agency flexibility in selectively contravening the statute.

Water League opposes all unlawful nonappurtenant uses of water,[16] especially those the Field Services Division has informally allowed, related to stacking the 15,000 GPD exempt domestic use and 5,000 GPD commercial/industrial uses.[17] OWRD ought to disclose the extent to which it has developed this policy that contravenes ORS 537.705, the extent of nonappurtenant water uses it has allowed, including their estimated number and locations, and produce all of the dated, written documents that pertain to the development and implementation of this policy, including the name by which OWRD refers to the policy.[18] Far from OWRD worrying about a major policy

[15] No agency can unreasonably misinterpret its own rules that it writes. Furthermore, legislators enacted HB 3569 in 2025 to invite bill sponsors to join RACs to protect against agencies from misconstruing statutes for which they write rules. Lastly, no agency can contravene statutes on the pretense of a policy interpretation.
[16] Note that Oregon provides for the use of water on lands to which a water right is not appurtenant in ORS 540.510(3). The law explicitly limits the carve out to municipalities and to uses of reclaimed water authorized by water rights. Oregon has no carve out for any exempt use of water, but if a provision were included in a 2027 bill to add a minor revision permitting domestic deliveries under 200 GPD and ranchers filling their livestock troughs, then we would support that effort.
[17] Kinser and Kinser, "Timeline and Witness Statement."
[18] This is a direct request for the OWRD Field Services Division to produce the records. Attempts to minimize or deny the request speaks for themselves.

change that it should not have attempted, the state should worry about the extent to which OWRD may have allowed egregious violations of the law, particularly as they apply to the exempt commercial, industrial, and domestic uses of water as a pretense to convey up to 20,000 GPD of water off the premises to which it is appurtenant.

Violating the Appurtenancy Laws By Trafficking in Exempt Use Authorizations

As noted earlier, persons cannot transfer exempt uses of water in the same way they can propose to transfer water right certificates, as provided by ORS 537.705 and ORS 540.505 to 540.589. An exemption is at first a liberty, and then, only after water has been lawfully appropriated, Oregon recognizes the appropriation is a right. OWRD proposes defining an exemption as the absence of needing a water right to authorize water use.[19] Oregon acknowledges that requiring water rights for more than 225,000 small volume uses is administratively impractical, given that as many domestic wells across the state account for only 1% of all water diversions.[20] Indeed, one might argue that what persons do with their exempt uses of water is of little concern relative to the vast majority of water use authorized by water right certificates. However, while the small volumes of water use associated with exempt uses of water do not reasonably require water right certificates, they do need controls,[21] which are well described in such statutes as ORS 537.141 *Uses of water not requiring water right application, permit or certificate; rules*, and 537.545 *Exempt uses; map; filing of use; fee; rules*, and in the existing administrative rules, such as OAR 690-300-0010 *Definitions*, and 690-340-0010 *Exempt Uses*.

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[19] Oregon Water Resources Department, Draft Rules for Discussion: OWRD Exempt Use Rulemaking, Track Change Draft Rules for RAC Meeting #2, defining "Exempt Use of Groundwater," OAR 690-300-0010(19) (Salem: Oregon Water Resources Department, October 27, 2026). [4] ("'Exempt Use of Groundwater' means a use of groundwater that is not required to have a registration, certificate of registration, application for a permit, permit, certificate of completion or ground water right certificate under ORS 537.505 to 537.795 and 537.992.")

[20] Pilz, D., Kruse S., Raucher R., Clements J., Gardner T., Odefey J., Madsen T., Purkey A., Sheridan C., McCoy A., Ehrens A., The Business Case for Investing in Water in Oregon. AMP Insights. (June 2023). [vi] (See: "FIGURE ES-2: WATER WITHDRAWALS BY SOURCE AND USE ACROSS OREGON.")

[21] Frank C. McColloch, "Progress Report on the Proposed Ground Water Code," May 24, 1954, p. 3, attached to Minutes of the Meeting of the Water Resources Committee, May 24–26, 1954, Water Resource Committee box set 2, PDF pp. 248, 250–56 (quoted language at PDF p. 252), Water League research accessed from Oregon State Archives, Salem, Oregon. (Mr. McColloch wrote: "Certain small wells are exempted from registration and application requirements but not from other controls." He was the Chair of the Water Resources Committee convened by HB 440, an act of the 1953 legislature to develop a statewide policy on water use and draft the 1955 Groundwater Act, both of which inform exempt uses. He and his official committee helped form the basis of the legislative intent.)

OWRD is currently revising these two rule divisions because impacts associated with exempt uses of water matter, in some ways more than others. While Water League supports restricting exempt use of water volumes,[22] we recognize that the big picture supports the very idea of exemptions. The big picture also shows why controls, associated with Oregon water law, greatly matter. The topic of these comments herein addresses the controls that would ensure the consistent application of the appurtenancy laws to exempt uses of water.

OWRD is allowing persons to traffic in the lease or sale of the state's exemption, which, according to ORS 537.705, they can exercise only on their own premises where the water is appurtenant. We note a difference between a transaction of water and a transaction of the state's exemption. The distinction arises from how an exempt use of water is a *liberty* that persons who own or control premises may exercise, where local laws permit, and by doing so constitute a right to appropriate. Exemptions are not scarce assets in the way water right certificates are scarce; as of yet, there is no limiting factor besides the need for an approved well and local land use permission to enjoy the exempt use of water. However, the state does limit the types of uses and the volumes of water that exempt use of water statutes and rules authorize, and those limits do create scarcity. Coupled with declining water availability and impaired water quality, from premises to premises, some exempt use of water authorizations may be more productive than others. As with water rights, Oregon's exempt use of water laws and rules do not guarantee access to water. Regardless of whether one has a low-performing well that supplies water for exempt uses, or if they cannot exercise an exemption for any reason, or if they want to import more water than their exemption allows, they do not have a right to others' exemptions located off their premises. The exemptions apply to persons who put water to use for an exempt purpose on the premises where that water is appurtenant.

[22] Water League spoke and wrote comments supporting a 1,000 GPD cap in OAR 690-340-0010(1)(c), which OWRD currently proposes as 4,000 GPD cap. Notably, there is debate about contravening the law by this rule revision: ORS 537.545(1)(d) states the maximum is 15,000 GPD for any "single or group domestic purpose," which is enough water for 75 three-bedroom apartments. We think that the law implies a range from "single" to "group," and we support the rules interpreting that range as a function of the beneficial use without waste. As we stated at the end of the RAC #2 meeting, we support RAC member, Sarah Liljefelt's comments [at 00:26:13] that OWRD could "define amounts of water that are kind of the default, before it's considered wasteful water use," and later noting [at 00:35:35] "that use of water exceeding 4,000 gallons per day would be a wasteful use of domestic water."

The only way to use another person's water right is to propose a water right transfer and acquire that right. However, one cannot *legally* acquire another person's exemption any more than they can acquire their liberty.[23] Furthermore, since the liberty to use water, as provided for in the statutes and rules governing the exempt use of water, hinges on practical limitations, such as owning/controlling land, water availability, and local land use laws, some persons cannot enjoy the liberty of an exemption if they cannot overcome those limitations. (Any person may lawfully access bulk water from municipalities, which Oregon provides for in ORS 540.510(3).)

Oregon puts strict limits on the exempt uses of water. But for the laws and rules that say persons may not use more water than they can beneficially use, there would be some excess of exempt use value left in the ground yet to be used/monetized for each premises that does not maximize the full water use duties by the end of each day. Another impossible hurdle to using/monetizing the excess water in the ground is the appurtenancy laws, which prohibit the use of water on premises where that water is not appurtenant. Together, the beneficial use and appurtenancy laws stop individual persons, over whom the state has no public health controls, from treating the excess exempt use duty as a commodity to sell to others for domestic, commercial, and industrial purposes. To be clear, a person may only use the amount of water that they can beneficially put to use on the premises where that water is appurtenant. OWRD's rejection of Water League's definition of premises suggests the agency believes that some water can be appurtenant wherever it is used.

Because the exempt use of water (liberty) is not literally transferable like a water right certificate, the bulk water trucking assumes the quality of a transfer of the daily unused exempt use "paper water." Contrary to OWRD's position (which we discuss later), when a person conveys water in bulk volumes, the use occurs at the premises where the water delivery terminates. According to OWRD, persons who have the ability to pump excess water beyond what they can put to beneficial use on their premises, to which the water is appurtenant, can market their exemption in the form of bulk water conveyances to others.

[23] We argue that the only way a person can acquire another person's exemption is by *illegal* means.

The simplest way to understand the concept of trafficking in the state's exempt use of water is this scenario:

> Person "A" has a productive well and wants to sell excess water from it that, in a 24-hour period, they cannot put to beneficial use on their own premises where that water is appurtenant. Person "B" has a poor well, or they want to use more water than the state's exemption offers, so they buy water from Person "A."[24] While it appears that Person "A" is trafficking in bulk water, they are, in fact, trafficking in a portion of the state's exemption that Person "A" could avail themselves of were they able to put the water to beneficial use on their own premises in a timely fashion. But, having no use for the groundwater on their premises, Person "A" uses conveyance methods (pipes or truck tankers) to provide Person "B" access to Person "A's" unused exemption. In doing so, Person "B" applies water that is appurtenant to Person "A's" premises.

We return to our discussion of how exemptions are not a transferable right but are an inherent liberty the state acknowledges as a right after the appropriation has been made: a groundwater use for a lawful exempt purpose constitutes a right to appropriate groundwater.[25] The very act of using the water constitutes the right, but only at the premises where the water is appurtenant: the foundational legal principle of appurtenancy states:

> "All ground water used in this state for any purpose shall remain appurtenant to the premises upon which it is used and no change in use or place of use of any ground water for any purpose may be made without compliance with a procedure as nearly as possible like that set forth in ORS 540.520 and 540.530."[26]

But since exempt uses are not material things like water right certificates, they cannot be transferred under the authority of ORS 537.705 or ORS 540.520 and 540.530.

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[24] OWRD would need to rely on complaints to police the overuse of water; even then, the ad hoc policy is lamentable.
[25] Oregon Revised Statutes § 537.545(2) (2025).
[26] Oregon Revised Statutes § 537.705 (2025).

ORS 537.705 continues, saying [**emphasis added**]:

> "However, **the owner of any ground water right** may, upon compliance with a procedure as nearly as possible like that set forth in ORS 540.520 and 540.530, change the use and place of use, the point of appropriation or the use theretofore made of the ground water in all cases without losing priority of the right theretofore established."[27]

When a person who holds a water right wants to transfer it, or a portion of its duty appurtenant to a premises, they must file an application with OWRD. Water right holders frequently transfer portions of their water rights; as for irrigation use, owners will send off some of the authorized rate/duty associated with a certain number of acres to other places. The law prohibits sending off portions of a person's right to appropriate water for an exempt purpose, as clearly evident in ORS 537.705, which provides no means for such an act. The superficial reason why Oregon does not provide for a lawful transfer of exemptions is that exempt use is not a scarce asset; everyone, in principle, is at liberty to use water for an exempt purpose, if they own/control land, and local land use laws permit. Sanctimonious claims that not everyone can exercise an exemption have nothing on those who wish they could be one of the 1% of Oregonians who hold water rights, which are an inelastic, scarce asset for the use of large amounts of the public's water.

Another difference between exempt uses and water right certificates is that the statutes generally account for exempt use duties in amounts per day (i.e., GPD); whereas water right certificates refer to seasonal or annual duties (i.e., for irrigation, acre-feet per acre). Because exempt uses reset every 24 hours, each duty has a shelf life of one day, and all unused portions of the exempt uses that a person could not put to beneficial use on their premises, where that water is appurtenant, are lost forever. While exemptions are not subject to forfeiture under ORS 540.610,[28] because the daily liberty to avail oneself of an exempt use of water cannot be alienated from a person the way a water right can be, exemptions are, nonetheless, true *use-it-or-lose-it* entitlements on a very tight 24-hour schedule. The exempt use statutes do not permit the accumulation of duties day after day; in this case, each person must use their exempt

[27] Oregon Revised Statutes § 537.705 (2025).
[28] Or. Rev. Stat. § 540.610 (2025), *Use as measure of water right; forfeiture for nonuse; confirmation of rights of municipalities*.

use authorizations every day, or lose them – for that day. Therefore, while an exempt use of water is a liberty acknowledged by the state, and to that extent, it is timeless, the exemption only lasts for 24 hours at a time, and any given exempt purpose duty ceases the instant it has been maximized, or the clock strikes twelve midnight. While a person who holds a water right certificate can choose to wait for an eternity to transfer portions of their water right, such as half the annual duty, to another POU, a person with an exempt use of water, were they to disregard the appurtenancy laws, would have at most the remaining time in a day, each day, to take such an action by issuing their exemption to others, where the water is not appurtenant.

One might ask: "What if a person drilled an approved well and just started selling water from it, near and far?" That is precisely the scenario OWRD's ad hoc policy allows, which we view as the daily transfer of that person's exemption, marketed, no less, by water trucks.[29] To be clear, this activity cannot be justified by OWRD's political act of citing the sentimental circumstances of a neighbor helping a neighbor in a time of need or a rancher driving water from a well to wherever their herd has roamed.

Regarding times when a person wishes to exceed the duties in ORS 537.545, we acknowledge that Person "A" could just as easily break the law by selling Person "B" a paper portion of their exemption, and in so doing, tell Person "B," perhaps by text, that they may exceed the amount of their exemption by the amount Person "A" did not plan to use that day. But we know such an arrangement sounds ridiculous because Person "B" could exceed their exemption all alone without having to implicate Person "A."[30] What makes sense, however, is *using the water to market* Person "A's" exemption.

Regarding other times, when a person cannot exercise their own exemption to the extent they want, it appears that OWRD supports side-stepping ORS 537.705, so long as Person "A" transfers a portion of their remaining exemption to Person "B" as "wet" water, given the practical circumstances that "paper" water would not solve the problem. The presumption behind most bulk water truck conveyances from Person "A" to Person "B" is that Person "B" cannot

[29] Kinser and Kinser, "Timeline and Witness Statement."
[30] In fact, using more water than the exempt use laws allow, is a common occurrence no one has data on.

access as much water as they want to use on their own premises. Whether Person "B" wants more water than ORS 537.545 allows, or because their well is underperforming, the structure of the "paper" water transfer is similar to what is happening in the "wet" water scenario.

We use the phrase *using the water to market the exemption*, deliberately, as in *water market*. OWRD has, by virtue of its unnamed policy, developed an exempt use water market in direct contravention of the appurtenancy laws. Given how the state understands, interprets, and manages "paper" water generally, we see no legal difference between a person issuing access to their exemption by means of "paper" water – forgoing water use on their premises so others may pump on their own, as a cap-and-trade scenario – and transferring the "wet" water from one exempt premises to another. While the person with a dry well may feel otherwise (and should buy water from a regulated municipality), it's a distinction without a difference because OWRD's in-house selective-appurtenancy policy makes exemptions fungible, hence marketable: anyone can market their water to anyone, and whether they do it by truck or text, water is being misappropriated.

Lest skeptics cling to their incredulity about exempt "paper" water transfers, we note the practice of water truck companies forging paper receipts for "customers" who misappropriate water on their own premises for free and then pay for forged receipts to fabricate evidence of lawful bulk water deliveries, the cost of which is a fraction of the going rate for "wet" water deliveries. Persons who had a legal requirement to demonstrate lawful water use associated with growing hemp and legal cannabis invented this scheme. "Paper" water had been a booming business for water haulers. The problem was so endemic that Oregon had to outlaw the practice of falsifying records in HB 4061, which is now law under ORS 537.898 *Hauling water used for Cannabis plants*:

> "(2) A person may not willfully or negligently provide false information to law enforcement or the Water Resources Department regarding the hauling of water related to plants in the plant Cannabis family Cannabaceae."[31]

[31] Or. Rev. Stat. § 537.898 (2025).

ORS 537.990 *Criminal penalties* states that "(4) Violation of ORS 537.387 or 537.898 (2) is a Class A misdemeanor,"[32] which is a severe penalty that illustrates the extent of that "paper" water problem. At the time in 2021, the only legal source of bulk trucked water was a municipality operating under ORS 540.510(3), but now that OWRD has allowed[33] any person with a well, which supplies water for exempt purposes, to become a source for bulk water trucks, all that exempt use water haulers need to do is point to silent "business" partners with exempt use wells as their water source, when they steal water out of rivers or still forge receipts for their "customers." Anyone with a water truck can go pump out of Sucker Creek (or perhaps, at certain times of the year, Clayton Creek[34]), deliver it to any premises, write a receipt for the sale, and cite a silent partner, or their own exempt use well, as their water source. And when OWRD would require bulk water truckers to produce paper or electronic water metering evidence to document measurement and reporting, that too is easily forged – just pay another person to pump their well. This forgery is especially true for circumstances when income is at stake, and the volume of water equals the volume of money.[35] This racket is the result of a poorly wrought ad hoc policy lacking the benefit of a durable, strategic, and open due diligence process in need of oversight by the Water Resources Commission, the Governor, and the legislature. We are not convinced that RAC members, in their advisory capacity, are sufficient to persuade OWRD to abandon its ad hoc policy to selectively apply the appurtenancy laws.

OWRD's policy presents a contradiction worth exploring: it allows the use of Person "A's" water on Person "B's" premises, to which the water is not appurtenant, but then restricts the amount of Person "A's" water that can be appurtenant to Person "B's" water-receiving premises. In the recently updated brochure, "Water Wells and Drought," OWRD addresses the problem of what to do when a person's well fails, suggesting [**emphasis in the original**]:

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[32] Or. Rev. Stat. § 537.990 (2025).
[33] When we say "OWRD has allowed," we do not mean to imply what OWRD is allowing is actually legal; rather, we mean that OWRD is simulating legality by allowing an unlawful practice.
[34] Kinser and Kinser, "Timeline and Witness Statement."
[35] Legislators had to enact HB 4061 because ORS 540.510(3) was insufficient to regulate and control municipalities from selling water to bulk water truckers, who were running amok in communities delivering water to unlicensed cannabis grows that the sheriffs and OSP were trying to control. Now that OWRD has improperly allowed exempt well users to operate similar to municipalities, without the benefit of a law allowing them to do so, such as ORS 540.510(3), the water truckers now have a loophole option to avail themselves of, and still have no corresponding law to prevent them from gaming the system, as they did with municipalities, because HB 4061 only applies to water suppliers regulated by ORS 540.510(3). To suggest otherwise, would be a blatant contravention of the legislative record, in which this writer was involved.

> **Temporary Emergency Measure – Obtain water from a nearby well.** It may be possible to obtain water from a neighbor's well. You will need to confirm that the combined new and existing uses will not result in an exceedance of the water rights or water right exemptions under ORS 537.545.[36]

Person "B's" exempt use only applies to water that is appurtenant to their premises, which comes from their exempt use well. For OWRD to argue that Person "B" cannot use any more of Person "A's" exempt use authorization than Person "B" is authorized, under ORS 537.545, on their own premises, then OWRD would have to treat Person "A's" water truck as if the water were still waters of the state, and that Person "B" was appropriating Person "A's" water as if they were drawing the water directly from Person "A's" well. Of course, that is what's happening in reality: Person "A" is pumping their well water into a truck and conveying it to Person "B" for use. But OWRD argues by fiat a different two-part theory: that the beneficial use of water occurs at Person "A's" premises when they pump water into the truck,[37] which staff then say is the same type of product as bottled beer, wine, or water.[38] Therefore, under OWRD's argument, Person "A" is conveying an unregulated product (in which water is *embedded*) that is no more waters of the state than bottled water, wine, or beer. Following this logic, Person "B" could purchase as much of this product as they want from as many sources as they wish. OWRD has argued that the bulk water trucking (or piping across property lines to neighbors) does not contravene ORS 537.705 (which means the water can no longer be under their jurisdiction), yet to read the "Temporary Emergency Measure – Obtain water from a nearby well," one would conclude that OWRD does view the water conveyed to premises, to which it is not appurtenant, as waters of

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[36] Oregon Water Resources Department, Water Wells and Drought (Salem, OR: Oregon Water Resources Department, September 18, 2026), brochure. [1]

[37] OWRD, RAC 1: Exempt Use Rulemaking (2026). [01:46:35–01:48:31] ("The water was appropriated for a commercial use. The commercial activity in that situation is putting it in the commercial truck, and then doing a commercial purpose with it. And so, the commercial thing happened on site.")

[38] OWRD, RAC 1: Exempt Use Rulemaking (2026). [01:46:35–01:48:31] (This recorded statement is one of many such statements made in conjunction with OWRD's efforts to compare bottling water with bulk water trucking. The logic OWRD uses is plainly wrong: bottled products are the result of commercial or industrial processes that *embeds* water into them – that is, water is *embedded* into the product. The same is not true for a bulk water delivery/ conveyance. OWRD has misinterpreted the Attorney General's 1993 opinion on bottled water, OP-6499, to also mean the tanks on bulk water trucks – to be fair, the AG errs as well, which we discuss in detail later. We note that the AG's opinion is irrelevant to this question, since ORS 540.510(3) already provides for the municipal use of water on lands where that water is not appurtenant.)

the state, and still under its jurisdiction. The confusion is alarming, especially since OWRD says in the next paragraph that persons must go to municipalities if they want a legal source of water.[39]

One might think that all of this is overwrought for a simple situation of one neighbor helping out another neighbor in times of an emergency; however, this morass of policy contradictions is precisely the policy that OWRD applies to much more substantial 5,000 GPD commercial and industrial conveyances, and to 15,000 GPD domestic use conveyances. (The use of minor sentimental examples is to minimize the full extent of OWRD's selective appurtenancy policy.) OWRD is alleged to have permitted a water truck company to pump 20,000 GPD for three years before neighbors finally convinced staff to address the problem, to which OWRD "asked" the truckers to reduce it to 5,000 GPD.[40] If not by ad hoc requests, the extent of which is unknown, how can OWRD manage water use in such an arbitrary fashion? To read the Kinser's witness statement, we surmise OWRD field staff knew they were making up this policy on the go, and may have suggested to the bulk water trucking company that if they wanted to avoid OWRD's policy from spiralling out of control, it would be best to keep the peace and cut back by a 4-to-1 ratio (from 20,000 GPD to 5,000 GPD). If this scenario describes the circumstances accurately, then clearly, this is not how OWRD should be setting policy; furthermore, OWRD should not be trying to ensconce such a failed, poorly wrought policy in rules.

What Little We Know: OWRD's Selective Appurtenancy Policy Comes to RAC Members in Fragments With No Organization or Strategy

Since we do not have full access or awareness of OWRD's in-house selective appurtenancy policy, we are left with what staff says in RAC meetings. We surmise that staff have a difficult time rationally explaining their unlawful construct, given the struggle to make clear and

[39] Oregon Water Resources Department, *Water Wells and Drought*. [2] (Indeed, the confusion is extraordinary: in the brochure that discusses obtaining water from a neighbor's well, it also states on page 2 "Water can be delivered by the landowner or by water trucking companies to fill a tank as needed, provided the water is obtained from a municipal supplier at an authorized fill station." How is it possible that OWRD can run a rulemaking process, in which it announces a preexisting policy to authorize bulk water trucking off the premises to which that water is appurtenant, but then on September 18, 2026, just days before the RAC #1 starts, publish a public brochure that directly countermands that unlawful policy? As we have said before regarding this fiasco, we are incredulous.)
[40] Kinser and Kinser, "Timeline and Witness Statement."

unambiguous statements, as demonstrated below. In fact, the very nature of the policy as ad hoc is reflected in the way OWRD has revealed its existence. Because this has been our only access point to OWRD's thinking, we quote staff comments on appurtenancy at length to provide the context for our critique. We encourage others to view the RAC #1 and RAC #2 recordings in full, the links to which can be found in the footnotes.

Below, OWRD explains its theory: first, in RAC #1, staff add to what appurtenancy means (it's also a water use type that remains a water use type), and then say that putting exempt use water in a truck, which was also equated with piping water to a neighbor's premises, is a commercial use of water, and that running a water bottling operation is equivalent to bulk water trucking [**emphasis added**]:

> That's the use, as the department looks at it, is which one of these exemptions you take the water out for. If you take the water out for domestic use, you put it in a 200-gallon tank, and you drive it down the road to your neighbor who has run out of well water, that's fine. **The appertenancy of the domestic use is still what it's being used for. It maintains that character of use if it were to move through a pipeline to your neighbor or if it were to move through a water truck in that situation down the road** to someone who has not, doesn't have an adequate domestic supply.[41]
>
> Again, what I was probably muddling through explaining before was, the use is appurtenant. Right? And so if you have, let's say, a water right for water bottling, a commercial water right for water bottling, we would allow that water bottling to occur via the source, but then that bottled water is then, as part of the commercial support, is then sold and shipped elsewhere. So that's where there's **this policy call, this kind of ambiguity in the middle there between statute and rule** of; does that mean that the water can never leave the site, or does it mean that each one of these uses is appurtenant to the site where the well is removed? **However, that use can support leaving the property**, and so that's kind of where we're at.[42]

[41] Oregon Water Resources Department, "RAC 1: Exempt Use Rulemaking, Division 340 and 300," video, September 28, 2026. [00:54:12 to 00:54:43]
[42] OWRD, RAC 1: Exempt Use Rulemaking (2026). [01:01:03 to 01:01:49]

> **The department's practice** here, around 537.545, is that there has been allowance for up to 5,000 gallons per day for any single commercial or industrial use. And so that **any commercial use is where that water hauling component would land** [. . .] The water was appropriated for a commercial use. **The commercial activity in that situation is putting it in the commercial truck, and then doing a commercial purpose with it. And so, the commercial thing happened on site.** An example is if we have a water bottle, water bottling water, right? The appurtenance of that certificate will say water bottling occurs here, right, at this facility. **The water's appropriated, and then it's packaged into small bottles, or however they, you know, sell it through the process. So it's that activity, that's that action that's happening, that's the commercial exempt use.**[43]

The conflation of criss-crossing ideas is staggering – that is what the public is expected to use in participating in the appurtenancy discussion. While so much of what is said speaks for itself, we note a few things: piping/bulk water trucking may be a commercial *activity* ("The commercial activity in that situation is putting it in the commercial truck…"), but it is not a commercial *use* of water; rather, the activity is a conveyance of water off the premises to which it is appurtenant, for a consideration, which is not an exempt use of water. OWRD conflates the commercial *activity* with the commercial *use* of water, which is a common problem. OWRD had a similar question in 2008, wondering about the conflation of a *commercial garden* with *commercial water use*, the latter of which is irrigation water use that services a commercial garden. OWRD asked for advice from its General Counsel at the DOJ on the matter, and received a very reasonable and credible answer.[44]

OWRD further discussed its views in RAC #2 on how staff arrived at their selective appurtenancy policy, explaining that [**emphasis added**]:

[43] OWRD, RAC 1: Exempt Use Rulemaking (2026). [01:46:35–01:48:31]
[44] Renee Moulun, Oregon Department of Justice, Letter of Advice to Juno Pandian, Oregon Water Resources Department, on Exempt Ground Water Use for a Commercial Purpose, DOJ File No. 690302 GN0836-06 (Dec. 1, 2008).

It's been a policy decision for quite some time for that latitude to exist in the commercial and industrial realm. And that has allowed for the utilization of water off-site in that commercial use realm.

[...]

But that latitude, some of the industrial examples are, you know, road watering and supporting things like that. And then, mixing things for forest management practices, those kinds of things, and then putting it in a truck and using it for those kinds of resources. So that has been something that's been allowed for a lot of time in my kind of research, and looking back in a time machine there for WRD policies, and then that commercial water use, putting that in there as well. **Whether or not the intention of the, you know, policy as it originated was thinking of water hauling, it was more thinking of water for consumption that was used in the commercial room. And so that's kind of where that policy came from**, from my research and kind of our understanding of it as it is today.[45]

[...]

I want to note, though, that **it's not our position that commercial water hauling to then use for irrigation is like a commercial venture.** We would still look at those uses differently.[46]

Related to this information, we comment on three topics:

1) OWRD explains that latitude in violating the appurtenancy laws related to commercial and industrial uses of water has been in place for some time. Water League requests information and documents that OWRD has researched that provide details about who, what, when, why, and how OWRD established and evolved this selective appurtenancy policy in general, and with

[45] Oregon Water Resources Department, "RAC 2: Exempt Use Rulemaking, Division 340 and 300," video, October 27, 2026. [00:43:58 to 00:45:25]
[46] OWRD, RAC 2: Exempt Use Rulemaking (2026). [00:47:57 to 00:48:08]

regard to domestic, commercial, and industrial uses of water, in specific. Having access to the same information OWRD has would be helpful for all RAC members and members of the public. As we noted earlier, regarding support for a provision in a 2027 water use bill, we support domestic neighborly deliveries of 200 GPD in emergencies and for securing for ranchers the ability to drive water from their wells to troughs where their livestock has roamed; furthermore, we would also support limited private road watering on right-of-way easements associated with landowners whose exempt use wells supply that water. As for other commercial uses, such as chemical mixing tanks for forest management practices, commercial businesses can and should buy water from municipal bulk water fill stations, which is the only lawful source of water for those who do not hold a water right specific to the task of their jobs.[47]

2) We understand that OWRD contemplated the AG opinion on municipal water use servicing a commercial activity bottling of water in OP-6499, and will discuss the topic at length later, specifically noting the error the AG made that OWRD has not questioned.

3) OWRD states that trucking bulk water off the premises under the pretense of a commercial use of water cannot be used for other types of water use, such as irrigation. We assume that it has always gone without saying that no water use type may morph into another water use type, no matter the fabrications for why the question of such an impossibility would come up. As we discuss in these comments, OWRD has little capacity and interest in tracking the destinations of bulk water trucks they have either let operate against the appurtenancy laws, or are unaware of operating, so the idea that OWRD would not hold a position that the different water use types are not like each other is moot.

Waters of the State That Belong to the Public and Water Embedded Into Consumer Products

Courts have recognized that the waters of the state are reasonably considered to be in the possession of a person when that water is lawfully put or enters into their plumbing system that they own as personal property. There is a possessory-control difference between the water in the

[47] Oregon Water Resources Department, *Water Wells and Drought*. [2]

ground and the water that enters pipes, tanks, or kitchen sinks: while the water remains under ownership of the public, persons temporarily possess and control the water once it leaves the ground and enters their plumbing. There is a further distinction to make, however, when that water becomes a product due to a commercial or industrial practice, and is no longer waters of the state, but a *water-embedded product*. For comparison, water use types, such as irrigation, domestic, and livestock uses, never become a product. The water those use types authorize only temporarily ceases being waters of the state when plants, humans, and livestock use the water internally. After the water leaves those plant and animal bodies, the water either returns to the terrestrial part of the water cycle and becomes waters of the state again, or it enters the atmospheric portion of the water cycle and becomes no one's property (*res nullius*).

Under OWRD's two-part theory, that 1) the beneficial use of water occurs at Person "A's" premises when they pump water into the truck, which 2) staff then say is the same type of product as bottled beer, wine, or water, then our description of "stacking exemptions" becomes "accumulating products" of exemptions. In this case, OWRD cannot prevent the accumulation of the water-embedded products on a remote premises because it does not control products, such as beer, wine, bottled water, or, by improper conclusion of its theory, bulk water trucked or piped to other premises. Therefore, under OWRD's policy theory, the idea that neighbors can supply each other with water cannot be limited by the water budget that ORS 537.545 places on water uses that are appurtenant to the receiver's premises. Were the bulk water transformed from being waters of the state into a water-embedded product that OWRD can no more control than it can bottled wine, beer, and water, then it has no authority to claim the water cannot be used for any specific purposes, lawful or unlawful – that's for the OLCC, OHA, sheriffs, OSP, and District Attorneys to decide.

For contrast, consider ORS 540.510(3) and OAR 690-300-0010(29), which govern how municipal use remains waters of the state when that law and rule provide for the use of water on nonappurtenant lands by requiring that the water "continues to be for municipal purposes" that are "usual and ordinary to such systems," respectively. Under that law and rule, the water remains a defined water use type under Division 300; indeed, it is unique to the municipal use of water that it is defined by the very act of conveying/distributing water towards use. Exempt use

of water has no such authority to authorize the conveying/distributing water towards use on lands to which the water is not appurtenant, and by OWRD's theory, the water is not being conveyed or distributed under its jurisdiction because it has become an unregulated water-embedded product.

One may not do whatever they want with water once it is in their possession-control within their plumbing systems; they must follow the law. One of the prohibited activities is the use of water at premises to which the water is not appurtenant, in contravention of ORS 537.705 and ORS 540.510(1)(a).[48] The temporary possession-control of water by a person who would put the water to a beneficial use does not strip the state of its authority to require full compliance with the laws; nor does it justify a state agency to actively subvert the laws, which we distinguish from an agency's discretion on the implementation and enforcement of the laws. Without a law, such as the ORS 540.510(3) carve-out for municipal water rights and reclaimed water, exempt use water may not be used on premises to which it is not appurtenant. While OWRD may choose to selectively ignore the appurtenancy laws and not implement or enforce them because it must prioritize personnel and funding resources,[49] it is a very different calculation that disagrees with consistently applying the appurtenancy laws equally, developing an ad hoc policy to that effect, and then subsequently wanting to ensconce that ill-conceived in rules by writing in the selective application of the appurtenancy laws on some water use types, and not others.

Since OWRD selectively ignores the appurtenancy laws, and cannot – will not[50] – track the transactions of water haulers trafficking in the exempt uses of water (HB 4061 record-keeping requirements only apply to *water suppliers* referred to in ORS 540.510(3) and in ORS 448.115), there are few practical ways to manage the misappropriations of water use that OWRD's policy enables. Such misappropriations include: 1) the use of water on premises to which the water is

[48] Oregon Revised Statutes § 537.705 (2025) and § 540.510(1)(a) (2025).
[49] Using agency discretion to disregard a law as fundamental to water law as appurtenancy is an extreme act that undermines the rule of law and is far more consequential than the typical accounting of priorities necessary when deciding where to allocate scarce personnel and funding resources, as described in: Oregon Water Resources Department, Internal Management Directives for Establishing Enforcement Priorities, Technical Operations Manual 01.01 (Salem: State of Oregon, August 14, 2008). [5-12]
[50] City of Cave Junction, City Council Meeting Public Audio Recording, September 13, 2021, audio file, Google Drive. [at 00:00:47] (For related information, see: City of Cave Junction, City Council Meeting Agenda, September 13, 2021 [2, 38–39] and the City of Cave Junction, City Council Meeting Minutes: September 13, 2021, from October 11, 2021, "6. Bulk Water Sales Discussion." [6–7]

not appurtenant, 2) unaccountability as to where the water goes, including unlawful sites where unlicensed cannabis plants are present, 3) unaccountability for controlling the types of various uses defined in Division 300,[51] 4) once the bulk water arrives at the delivery site, OWRD has no idea of whether the water is being put to beneficial use (generally, we argue water cannot be put to any beneficial use on premises where the water is not appurtenant), and 5) transfers of "paper" water and "wet" water. Regarding this last point, OWRD has no way of knowing whether Person "B" is accumulating multiple factors of exemptions on their property in the form of embedded water products,[52] thereby simulating a water use that would otherwise require a water right under ORS 537.535 (1) – contravening ORS 537.990 – which describes the criminal penalties for using water without a water right and harming others [**emphasis added**]:

> (1) Violation of ORS 537.130 (2) is a Class B misdemeanor.
> (2) **Any person who willfully diverts or uses water to the detriment of others without compliance with law shall be punished** as provided in subsection (1) of this section. The possession or use of water, except when a right of use is acquired in accordance with law, shall be prima facie evidence of the guilt of the person using it.
> (3) Violation of ORS 537.535 (1) or 537.747 is a Class B misdemeanor.[53]

OWRD has little ground to stand on enforcing against accumulating multiple factors of exemptions on their property in the form of embedded water products that it cannot control any more than it can bottled beer, wine, or water. Nor can OWRD enforce against exemption stacking, which is what's often happening in reality, since Person "A" literally pumps water into tanks and conveys/distributes it off their premises to remote locations for unknown uses in

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[51] Oregon Water Resources Department, "RAC 1: Exempt Use Rulemaking, Division 340 and 300," video, September 28, 2026. [00:54:12 to 00:54:43] (OWRD has little capacity to enforce the nonappurtenant use of water as described: "That's the use, as the department looks at it, is which one of these exemptions you take the water out for [...] *The appertenancy of the domestic use is still what it's being used for*. It maintains that character of use if it were to move through a pipeline to your neighbor or if it were to move through a water truck in that situation down the road...")

[52] We mean the term "stacking exemptions" on their property, since we know that bulk water conveyed in trucks is not an embedded water product, as OWRD contends, but we use OWRD's assumption that water becomes a commercial product by the act of filling a tank on a truck for distribution to demonstrate that even under their own constructions, they are unable to present a lawful case.

[53] Or. Rev. Stat. § 537.990 (2025). (Lest one wonder, subsection (2) does not solely apply to ORS 537.130(2); rather, it describes unlawful actions and threatens the punitive measure described in subsection (1).)

unknown quantities.[54] We acknowledge that OWRD's selectivity policy says that irrigation use of water must remain appurtenant to the premises, but that others, such as commercial, industrial, and domestic uses of water, do not; and we acknowledge that OWRD has said that a water use, such as commercial, industrial, and domestic uses of water, if conveyed off the premises for use elsewhere, must remain the same use. And so we acknowledge the impossibility for OWRD to enforce compliance with this arbitrary policy fabrication, since it will not track the trucks, or by definition, have little knowledge of all the exempt well users trafficking in exemptions (or, if OWRD prefers, embedded water products), except for times when they receive complaints.[55]

As noted, OWRD either allows owners of wells that supply water for exempt purposes to 1) traffic in portions of exemptions, if the water remains *waters of the state* and use occurs at the remote premises where the delivery terminates, or 2) to sell unregulated *water-embedded products* if the water use occurs at the premises where the well owner fills the truck. Neither scenario is lawful. It appears that OWRD wants to have it both ways: staff argues on behalf of the latter scenario, but they also want to reserve the right to selectively control the water, as if it were still waters of the state. In fact, it appears that staff theorizes why they can selectively apply the appurtenancy laws to some water use types, such as domestic, commercial, and industrial, but not to others, such as irrigation. They want to say that a person can convey water off the premises where it is appurtenant, but that the receiver of that water can't use the water in excess of what is appurtenant to their premises. Furthermore, OWRD wants to say it can control how the water use type remains the same type of use after it leaves the premises to which that water is appurtenant, knowing full well that none of the trucks (or "paper" texts) are being tracked to their destinations, and that doing so is a folly equal to tracking where beer, wine, and bottled water go.

Whether the water marketed is "wet" or "paper;" or if it belongs to the public or is a consumer product; or if it remains the same type of use from premises to premises; or whether OWRD can legally enforce ORS 537.545 restrictions at the receiving buyer's premises (either for a product it

[54] Recall, under OWRD's policy, water trucks can side-step metering and reporting requirements by roaming wherever they want, to pump water from any exempt wells, whose owners agree to for a financial consideration.
[55] Kinser and Kinser, "Timeline and Witness Statement." (If the Kinser complaint exemplifies OWRD's handling of the negative impacts resulting from their selective appurtenancy policy, then the circumstances surrounding the Field Services Division policy and practice are a grave concern.)

cannot regulate or for fugitive water that has no appurtenancy requirements), there is no good outcome to OWRD's selective-appurtenancy policy. OWRD's policy lacks the benefit of a legitimate lawmaking or rulemaking process; it lacks an open and well-researched planning effort; and it appears to lack competent legal oversight. The policy is ad hoc; it's being applied arbitrarily,[56] and does not appear to benefit from distinctions among three agency activities: 1) the discretion to make decisions on the implementation and enforcement of rules and laws, 2) discretion to interpret those rules and laws, and 3) the discretion to write rules that must not conflict with the laws or to silently let rules remain ambiguous and inconsistent enough to protect unworkable policies that conflict with statutes. We support OWRD promulgating rules to ensconce competent inchoate policies; we do not support doing so for unlawful and arbitrary policies.

Appurtenancy is one of the most fundamental cornerstones of water law in the West because it prevents the private control and speculation over the public's water by private interests. Were OWRD to pull their finger from the dike of appurtenancy, especially as the law applies to exempt uses of water, then the limited exemption available to persons on their premises could become a privately controlled commodity as water scarcity increases alongside declining water availability in the 21st century.

[56] Kinser and Kinser, "Timeline and Witness Statement." (The Kinsers allege that OWRD was inconsistent with the amount of water OWRD "allowed" to be trucked off the premises of their neighbors, at first allowing 20,000 GPD by combining the total domestic use of 15,000 GPD plus 5,000 GPD for three years from July 2023 to June 2026, and then after much turmoil, reducing it to 5,000 GPD. To read the witness statement, emails, and texts, plus wade through the insufficient memo on well interference, paints a lamentable example of OWRD's predictable inability to carry out its ill-conceived selective appurtenancy policy.)

Appendix A – Additional Thoughts on Appurtenancy

Some History Relevant to the Selective Appurtenancy Regarding Exempt Use

In 1955, when legislators envisioned ORS 537.545, the exempt use of groundwater, they did not envision that the state engineer would establish the basis for an exempt use water market; we know this to the best of anyone's ability, having accessed all the records on the work of the 1953–1955 Water Resources Committee, the development of a statewide water policy and groundwater act in HB 25 and HB 26, and all associated files and correspondence.[57] Notwithstanding that legislative intent, and with regard to water right certificates, we do understand that OWRD has permitted Avion, which holds two quasi-municipal water rights,[58] to truck water in bulk, despite that OAR 690-300-0010(39) *Quasi-Municipal Use* prohibits such action.[59] And to our knowledge, for which we would appreciate OWRD's confirmation, Thunderbird Springs (a.k.a., Pure Waters NW) is the only holder of a water right (in this case, an industrial use) that we are aware of that trucks water in bulk off its premises, despite the Place of Use (POU) being the same location as the Point of appropriation (POA), as designated by the PLSS coordinates on its permit and its certificate.[60] We are aware of other commercial use water right holders authorized to bottle water, but from our research, it appears they all bottle the water on the premises to which the commercial use of water is appurtenant.

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[57] Water League, Records of the 1953–1955 Water Resources Committee, HB 25, and HB 26, compiled from the Oregon State Archives (accessed April 9–10, 2024), Google Drive folder.

[58] Oregon Water Resources Department, Certificate 98426, water right details for SNP ID 229213, accessed November 2026; see also: Oregon Water Resources Department, Certificate 98425, water right details for SNP ID 229212, accessed November 2026.

[59] Or. Admin. R. 690-300-0010(39) (2026). ([**Emphasis added**]: "A quasi-municipal water right shall not be granted the statutory municipal preferences given to a municipality under ORS 537.190(2), 537.230(1), 537.352, 537.410(2), **540.510(3)**, 540.610(2), (3)...")

[60] Oregon Water Resources Department, Water Right Information System (WRIS): Water Right Details for Thunderbird Springs LLC (SNP ID 173373), accessed October 6, 2026. (The 1998 permit, G-13407, says: "PURPOSE OR USE: INDUSTRIAL USE (BOTTLING WATER)," and the 2012 C-87431, says the certificate issued to Thunderbird Springs "confirms the right to use the waters of A WELL in the WEST FORK DAIRY CREEK BASIN for INDUSTRIAL USE (BOTTLING WATER)." Both documents show the POA and POU as the same PLSS location. We note that a Google Earth photo from April 2023, shows a tractor trailer truck at the site where the pump house is located. Their website says: "Delivery is available in the Portland Metro region, Vancouver, Washington, and to the Coast." No other facilities other than a house and barn exist – there is no bottling facility we are aware of, and OHA does not believe the bulk water hauling business is regulated under OAR 333-061.)

Currently, Oregon limits the sale of off-premises bulk water to municipalities, under ORS 540.510(3), for good reason: not only are water quality controls more carefully maintained to protect and secure the public health, but also, the likelihood of cities extorting the public, who may rely on water for life, is much lower than unaccountable bulk water truckers, over whom the state has no tracking controls, except for the possibility of water metering that is easily side-stepped when truckers maintain a list of exempt use well sources as their supply clients. As noted, OWRD has little interest in tracking where the exempt use water haulers deliver the water for use. Doing so for lawfully operating truckers associated with municipalities is hard enough: it requires poring through municipal records to identify the truckers, and then poring through those truckers' records, and then following up with the buyers. While municipalities are regulated by DEQ and OHA, these agencies are not set up to monitor the potable water quality of unknown, unregistered exempt use water haulers that OWRD has improperly allowed to proliferate. OWRD's informal, ad hoc policy to violate ORS 537.705 is not just a bad policy in principle; it is a bad policy in practice, and it must be scuttled immediately, despite staff's claims that stopping the policy "would be a major policy change for domestic, stockwater and commercial/industrial exempt uses."[61] Indeed, just the suggestion of the extent of the policy in that statement as "major" implies a potentially significant public health and policy concern, notwithstanding the principle of appurtenancy being flouted.

As for the history of OWRD's interpretation on commercial use leading to bulk water trucking off premises: the question goes back to a 1993 Oregon Attorney General opinion, OP-6499,[62] on the matter of whether the Town of Butte Falls could sell bottled water under the authorization of its municipal use water right. OWRD has interpreted the 1993 Oregon Attorney General's opinion to mean that bottled water is synonymous with bulk water trucking. That is the wrong interpretation: bottled water is a finished product in which water is embedded, and is no longer waters of the state anymore than the water in beer or wine remains water of the state. Water in

[61] OWRD, *Exempt Use Rulemaking RAC Meeting Summary*, September 28, 2026. (As we noted earlier, Water League would support a provision tacked onto a 2027 water bill that legalizes neighborly domestic water sharing of up to 200 GPD, and securing the right of ranchers driving water from their wells to wherever their livestock has roamed.)

[62] Donald C. Arnold (Chief Counsel, General Counsel Division, Oregon Department of Justice), Letter of Advice on the Authority of the Town of Butte Falls to Bottle and Sell Water Commercially, Op. Att'y Gen. OP-6499 (to Rep. Nancy Peterson, Aug. 2, 1993).

commercial or industrial products is consumed by the processes; the same is not true for water that a municipality pumps into a truck for conveyance/distribution elsewhere, for some unknown use that is usual and ordinary to a municipal use.

ORS 540.510(3) states that "Any water used under a permit or certificate issued to a municipality [...] may be applied to beneficial use on lands to which the right is not appurtenant."[63] ORS 540.510(3) works in conjunction with ORS 225.020 *Ownership and operation of utilities by city within and without city limits*, and 225.030 *Utility may provide services within or without city limits*[64] to provide for the conveyance of water to lands to which it is not appurtenant.

We note OWRD's error in thinking that because bottling water is a commercial use of water, then so must bulk water trucking also be a commercial use of water. Commercial use is one of many water use types a municipal water right authorizes, but when one engages in activities under the authorization of a municipal water right, such as delivering water for use on lands to which that water is not appurtenant as provided for by ORS 540.510(3), it is not the commercial use of water that provides that authorization; rather, it's the municipal water right. No law says that the authorizing activity under a municipal water right, to distribute water in bulk off the premises to which that water is not appurtenant, is a commercial use of water.

OWRD can be excused for erroneously thinking that filling a bulk water truck for distribution is the same as producing a commercial product, such as bottled water, in which the water is embedded (consumed), since they may have uncritically accepted the AG's mistake on the same matter. The AG states upfront, as if by fiat in OP 6499, that "We find no basis in the authorizing statutes to distinguish the sale of water in bottles from sales through the municipal piping system."[65] The AG's views on bottles vs. pipes liken delivering water for a commercial use via a municipal use water right to delivering water for a domestic use with a municipal water right. On that superficial level, we agree that there is little difference to parse. However, the AG failed to incorporate the fact that commercial processes consume the water, and in so doing, embed the water into the finished commercial product, be it bottled soft drinks or water, both of which the

[63] Oregon Revised Statutes § 540.510(3) (2025).
[64] Oregon Revised Statutes §§ 225.020, 225.030 (2025).
[65] Op. Att'y Gen. OP-6499 (1993). [1]

AG refers to. For comparison, when a plant consumes water, that water is no longer water of the state. Therefore, the AG erred when he declared no difference between bottled water and water delivered through pipes to rate-payers. Were we to modify the AG's statement to make legal sense, we would say that the commercial activity of bottling water is similar to the domestic use of water that rate-payers consume in their homes, be it through cooking, irrigating, drinking, or other consumptive uses. The delivery through pipes, which is central to the meaning of the municipal use of water, is an act of distribution, and several statutes distinguish between the acts of appropriation, distribution, use, and consumption. The AG did not distinguish among these acts and erred in conflating them. Water League requests OWRD or a legislator to ask the current AG to update this 33-year-old opinion in 2027.

More Consideration on the Trafficking in Exemptions and Conflating Commercial Activity with Nonappurtenant Water Use

When considering that a commercial transaction is only the means by which water reaches the nonappurtenant premises, where it has the potential for being put to beneficial use, loading water into a storage tank to convey the water towards a nonappurtenant premises to be put to beneficial use is not a commercial use of water; rather, it is a sale of a portion of a person's right to an exempt use of water to another person. The sale of an exempt use of water is not an authorized water use; it is a sale of the state's preemptive authority to control water use authorizations, in this case, to enforce the appurtenancy of water use. In fact, misconstruing the commercial use of water as a means to circumvent appurtenancy laws, as if that were a beneficial use, results in a form of privatizing the state's authority to manage water use because the misconstruction relies on capitalizing (literally) on the temporary control of water, elongated in time by storage in a truck tank (or very long pipes), which courts have understood as a temporary form of ownership of water. We acknowledge the understanding that once waters of the state enter the private property facilities owned by a water user, the control the water user has over the water is akin to possessing the water as if they are a temporary owner (a renter). While under their possession, a water user may reasonably use water for a beneficial use, as described in OAR 690-300-0010(5) and 690-400-0010(3), but that control does not equal or supersede the state's preemptive

authority to manage water use, in this case, to assign their authorized exempt use to others. To do so for a fee – to capitalize on selling off portions of one's exempt use authorization – is not a commercial use of water; it is a privatization of water use management that relies on the temporary control-ownership of water, no less, to pull off the scheme.

While it may seem like the water is the "thing" both parties "A" and "B" care about, it's really the exemption that's the thing that persons "A" and "B" are transacting over. Water is always the "incident," and the premises are the "principal."[66] Water is incidental to the land; as such, it is appurtenant to the land. Water can (unlawfully) be incidental to lands to which it is not appurtenant by means of piping or trucking it there. Putting water onto lands to which it is not appurtenant is unlawful (except by way of municipal use), but it is doable, nonetheless. Since only one exemption is allowed per well system on one or more connected tax lots, or allowed for one or more houses on one or more connected tax lots, an exemption is allowed on only one such premises as defined by one or more than one connected tax lots. "Stacking" exemptions on any premises is unlawful; doing so by means of putting water onto lands to which it is not appurtenant violates two laws: ORS 537.545 and 537.705.

As water availability has declined and water scarcity (read: *economic scarcity*) has increased, pumping exempt use well water into bulk water trucks, hired to supply water for presumptive exempt uses off-site to other locations (usually for criminal purposes to irrigate unlicensed cannabis), has proliferated. These water transfers are unlawful because the trucks perform conveyance services similar to underground water pipes; the use of the water occurs off the appurtenant site from where the water was appropriated. The state has exempted the use of water from needing a water right certificate to authorize its use; however, the state has never exempted the use of water away from the appurtenant site.

We could see a time when Oregon restricts issuing start cards for domestic wells, thereby limiting the expansion of the exempt use of water. Were that to occur, pressure would increase on the state to permit "exempt use transfers," similar to water right transfers, by moving exempt use

[66] Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States*, vol. 1, Miscellaneous Publication no. 1206 (Washington, DC: U.S. Department of Agriculture, Economic Research Service, 1972). [455]

authorizations to other premises (i.e., other tax lots). Were this the case, it would appear that bulk trucking water off the premises to other nonappurtenant sites would be a proto-transfer or temporary transfer of water policy, especially if the water were trucked daily or piped/ditched to the nonappurtenant site.

The comparison of the beer/wine example with the bottled water/bulk trucking example conflates the exempt commercial use of water with the transfer of water away from the appurtenant site: the exemption is for needing a water right, not from the appurtenancy requirement.

Turning water into wine and beer limits the use of the commercial product and does not simulate a transfer of water off the site of appurtenancy. Washing cars, pets, and laundry does not transfer the water; rather, the water is a consumed/embedded ingredient in the commercial process, which is why Oregon calls the water use a commercial use of water. Yes, the commercial sale on site for a good or service, where the water has been appropriated from a well, confirms the commercial use of the water; however, unlike municipal use, which is generally indifferent to the end use, commercial use is not indifferent to the end use, and transferring water off site is not a commercial use only because a sale has been made.

To be clear, a sale of water may be made, but that sale, lawful or unlawful, does not remove the appurtenancy requirement. The folly of selling water that must be used on-site is matched only by the false presumption that the sale has somehow authorized the delivery of water to a site where the water is not appurtenant. A person may make wine, beer, vinegar, and juice, and then transport those commercial products to different locations because they are not transfers of water. Bottling water is different than directly pumping water from a well into a large transport truck because the scale of the packaging strictly limits the idea that water is being transferred for a subsequent use off-site and places the fact of commerce onto the bottling process itself: there is no credible subsequent use because the water has been consumed and is embedded into the product.

While freshwater placed into bottles, ranging from eight ounces to five gallons, preserves the ostensible purpose of drinking the water or using it for light domestic purposes, bulk trucking

hundreds and thousands of gallons portends irrigation use or other large-scale water uses, which are activities that are the prerogative of municipal use, as provided for in ORS 540.510(3) and OAR 690-300-0010(33).

The commercial use of water includes filtering the water through a commercial process to make a product or service. In the case of wine, irrigation water is filtered through grape plants, which produce leaves and fruit; the fruit is pressed and stored until it is saleable, similar to apple cider, both of which can end up as juices, vinegars, or alcoholic beverages that get packaged. As for beer, the commercial use of water includes pumping water into vats and soaking grains until they have fermented until the optimal time has been reached to bottle the liquid.

As to the concept of the term "facility," we note that the definition of the commercial use of water has three contiguous sentences: the first exemplifies general uses associated with a facility; the second are examples of such facilities; and the third are more specific examples of uses in those facilities. While each sentence has examples of uses and facilities, the unavoidable terminology is that every example of commercial use of water is understood in terms of "facility," and that facility is the appurtenant premises where the water is put to beneficial use.

Outlook

Re: Reminder to Submit Any Additional Comments By October 7, 2026, by 5 PM

From Y Lind [redacted]
Date Mon 10/12/2026 1:01 PM
To MEINZ Kelly A * WRD <Kelly.A.MEINZ@water.oregon.gov>

Kelly,

Sorry for the late response, last week I was off grid camping on the side of a river, but here are my comments.

1) We need clarity on how much water an exempt well owner can use. The discussion indicated that with the new rules water usage could actually increase to 3,000 gallons a day for outside use on top of 15,000 gallons a day for domestic use by a single household. That does not seem to fit the intent of the legislation and certainly seems excessive to me as an exempt well owner.

2) I don't understand how the legislative changes help without measuring and reporting actual water use. Stating that exempt well users need to stay within the limits and use the water beneficially is hardly sufficient. I am confident that I use well under 15,000 gallons a day, but have no way of being certain of that.

3) There should be some clarification around storage. Like many exempt well owners, I have a storage tank, 2,000 gallons in my case. I know that this is common, but is it explicitly allowed? There was some discussion on this but no firm statement.

4) One participant stated that water use by exempt wells is trivially small and really not worth considering. How do we know this? I have read that approximately 25% of all Oregon households use exempt wells. This seems non trivial to me, especially in areas where groundwater levels are declining, like here in Central Oregon.

Best wishes,

Yancy

On Mon, Oct 5, 2026 at 3:21 PM MEINZ Kelly A * WRD <Kelly.A.MEINZ@water.oregon.gov> wrote:

> Hi RAC Members,
>
> Thank you all for attending last week's meeting. **As a reminder, please send any additional comments on the rules in writing by 5 pm on October 7, 2026.**

During our last meeting, we said we would provide definitions of waste in our rules; please see below.

1. **Rule (OAR) 690-260-0010(6):** "Waste" means, for purposes of assessing civil penalties, when the quantity of water diverted exceeds the quantity required to meet the beneficial use specified in a water right, not including reasonable system losses, return flows, or diversion rates of water allowed in a water right or a rotation agreement.

2. **OAR 690-400-0010(16):** "Waste" means the continued use of more water than is needed to satisfy the specific beneficial uses for which a right was granted. The need for water shall be based on using the technology and management practices that provide for the efficient use of water, considering:

    a. The economic feasibility of use of the technology and management
    b. practices by the water user;
    c. The environmental impacts of making modifications;
    d. The available proven technology;
    e. The time needed to make modifications;
    f. Local variations in soil type and weather; and
    g. Relevant water management plans and subbasin conservation plans.

3. **OAR 690-008-0001(13): "**Wasteful Use (of groundwater)" means any artificial discharge or withdrawn of groundwater from an aquifer that is not put to a beneficial use described in a permit or water right, including leakage from one aquifer to another aquifer within a well bore.

If you have any questions, please let me know.

Take care,

Kelly Meinz, EIT (he/him)

Water Policy Analyst

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Outlook

Expanded exempt well comment, etc.

From Y Lind[redacted]
Date Fri 10/30/2026 1:41 PM
To MEINZ Kelly A * WRD <Kelly.A.MEINZ@water.oregon.gov>

Kelly,

Over the past few comment periods on the Deschutes Groundwater Mitigation Program a number of suggestions have been made to OWRD that were dismissed not due to poor quality but for the lack of OWRD's ability or willingness to address them. To the department's credit, however, those comments are now being incorporated into the new plan with the provision that it could take as long as 10 years to adequately address them. The 10 year window is disappointing, but I for one am happy that comments I first made over a decade ago are now going to be considered.

I suggest that OWRD take a similar approach to measuring, reporting, and monitoring exempt well usage. I understand that the department is not currently equipped to do this. It does seem important, however, to put a plan in place to understand how much water exempt well users are using. Yes, systems will have to be put in place and equipment installed. This could be done gradually. For example, after a date not too far in the future, new exempt wells could be required to install measuring devices as a start. Then perhaps measuring devices could be required if a well is extended or if a remodel of a home using a well is done. A phase in requiring all exempt wells to be measured could be done over a longer period. Perhaps these steps would only be required in areas experiencing groundwater declines.

I don't know what the specifics of such a plan should be, but over time we could gradually get an understanding of exempt well water withdrawals. Given the likelihood of continued climate change and periods of prolonged drought, starting a program like this seems prudent.

I have another comment on large amounts of stored water being needed for wildfire protection. As someone in a high desert, rural area surrounded by highly flammable juniper trees, I am acutely aware of the need for taking proactive steps. The science is clear on what individual property owners need to do. Homes and outbuildings need to be hardened. Defensible spaces need to be created. My chainsaw has seen a lot of use over the past few years doing exactly that. No amount of water will protect buildings in a large scale, wind driven fire without this. Homeowners are not going to fight out of control wildfires, at best we can water down our buildings from our defensible space. If I can't do that from my 3,000 gallon cistern with my generator to power my pump then it's time to flee the area.

Yancy