WATER LEAGUE

Water League engages the public in water stewardship.

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To: House Committee on Agriculture, Land Use, Natural Resources, and Water

Representative Ken Helm, Co-Chair
Representative Mark Owens, Co-Chair
Representative Sarah Finger McDonald, Vice-Chair
Representatives Court Boice, Annessa Hartman, Bobby Levy, Pam Marsh, Susan McLain, Anna Scharf

RE: Water League supports HB 3372-5, which allows the existing 1/2 acre exempt use irrigation allotment to apply not only when homeowners water their lawns and gardens but when they feed their neighbors from those gardens by participating in local farmers' markets, CSAs, and fruit stands.

Dear Co-Chairs Helm and Owens, Vice-Chair Finger McDonald, and committee members,

Water League supports HB 3372-5 because homeowners, whom the state permits to irrigate up to 1/2 acre of lawn or backyard garden, should be able to sell their produce or plants at their local farmers' markets, CSAs, and fruit stands as they have been doing since the 1920s or even earlier. The 1928 water code, under Section 3 of Caption Title "Appropriation of Underground Waters," states [**emphasis added**]:

> § 3. Nothing in this act shall be construed as requiring an application or permit for the developing for beneficial uses of underground waters for domestic and culinary purposes, for stock, or for the watering of lawns and **gardens for profit**, and not exceeding one-half acre in area.

In 1953, the legislature renamed this section ORS 537.530; then, with the

passage of the 1955 Groundwater Act, legislators summarily repealed ORS 537.530. Notably, none of the backyard gardeners knew of the 1955 repeal because Oregon never enforced the prohibition until last year.

We obtained over 1,300 pages of documents from the Oregon State Archives related to 1) the Interim Water Resources Committee that the legislature empaneled from 1953 through 1955, and 2) all of the legislative records related to HB 26, the 1955 Groundwater Act ensconced in Chapter 537, and HB 25, the revision of the State Policy on Water ensconced in Chapter 536. We sought to understand why legislators outlawed the 1/2 acre home "gardens for profit" clause. We digitized and researched the entire set of documents and produced an extensive paper on the circumstances in a letter to state officials on April 18, 2024, which we incorporate by reference at this hyperlink here.

In a sea of words, ideas, and invective, not once did any of the scores of officials ever question the removal of "gardens for profit" or venture to speak up about the new language, which stated in Section 5 of HB 26 (now part of ORS 537.545(1) that [**emphasis added**]:

> No registration, certificate of registration, application for a permit, permit, certificate of completion or ground water right certificate under this Act is required for the use of ground water for stockwatering purposes, for watering any lawn or **non-commercial garden** not exceeding one-half acre in area...

The silence, as the adage says, is deafening. Indeed, the quiescence is even more unsettling when we consider the silence on the new exempt water use provision legislators added in the same bill, HB 26, which is now ORS 537.545(1)(f). That subsection permits: "Any single industrial or commercial purpose in an amount not exceeding 5,000 gallons a day."

Without any discussion evident in the record, officials repealed the law permitting neighbors to feed neighbors off their 1/2 acre backyard "gardens for profit" while allowing a new 5,000 GPD allotment for Commercial or Industrial water uses. And yet, homeowners could still use their exempt domestic wells to water their 1/2 acre lawns and backyard gardens. Prohibiting 1/2 acre commercial garden sales was only related to shutting down commerce because the volume of water has never changed for 1/2 acre lawns or gardens. This political act was a double standard and a miscarriage of justice.

Lest there be any confusion on the amount of water Oregon's 225,000 domestic wells divert

annually, we offer the following two charts. Figure 1 shows the relative amount of annual surface water and groundwater diversions in the state,[1] and Figure 2 shows the relative amount of just groundwater diversions.[2]

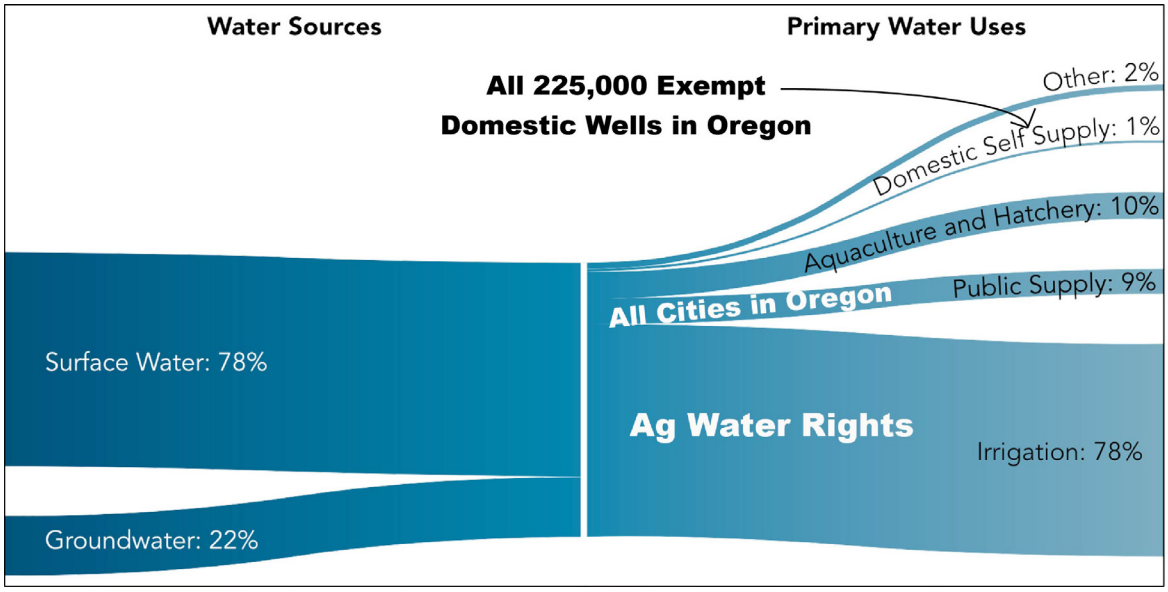

Figure 1: The Business Case for Investing in Water in Oregon (AMP Insights and Pilz 2023, vi).

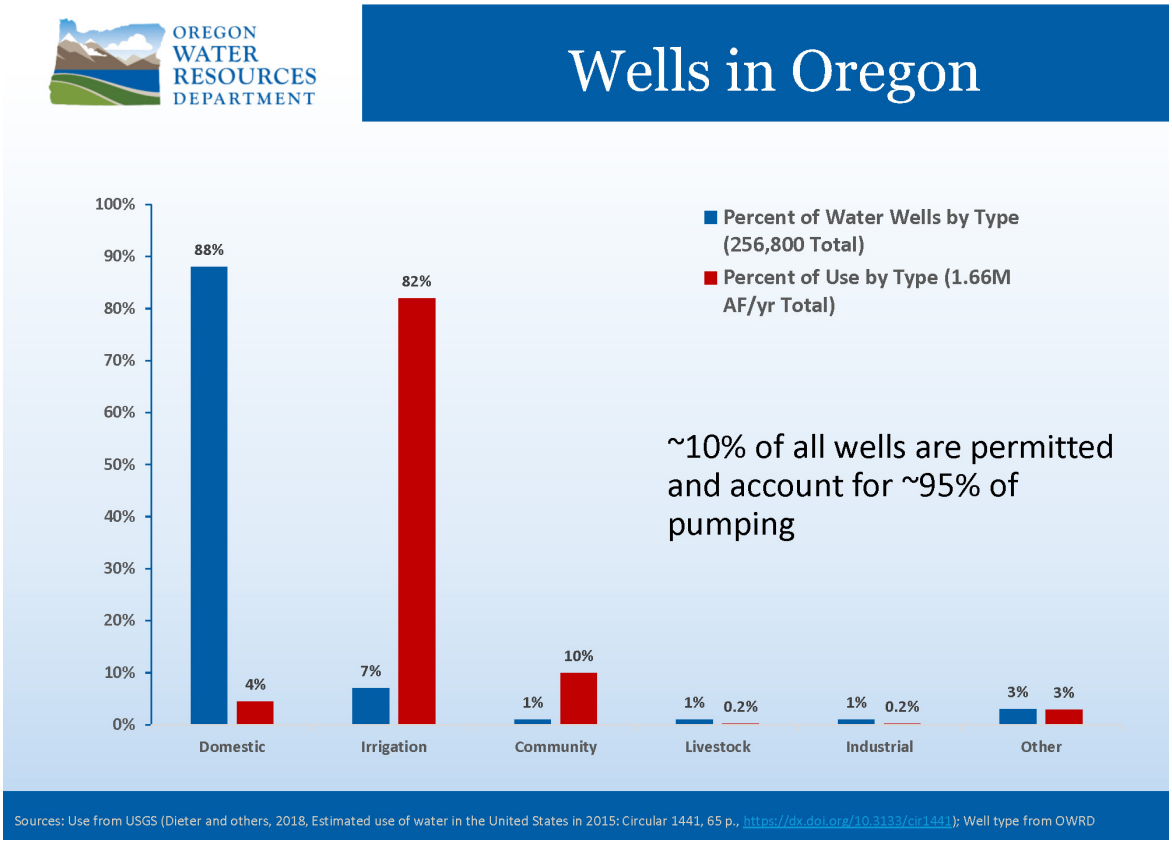

Figure 2: Groundwater Allocation Rulemaking Public Hearing

Oregon's domestic wells divert a minuscule amount of water. Since enacting Oregon's Water Code in 1909, small-scale domestic wells that use little water have been exempt from needing a water right, hence the term *exempt use*. We reject the mischaracterization of exempt uses as a "loophole" because the contention implies that exempt uses are an unintended gap in the law that allows homeowners to circumvent regulations around the water right permitting requirements. Contrary to this misconstruction, the legislature only requires water rights for large-volume water uses. The legislature has sought to accommodate small-scale water needs that have minimal impacts on water resources. We reject the distortion of exempt uses as having unreasonable negative impacts on water resources. We are incredulous that exempt uses would come under such scrutiny, given that they account for only 1% of all annual water diversions in the state. Exempt uses fall outside the scope of water right permitting requirements due to their minimal impact; overstating this 1% is unjustified and wrong.

We also reject the specious claims that HB 3372-5 expands the exempt use statutes because the charge strongly implies the so-called expansion is an increase in the volume of water, which is false. For over a century, people have been able to irrigate their 1/2 acre lawn or garden, and this bill does not expand the area. In fact, the bill caps the amount at 3,000 gallons per day on the 1/2 acre, which is a new limit.

HB 3372-5 permits commerce off that 1/2 acre, which does not increase the water volume. The bill depenalizes the smallest fraction of water users in the state who have a right to irrigate their lawn or garden but not a right to sell at their local farmers' markets, CSAs, or fruit stands. As others have mentioned, speculation that HB 3372-5 will create a *Farmers' Market Rush* is baseless, not only because produce sells for less than two orders of magnitude than cannabis, or because commercial gardening is strenuous work that is a labor of love few have the motivation and grit to pursue, but mostly because all the people who ever wanted to run small commercial gardens in their backyards are doing so; they never knew they were breaking the law and their presumption of innocence rebuts the speculation out of hand.

Notably, the ideological opposition to HB 3372-5 is not limited to unfounded concerns about the volume of water use; indeed, opposition from the other end of the water policy spectrum comes from those who are indignant about the commerce element, which is the sole factor this bill changes by depenalizing those who never knew they were scofflaws. We believe complaints about commerce are why the legislature struck ORS 537.530 from the water code in 1955. Seventy years ago, concerns about water volume irrigating 1/2 acre lawns or gardens were not the legislature's concern (see our April 18, 2024, letter referred to above).

Today, we are hearing the recrudescence of that opposition in HB 3372-5. This time, lobbyists claim that small farms with water rights are somehow disadvantaged by half-acre backyard gardens on exempt domestic wells. The complaint revolves around how the investment costs related to those water rights create an unfair burden on the water right holders.

Have we come to a point in our society where water right holders can make a call to shut off water use on domestic gardens based on unfair competition? The Oregon Water Resources Department (OWRD) did not recently begin shutting down small 1/2 acre backyard gardeners because their commerce was unfair to water right holders. It is untenable to argue that water rights holders are disadvantaged by a small number of half-acre commercial gardeners, given the extraordinary privilege associated with holding a water right to use substantially larger amounts of water. Now that Oregon has restricted permitting new water rights, water rights have become a scarce commodity that will increase their value substantially. As with the baseless claims about volume, we are likewise incredulous at the thought that commerce by 1/2 acre backyard gardeners threatens small and medium-sized farms that hold water rights. Indeed, the fallacy advanced by such protectionism is that backyard gardeners who irrigate their plants and produce with their exempt domestic wells are engaging in non-beneficial uses of water that are not in the public interest.

HB 3372-5 is like a poultice that has drawn out of the conventional wisdom two ideologies that exemplify the need to modernize Oregon's water code: untenable hydrologic fallacies and economic protectionism. HB 3372-5 embodies values that contrast with the polarized interests of those who've awkwardly come together from the ends of the water policy spectrum to preserve their respective status quos. We recognize the need to maintain stable groundwater levels and base flows in streams. We also recognize the need to ensure the longterm viability of small and medium-sized farms. However, ganging up on the 1/2 acre gardeners who wish to sell their produce and plants at the farmers' markets is not the way to go about it.

Sincerely,

Christopher Hall
Executive Director

Endnotes

1 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). [p. vi: FIGURE ES-2: WATER WITHDRAWALS BY SOURCE AND USE ACROSS OREGON.]

2 Justin Iverson, Groundwater Allocation Rulemaking, Pre-Hearing, Information Only Session Slideshow, Oregon water Resources Department, May 2024. [Slide #6] (All told, 90% of all wells are "exempt use" but account for only 5% of the volume.)