



Oregon

Tina Kotek, Governor

Water Resources Department

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MEMORANDUM

TO: Water Resources Commission

FROM: Douglas E. Woodcock, Acting Director

SUBJECT: Agenda Item C, September 28, 2023
Water Resources Commission

***Request for Adoption of Division 10 Rules: Defining the Processes to Designate a Critical Groundwater Area and Limit Groundwater Use**

I. Introduction

During this agenda item, staff will present a request to adopt revised Oregon Administrative Rule (OAR) 690, Division 10 rules that identify the processes for establishing a critical groundwater area (CGWA). This rulemaking will not establish any critical groundwater areas. *The Commission will be asked to consider adoption of final proposed rules.*

II. Integrated Water Resources Strategy Recommended Action

- 5.5A – Plan and prepare for drought resiliency
- 11.E – Develop additional groundwater protections

III. Background

Oregon Revised Statute (ORS) 537.730 to 537.742 provide authority for the Commission to establish a CGWA. Establishment of a CGWA provides access to additional management tools as outlined in ORS 537.735 (rules designating a CGWA) through ORS 537.742(2) (corrective control following a contested case).

ORS 537.730 provides that a CGWA is generally established to address one or more of the following conditions: (1) groundwater levels in the area in question are declining or have declined excessively; (2) a pattern of substantial interference is found between wells within the area in question; (3) a pattern of substantial interference is found between wells and surface water right holders; (4) a pattern of interference or potential interference is found between wells of groundwater claimants or appropriators within the area in question with the production of geothermal resources from an area regulated under ORS chapter 522; (5) the available groundwater supply in the area in question is being or is about to be overdrawn; (6) the purity of the groundwater in the area in question has been or reasonably may be expected to become polluted to an extent contrary to the public welfare, health, and safety; or (7) groundwater temperatures in the area in question are expected to be, are being or have been substantially altered.

The Department's rules (OAR Chapter 690, Division 10) that outline procedures for establishing CGWA designations and associated contested case procedures that can lead to curtailment and other controls of groundwater uses are out-of-date and inconsistent with current statutes. The CGWA statutes were last updated in 1991. Prior to this, the statutes and associated rules directed that the State Engineer would issue an order designating all or parts of a basin as a CGWA. The purpose of this rulemaking is to update the rules to conform to the 1991 CGWA statutes in ORS 537.730 to 537.742. The draft amended Division 10 rules before the Commission provide a framework for establishing future CGWA designations and corrective controls within a CGWA consistent with statute. The proposed rule changes primarily focus on the updates necessary to conform to the statutes as well as to provide clarity on procedures for conducting contested case hearings associated with CGWA controls such as curtailment orders.

IV. Overview of the Rulemaking Process

Rules Advisory Committee (RAC) Meetings: The Department formed a RAC to review and provide input on the draft rules, as well as to review the statement of need and fiscal impact. The first hybrid RAC meeting was convened on December 17, 2021. The rulemaking was subsequently put on hold due to a lack of staff capacity as a result of a rules coordinator staff becoming vacant in early 2022.

Upon restarting the rulemaking, the Department added additional RAC members based on the public feedback received during the first RAC meeting. The RAC for Division 10 included 33 members representing non-governmental organizations, farmers, cities, county planners, special districts, tribes, domestic well users, and others (see Attachment 1). The Department also facilitated a virtual meeting with county planners to discuss the relationship between groundwater supplies and county planning requirements.

The second RAC was held on December 5, 2022. Additional RAC meetings were convened in 2023 on January 10, February 16, and March 2. All RAC meetings were noticed to the public, and all meeting materials were made available on the Department's webpage. Public comment opportunities were provided at the end of each RAC meeting. Between RAC meetings, rules were revised based on discussions and comments from the RAC and public.

Notice of Proposed Rulemaking: The Department filed the Notice of Proposed Rulemaking with the Secretary of State's Office and the notice was subsequently published in the Oregon Bulletin on April 3, 2023. The Department also notified the members of the RAC, interested parties, and other members of the public. Information was posted or emailed to: RAC members, the Department's Proposed Rulemaking website, the Oregon Transparency website, stakeholders and members of the public subscribed to the Department's GovDelivery listservs for Rulemaking and Legislation/Budget, members of the Groundwater Advisory Committee, the Oregon Groundwater Association, and legislators that are required to be notified by law. The Department also issued a press release to announce the opening of the public comment period and the public hearings. The rulemaking notice can be found in Attachment 2.

Groundwater Advisory Committee (GWAC) Meetings: GWAC consists of nine members appointed by the Commission to provide advice on the development of rules related to groundwater, per ORS 536.090. GWAC met on February 2 and May 2, 2023, to review and

discuss the Division 10 draft rules. Attachment 3 contains a list of the GWAC members, their recommendation on the proposed Division 10 rules, and the Department's response to that recommendation.

Public Comment and Public Hearings: The public comment period for the proposed rulemaking was from April 3 to May 22, 2023. The Department received 34 written comments and 102 written form letter comments. In addition to accepting written comments, the Department held three in-person public hearings and one hybrid public hearing between April 24 and May 8. Hearings were held in Pendleton, Burns, Klamath Falls, and Salem/Virtual. No comments were provided during the Pendleton and Burns meetings. Six members of the public commented during the Klamath hearing, and 15 commented during the Salem/Hybrid meeting.

Summary of Comments & Response: Staff reviewed the 136 written comments and the 21 oral comments and modified the draft proposed rules as considered appropriate. Attachment 4 provides the written and oral comments received and the Department's response to each comment.

V. Overview of rules

The final proposed rules with the proposed changes are found in Attachment 5. At a high-level, the proposed rules specify:

- Relevant definitions,
- Required criteria for CGWA designation as specified by statute,
- CGWA rulemaking process requirements,
- Requirements for land use planning coordination with affected local government(s) and engagement with affected federally recognized Indian Tribes,
- CGWA rule content, filing, and review requirements as specified by statute,
- Notification process requirements for corrective control orders,
- Contested case processes for corrective control orders, and
- Procedures for making changes to existing CGWAs.

The statutes and rules outline two distinct processes for a critical groundwater area: rulemaking and contested cases. Rulemaking is the first phase and involves designating a portion of a basin as a CGWA. After the designation of a CGWA via rule, the Department may proceed to the second step and draft an order and initiate a contested case process to implement certain corrective actions such as curtailment of existing uses.

The Department will use the processes in the Division 10 rules to guide the Division 512 Rulemaking for the Harney Basin and to request the Commission designate a critical groundwater area. Since a RAC was already established for the Division 512 CGWA process in accordance with existing Division 512 rules requiring a RAC to be convened following completion of the Harney Groundwater Study, the draft proposed rules add an additional section that is specific to the current Harney rulemaking process. This is because the draft proposed Division 10 rules contain requirements for actions to occur before a RAC is formed, which is not possible to be met for the current 512 process.

VI. Conclusion

The Division 10 rules identify the processes for establishing a CGWA and corrective controls. The rules are currently inconsistent with ORS 537.730 to 537.742 and must be aligned with those statutory requirements. Adoption of these rules is necessary to provide clarity on the process for work in the Harney Basin.

VII. Alternatives

The Commission may consider the following alternatives:

1. Adopt the final proposed rules as written.
2. Adopt modified final proposed rules.
3. Not adopt rules and request the Department further evaluate the issue.

VIII. Acting Director's Recommendation

The Acting Director recommends Alternative 1.

Attachments:

1. Rules Advisory Committee Members and Affiliations
2. Division 10 Notice of Proposed Rulemaking
3. Groundwater Advisory Committee Membership, Recommendations, and Response
4. Public Comments and Response to Comments Received
5. Final Proposed Rules with Track Changes

Kelly Meinz
(971) 718-7087

Tim Seymour
503-979-3512

Ivan Gall
971-283-6010

Division 10 Rules Advisory Committee Members

<u>Name</u>	<u>Affiliation / Organization</u>
Lauren Poor	Oregon Farm Bureau
Sarah Liljefelt	Oregon Cattlemen's Association
Lisa Brown	WaterWatch of Oregon
Zach Freed	The Nature Conservancy
Chrysten Lambert	Trout Unlimited
James Fraser	Trout Unlimited
John Stadel	Oregon Ground Water Association
Branden Pursinger	Association of Oregon Counties
Michael Martin	League of Oregon Cities
Anton Chiono	Confederated Tribes of the Umatilla Indian Reservation
Brad Parrish	The Klamath Tribes
Brandon Haslick	Burns Paiute Tribe
Drenda Howatt	Association of Oregon Counties
Tamra Mabbott	Morrow County Planner
Karen Lewotsky	Oregon Environmental Council
David Filippi	Water Law Attorney
Mark Landauer	Special Districts
Clark Balfour	Special Districts
Marika Sitz	Oregon Association of Nurseries
Brock Nation	Oregon Realtors
April Snell	Oregon Water Resources Congress
Cheyenne Holiday	Verde
Rob Brown	Senior Water Right Holder/Groundwater User/ Wineries
Nathan Rea	Senior Groundwater User
Andrew Miles	Groundwater User
JR Cook	Northeast Oregon Water Association
Ryan Hartman	Well User in Klamath Project Area

<u>Name</u>	<u>Affiliation / Organization</u>
James Baker	SeVein Water Association / Wineries
Julie Weikel	Harney Domestic Well Owner
Bob Waldner	Umatilla County Planning Director
Kelly Waren	Confederated Tribes of the Umatilla Indian Reservation
Christopher Hall	Water League

OFFICE OF THE SECRETARY OF STATE
SHEMIA FAGAN
SECRETARY OF STATE

CHERYL MYERS
DEPUTY SECRETARY OF STATE



ARCHIVES DIVISION
STEPHANIE CLARK
DIRECTOR

800 SUMMER STREET NE
SALEM, OR 97310
503-373-0701

NOTICE OF PROPOSED RULEMAKING
INCLUDING STATEMENT OF NEED & FISCAL IMPACT

CHAPTER 690
WATER RESOURCES DEPARTMENT

FILED
03/24/2023 2:45 PM
ARCHIVES DIVISION
SECRETARY OF STATE

FILING CAPTION: Amends the Division 10 rules for Appropriation And Use Of Ground Water [Corrected]

LAST DAY AND TIME TO OFFER COMMENT TO AGENCY: 05/22/2023 5:00 PM

The Agency requests public comment on whether other options should be considered for achieving the rule's substantive goals while reducing negative economic impact of the rule on business.

CONTACT: Kelly Mainz
971-718-7087
WRD_DL_rule-coordinator@water.oregon.gov

725 Summer ST NE A
Salem,OR 97301

Filed By:
kelly mainz
Rules Coordinator

HEARING(S)

Auxiliary aids for persons with disabilities are available upon advance request. Notify the contact listed above.

DATE: 04/24/2023
TIME: 5:00 PM - 7:00 PM
OFFICER: Kelly Mainz

HEARING LOCATION

ADDRESS: Blue Mountain Community College, 311 N Columbia St., Milton-Freewater, OR 97862

SPECIAL INSTRUCTIONS:

If you wish to comment publicly during the hearing, please email Kelly Mainz at the contact on this notification. The meeting location is accessible to persons with disabilities. Language services also are available upon request. A request for an interpreter for the hearing impaired, other language services, or other accommodations for persons with disabilities should be made at least 48 hours before the meeting to Kelly Mainz at WRD_DL_rule-coordinator@water.oregon.gov.

DATE: 04/26/2023
TIME: 5:00 PM - 7:00 PM
OFFICER: Kelly Mainz

HEARING LOCATION

ADDRESS: Harney County Community Center, 478 N Broadway Ave, Burns , OR 97720

SPECIAL INSTRUCTIONS:

If you wish to comment publicly during the hearing, please email Kelly Mainz at the contact on this notification. The meeting location is accessible to persons with disabilities. Language services also are available upon request. A request for an interpreter for the hearing impaired, other language services, or other accommodations for persons with disabilities should be made at least 48 hours before the meeting to Kelly Mainz at WRD_DL_rule-coordinator@water.oregon.gov.

DATE: 05/04/2023

TIME: 5:00 PM - 7:00 PM

OFFICER: Kelly Mainz

HEARING LOCATION

ADDRESS: Klamath County Event Center , 3531 South 6th Street, Klamath Falls, OR 97603

SPECIAL INSTRUCTIONS:

If you wish to comment publicly during the hearing, please email Kelly Mainz at the contact on this notification. The meeting location is accessible to persons with disabilities. Language services also are available upon request. A request for an interpreter for the hearing impaired, other language services, or other accommodations for persons with disabilities should be made at least 48 hours before the meeting to Kelly Mainz at WRD_DL_rule-coordinator@water.oregon.gov.

DATE: 05/08/2023

TIME: 3:00 PM - 5:00 PM

OFFICER: Kelly Mainz

HEARING LOCATION

ADDRESS: Oregon Department of State Lands , 775 Summer St NE #100, Salem, OR 97301

SPECIAL INSTRUCTIONS:

This meeting will be in a Hybrid format. Please register on the zoom link attached to join online. If you wish to comment publicly during the hearing, please email Kelly Mainz at the contact on this notification. If you wish to comment publicly during the hearing, please email Kelly Mainz at the contact on this notification. The meeting location is accessible to persons with disabilities. Language services also are available upon request. A request for an interpreter for the hearing impaired, other language services, or other accommodations for persons with disabilities should be made at least 48 hours before the meeting to Kelly Mainz at WRD_DL_rule-coordinator@water.oregon.gov.

NEED FOR THE RULE(S)

The proposed rules are necessary because the current Division 10 rules do not conform to the Critical Ground Water Area (CGWA) processes outlined in Oregon Revised Statutes (ORS) 537.730 – 537.742. These statutes were last updated in 1991; the previous Division 10 rule update was in 1990. The proposed rules conform to the current statutes.

These rules outline the procedure that the Oregon Water Resources Department (OWRD) and the Water Resources Commission (WRC) can take to design a CGWA. ORS 537.730 lays out several conditions for a CGWA designation. If one or more of these conditions exist within an area of the state, then a CGWA can be designated. A CGWA allows the OWRD and WRC to establish corrective control provisions for the CGWA via rule writing. A CGWA designation by the OWRD will be based on any available records, including, but not limited to, reports, studies, maps, data, and model results, to select the appropriate corrective control actions. The proposed rules only provide the procedure for designating a CGWA and do not designate any area of the state as a CGWA.

DOCUMENTS RELIED UPON, AND WHERE THEY ARE AVAILABLE

None.

STATEMENT IDENTIFYING HOW ADOPTION OF RULE(S) WILL AFFECT RACIAL EQUITY IN THIS STATE

OWRD does not anticipate any impact on Racial Equity. The proposed Division 10 rules only provide the procedure by which OWRD and the WRC would designate an area of the state as a CGWA. Further analysis will be needed to assess

the specific effect on Racial Equity when the WRC proposes to declare an area of the state a CGWA, which could include corrective control provisions laid out in ORS 537.730 – 537.742.

FISCAL AND ECONOMIC IMPACT:

OWRD does not anticipate any fiscal impact from the proposed Division 10 rules. The proposed Division 10 rules only provide the procedure by which OWRD and the WRC would declare an area of the state a CGWA. Further analysis will be needed to assess the fiscal impact when the WRC proposes to declare an area of the state a CGWA, which could include corrective control provisions laid out in ORS 537.730 – 537.742.

COST OF COMPLIANCE:

(1) Identify any state agencies, units of local government, and members of the public likely to be economically affected by the rule(s). (2) Effect on Small Businesses: (a) Estimate the number and type of small businesses subject to the rule(s); (b) Describe the expected reporting, recordkeeping and administrative activities and cost required to comply with the rule(s); (c) Estimate the cost of professional services, equipment supplies, labor and increased administration required to comply with the rule(s).

(1) State Agencies: The OWRD will need staff time to develop the rules for designating a Critical Groundwater Area (CGWA) and adopt these rules following the Oregon Administrative Procedures Act. In addition, the OWRD will need to use staff time to develop the records showing that a condition under Oregon Revised Statutes 537.735(3)(a-f) is met for a CGWA declaration. Units of local government and members of the public will not have a cost of compliance under these rules. The proposed rules are the procedures that OWRD and the WRC must follow to declare an area of the state a CGWA.

(2)(a) No small businesses will be affected by adopting these rules. If the WRC adopts rules declaring an area of the state a CGWA, small businesses could be affected. The proposed Division 10 rules will not affect small businesses because they specify the procedures the OWRD and WRC must follow to designate a CGWA.

2(b) None. The proposed rules impose no reporting, recordkeeping, or administrative requirements on small businesses

2(c) None. The proposed rules impose no costs or other requirements on small businesses.

DESCRIBE HOW SMALL BUSINESSES WERE INVOLVED IN THE DEVELOPMENT OF THESE RULE(S):

The Rulemaking Advisory Committee (RAC), which helped develop the rules and fiscal impact statement, included representatives from more than one small business. Other small businesses are being allowed to provide comments on the rules during the public comment period.

WAS AN ADMINISTRATIVE RULE ADVISORY COMMITTEE CONSULTED? YES

RULES PROPOSED:

690-010-0045, 690-010-0050, 690-010-0053, 690-010-0054, 690-010-0070, 690-010-0100, 690-010-0110, 690-010-0120, 690-010-0130, 690-010-0140, 690-010-0150, 690-010-0160, 690-010-0170, 690-010-0180, 690-010-0190, 690-010-0200, 690-010-0210, 690-010-0220, 690-010-0230, 690-010-0240

REPEAL: 690-010-0045

RULE SUMMARY: Rule repealed to align division with statute.

CHANGES TO RULE:

~~690-010-0045~~

~~Hearings and Protests~~

~~Rules and regulations governing the filing of protests or petitions and procedures to be followed in hearings as required by ORS Chapter 183 and division 1.~~

~~Statutory/Other Authority: ORS 536, 543~~

~~Statutes/Other Implemented:~~

REPEAL: 690-010-0050

RULE SUMMARY: Rule repealed to align division with statute.

CHANGES TO RULE:

~~690-010-0050~~

~~Initiation of Proceeding for Determination of a Critical Groundwater Area - Notification~~

- ~~(1) A proceeding for the determination of a critical ground water area shall be initiated by a Notification from the Water Resources Director.¶¶~~
- ~~(2) The Notification shall include:¶¶~~
- ~~(a) A description of the proposed exterior boundaries of the area for which, the proceeding is initiated, referenced to the U.S. Public Lands Survey;¶¶~~
- ~~(b) Citation to the specific statutory provision or provisions under which the proceeding is brought;¶¶~~
- ~~(c) The preliminary findings indicating why the area described may be a critical ground water area;¶¶~~
- ~~(d) A general description of the nature of the ground water reservoir which is the subject of the determination;¶¶~~
- ~~(e) The effective date and duration of the Notification. In no case shall the Notification have a duration greater than 270 days;¶¶~~
- ~~(f) A statement concerning applications in the area and reservoir in question which were filed in the Water Resources Department prior to the effective date of the Notification, but which had not received permits prior to that date. Such statement shall explain the applicants' options which include:¶¶~~
- ~~(A) Withdrawing the application with refund of any submitted recording fees; or¶¶~~
- ~~(B) Requesting deferral of action on the application until a determination of a critical ground water area; or¶¶~~
- ~~(C) Requesting a hearing on the application with the understanding that permit denial will result in rejection of the application. Failure to request a specific option will result in the department taking no action on the application until the Commission takes action on the area in question.¶¶~~
- ~~(g) A statement concerning applications in the area and reservoir in question which are submitted on or after the effective date of the Notification. The statement shall explain the applicants' options which include:¶¶~~
- ~~(A) Withdrawing the application with refund of all related fees; or¶¶~~
- ~~(B) Requesting deferral of permit action until a determination of a critical ground water area; or¶¶~~
- ~~(C) Requesting a hearing on the application with the understanding that permit denial will result in rejection of the application. Failure to request a specific option will result in the department taking no action on the application until the Commission takes action on the area in question.¶¶~~
- ~~(h) Upon receipt of a request for hearing under subsection (2)(f) or (g) of this rule, the Director shall schedule and conduct the hearing.¶¶~~
- ~~(3) The Notification shall be distributed by:¶¶~~
- ~~(a) Publication at least once each week for two consecutive weeks in a newspaper having general circulation in the area in question;¶¶~~
- ~~(b) Mailing by regular or certified mail to each legal claimant or appropriator of ground water in the area in question;¶¶~~
- ~~(c) Mailing by regular or certified mail to each applicant for a permit to appropriate water from the ground water reservoir and area in question;¶¶~~
- ~~(d) Mailing by regular or certified mail to the governing body and planning department(s) of the affected local governments within which all or part of the area in question is located;¶¶~~
- ~~(e) Mailing by regular or certified mail to each licensed water well constructor licensed to construct wells in the State of Oregon;¶¶~~
- ~~(f) Mailing by regular or certified mail to the state legislative delegates representing the people of the area in question.¶¶~~
- ~~(4) The Notification initiating a proceeding for determination of a critical ground water area shall be recorded in the Special Order Record of the Water Resources Director.¶¶~~
- ~~[Publications: Publications referenced are available from the agency.]~~
- ~~Statutory/Other Authority: ORS 183, 197, 536, 537~~
- ~~Statutes/Other Implemented:~~

REPEAL: 690-010-0053

RULE SUMMARY: Rule repealed to align division with statute.

CHANGES TO RULE:

~~690-010-0053~~

~~Process Options-~~

~~Within 270 days of the issuance of Notification, the Commission shall:¶~~

~~(1) Determine that a critical ground water area is not warranted and inform those parties who received the Notification of the Commission's determination.¶~~

~~(2) Conduct a public hearing to withdraw the ground water from further appropriation as authorized by ORS 536.410.¶~~

~~(3) Conduct a public hearing to amend the appropriate basin program to classify the ground water in question as authorized by ORS 536.310 and 536.340.¶~~

~~(4) Complete sections 2 and/or 3 of this rule and proceed at some future date with additional hearings necessary to fulfill the requirements of ORS 537.730 and issue a critical ground water area order.¶~~

~~(5) Conduct a public hearing and issue a critical ground water area order and/or adopt rules.~~

~~Statutory/Other Authority: ORS 197, 536~~

~~Statutes/Other Implemented:~~

REPEAL: 690-010-0054

RULE SUMMARY: Rule repealed to align division with statute.

CHANGES TO RULE:

~~690-010-0054~~

~~Public Hearing Requirements~~

~~(1) At least one public hearing shall be held within or near the proposed critical ground water area.¶~~

~~(2) Notice of any hearing associated with critical ground water area proceedings shall be distributed as provided in OAR 690-010-0050(3).~~

~~Statutory/Other Authority: ORS 197, 536~~

~~Statutes/Other Implemented:~~

REPEAL: 690-010-0070

RULE SUMMARY: Rule repealed to align division with statute.

CHANGES TO RULE:

~~690-010-0070~~

~~Local Government Coordination~~

~~(1) Proceedings for the determination of a critical ground water area include Notification, rulemaking, the issuance or modification of an order, or other related activities.¶¶~~

~~(2) The Director and Commission shall assure that proceedings for the determination of a critical ground water area meet the requirements established in OAR 690-005-0045 (Standards for Goal Compliance and Compatibility with Comprehensive Plans). Further, the Commission shall:¶¶~~

~~(a) Upon notification, request the planning director of affected local governments to submit applicable policies, provisions, or procedures from acknowledged comprehensive plans which address and provide guidance for mitigating ground water problems;¶¶~~

~~(b) Accommodate comprehensive plans (i.e., areas of planned growth and priority land uses) to the extent possible within the physical constraints of the ground water resource and the Commission's responsibilities under ORS 537.525, in adopting rules or issuing orders to manage or control water use in established or potential critical ground water area;¶¶~~

~~(c) Instruct the planning directors of affected local governments how comprehensive plans, maps, ordinances, and/or land use approval procedures may need to be amended to:¶¶~~

~~(A) Reflect the physical constraints of ground water resources in the critical area;¶¶~~

~~(B) Ensure compliance with restrictions in the Notification, withdrawal order, classification, or critical ground water area order; and¶¶~~

~~(C) Reduce the potential for future ground water problems within affected localities.¶¶~~

~~(d) Consider how local government participation could enhance the effectiveness of managing the area;¶¶~~

~~(e) Distribute the final critical ground water area rule and/or order to the county clerk and the planning director(s) of affected local governments.¶¶~~

~~(3) In the event of a land use dispute, as defined in OAR 690-005-0015 (Definitions), the Director and Commission shall follow procedures in 690-005-0040 (Resolution of Land Use Disputes).~~

~~Statutory/Other Authority: ORS 197, 536~~

~~Statutes/Other Implemented:~~

ADOPT: 690-010-0100

RULE SUMMARY: This new rule describes the purpose of OAR Chapter 690 Division 10.

CHANGES TO RULE:

690-010-0100

Purpose

The purpose of these rules is to guide implementation of the critical ground water area statutes, ORS 537.730 to 537.742.

Statutory/Other Authority: ORS 536.027, ORS 537.730

Statutes/Other Implemented: ORS 537.730

ADOPT: 690-010-0110

RULE SUMMARY: This new rule defines terms used in OAR Chapter 690 Division 10 and ORS 537.730 to 537.742.

CHANGES TO RULE:

690-010-0110

Definitions

In addition to the definitions in OAR 690-008-0001, the following definitions apply to critical ground water area designations conducted pursuant to ORS 537.730 to 537.742 and these rules, unless the context requires otherwise: ¶

(1) "Affected local government" means any city, county, or metropolitan service district formed under ORS Chapter 268 or an association of local governments performing land use planning functions under ORS 195.025 located within the boundaries of the proposed critical ground water area. ¶

(2) "Groundwater right" means a permit, certificate, decree, or certificate of ground water registration as provided in ORS 537.610 authorizing the appropriation and use of ground water. ¶

(3) "Ground water reservoir" means a designated body of standing or moving ground water having exterior boundaries which may be ascertained or reasonably inferred as provided in OAR 690-010-0130. ¶

(4) "Person" means individuals, corporations, associations, firms, partnerships, limited liability companies, joint stock companies and Indian tribes. ¶

(5) "Exempt User" means any person who exercises the right to use groundwater pursuant to the exemption in ORS 537.545.

Statutory/Other Authority: ORS 536.027, ORS 537.730

Statutes/Other Implemented: ORS 537.730

ADOPT: 690-010-0120

RULE SUMMARY: This new rule incorporates and clarifies the statutory requirements under ORS 537.730 for designating an area of the state a critical ground water area.

CHANGES TO RULE:

690-010-0120

Required Criteria for Designation of Critical Ground Water Area

(1) The Commission may adopt rules to designate an area of the state a critical ground water area if any of the requirements under ORS 537.730(1)(a)-(g) are met. These requirements are: ¶

(a) Ground water levels in the area in question are declining or have declined excessively;/ ¶

(b) The Water Resources Department finds a pattern of substantial interference between wells within the area in question;/ ¶

(c) The department finds a pattern of interference or potential interference between wells of ground water claimants or appropriators within the area in question with the production of geothermal resources from an area regulated under ORS chapter 522;/ ¶

(d) The department finds a pattern of substantial interference between wells within the area in question and;/ ¶

(A) An appropriator of surface water whose water right has an earlier priority date; or ¶

(B) A restriction imposed on surface water appropriation or a minimum perennial streamflow that has an effective date earlier than the priority date of the ground water appropriation ¶

(e) The available ground water supply in the area in question is being or is about to be overdrawn;/ ¶

(f) The purity of the ground water in the area in question has been or reasonably may be expected to become polluted to an extent contrary to t¶

(g) Ground water temperatures in the area in question are expected to be, are being or have been substantially altered except as specified in ORS 537.796. ¶

(2) For the purposes of ORS 537.730(1)(d)(A), a surface water right with an earlier priority date means a certificated and permitted water right including instream water rights, inchoate transfers and determined claims, the source of which is surface water, including springs, streams, lakes, reservoirs, rivers and a "surface water diversion" as provided in OAR 690-008-0001(4). ¶

(3) For purposes of the determination under ORS 537.730(1)(d)(B), restrictions imposed on surface water appropriations' include but not limited to, scenic waterways and other types of legally protected surface water flows.

Statutory/Other Authority: ORS 536.027, ORS 537.730

Statutes/Other Implemented: ORS 537.730

ADOPT: 690-010-0130

RULE SUMMARY: This new rule describes the additional requirements of the rulemaking process applicable to rulemaking actions to designate an area of the state a critical ground water area.

CHANGES TO RULE:

690-010-0130

Additional Requirements for Critical Ground Water Area Rulemaking Process

(1) The rulemaking process for designation of a critical ground water area is governed by the applicable provisions under ORS Chapter 183, ORS 537.730 to 537.742, OAR Chapter 690, Division 001, and these rules. ¶

(2) A rule adopted by the Water Resource Commission shall: ¶

(a) Define the boundaries of the critical groundwater area and shall indicate which of the groundwater reservoirs located either in whole or in part within the area in question are included within the critical groundwater area. Any number of groundwater reservoirs which either wholly or partially overlie one another may be included within the same critical groundwater area. ¶

(b) Contain a provision requiring a periodic review of conditions in the critical ground water area. The review shall be in sufficient detail to evaluate the continuing need for the critical ground water area designation and shall occur no less frequently than once every 10 years. ¶

(3) For the purposes of ORS 537.735(1)(a) the exterior boundaries of groundwater reservoirs may be reasonably inferred or ascertained: ¶

(a) According to the presence of physical natural boundaries, hydrological conditions, or recharge or discharge areas; or ¶

(b) Administratively by defining an affected area that does not have boundaries defined by natural features. ¶

(c) Additionally, to the extent that sub-areas wholly contained within the designated Critical Ground Water Area must be defined to allow for implementation of corrective control provisions, these sub-area boundaries will also be reasonably inferred or ascertained as in 690-010-0130 (3)(a) or (3)(b). ¶

(4) In addition to the requirements under section (1), prior to Commission adoption of a rule designating a critical ground water area, the Department shall: ¶

(a) Coordinate with the affected local government using the process described in OAR 690-010-0140; and ¶

(b) Consult, as described in OAR 690-010-0150, with any federally recognized Indian tribes; ¶

(c) Provide and present to the Commission a report, based on the best available science and information, identifying and characterizing the groundwater reservoirs subject to the proposed critical ground water designation; states any findings the Department is proposing to make under ORS 537.730(1)(a) - (g); and if applicable, states the Department's proposal for any of the corrective control provisions under ORS 537.735(3)(a) - (f). ¶

(d) The Department shall post the report presented to the Commission on the Department's website at least 60 days prior to the public hearing as provided in section (6) of this rule. ¶

(5) In addition to the notice requirements under ORS 183.335, the Department shall give notice of the proposed rules by regular mail to: ¶

(a) The owners of record of all groundwater registrations, inchoate transfers, permits and certificates for groundwater use within the affected area. ¶

(b) For the purpose of providing notice by regular mail, the Department may rely upon the available county tax lot ownership information for parcels underlying or overlapping with water right places of use in the proposed critical ground water area. ¶

(c) Each well constructor licensed under ORS 537.747. ¶

(6) At least 60 days after notice of the proposed rules is provided under ORS 183.335, ORS 537.730(3) and these rules, the Department shall hold a public hearing within each county in which the proposed critical ground water area lies. Notice of the hearing shall be provided in a manner consistent with ORS 537.730(3) and ORS 183.335(3)(b).

Statutory/Other Authority: ORS 536.027, ORS 537.730, ORS 537.735, ORS 537.742

Statutes/Other Implemented: ORS 537.730, ORS 183.335, ORS 537.780

ADOPT: 690-010-0140

RULE SUMMARY: This new rule describes the process and requirements of coordination with affected local government to adoption of a rule designating an area of the state a critical ground water area.

CHANGES TO RULE:

690-010-0140

Land Use Planning Coordination with Affected Local Government

(1) Prior to notification of the proposed rules under ORS 183.335, the Department shall coordinate with the affected local government pursuant to the applicable provisions under ORS Chapter 197 (State Agency Planning Responsibilities), OAR Chapter 690, Division 005 (Compliance With Statewide Planning Goals, Compatibility With Comprehensive Plans, And Coordination On Land Use Matters), and these rules. ¶

(2) To facilitate coordination as described in the State Agency Coordination Program, the Department shall provide the following information to affected local governments: ¶

(a) Boundaries of the proposed critical ground water area; ¶

(b) A list of any groundwater reservoirs located either in whole or in part within the proposed critical ground water area; ¶

(c) A list of subsections under ORS 537.730 relied upon for the designation of the proposed critical ground water area; ¶

(d) A copy of the report presented to the commission in OAR 690-010-0130(5)(c); ¶

(e) A list of any proposed corrective control provisions to be included in the proposed critical ground water area rule under ORS 537.735.

Statutory/Other Authority: ORS 536.027, ORSA 537.730

Statutes/Other Implemented: ORSA 537.730, ORS 537.735

ADOPT: 690-010-0150

RULE SUMMARY: This new rule describes the consultation process with a Federally Recognized Tribe within the basin.

CHANGES TO RULE:

690-010-0150

Consultation with Federally Recognized Tribes

(1) Prior to convening the Rules Advisory Committee, the department shall consult with any federally recognized tribes within the basin and consult with any federally recognized tribes who have expressed an interest in the proposed Critical Ground Water Area. ¶

(2) To aid with consultation the department will provide the information in 690-010-0140(2)(a) - (e) to the federally recognized tribe and any interested federally recognized tribes.

Statutory/Other Authority: ORS 536.027, ORS 537.730

Statutes/Other Implemented: ORS 536.027, ORS 537.730

ADOPT: 690-010-0160

RULE SUMMARY: This new rule incorporates the statutory requirements for a rule designating an area of the state a critical ground water area, references the available corrective control provisions, outlines the timing of rule filing under ORS 537.740, and describes the required frequency of rule review.

CHANGES TO RULE:

690-010-0160

Content, Filing, and Review of Adopted Critical Ground Water Area Rules

(1) Any rule adopted by the Commission under ORS 537.730 and these rules shall meet the requirements of ORS 537.735. ¶

(2) A critical ground water area rule may include any one or more of the corrective control provisions under ORS 537.735(3)(a)-(f). These corrective controls provisions may include: ¶

(a) A provision closing the critical ground water area to any further appropriation of ground water, in which event the commission shall thereafter refuse to accept any application for a permit to appropriate ground water located within such critical area./ ¶

(b) A provision determining the permissible total withdrawal of ground water in the critical area each day, month or year./ ¶

(c) The disposition of any application for a water right permit for the use of water in the area that is pending at the time the commission initiates the rulemaking process or that is received during the rulemaking process. ¶

(d) Any one or more provisions making such additional requirements as are necessary to protect the public welfare, health and safety in accordance with the intent, purposes and requirements of ORS 537.505 to 537.795 and 537.992./ ¶

(e) A provision closing all or part of the critical ground water area to further appropriation of ground water for its thermal characteristics. ¶

(f) A provision determining the permissible change in thermal characteristics of ground water in all or part of the critical ground water area each day, month or year. Insofar as may be reasonably done, the Water Resources Director shall apportion the permissible total temperature impact among those appropriators whose exercise of valid rights in the critical area affect the thermal characteristics of the ground water, in accordance with the relative dates of priority of such rights./ ¶

(3) The Department shall file a copy of any rules designating a critical ground water area with the Secretary of State as provided in ORS 183.355 and with the county clerk of each county within which any part of a critical ground water area lies, and the county clerk shall record the designation in the deed records of the county. ¶

(4) The Department shall conduct a periodic review of conditions within the critical ground water area no less than once every 10 years to evaluate the continuing need for the critical ground water area. ¶

(5) In addition to the requirements of section (4), if the Commission adopts a critical ground water area rule that limits groundwater use, the Department shall review the rule at least once every three years. The review process shall include public notice and an opportunity to comment on the rule.

Statutory/Other Authority: ORS 536.027, ORS 537.730

Statutes/Other Implemented: ORS 537.730, ORS 537.735, ORS 537.740, ORS 537.780

ADOPT: 690-010-0170

RULE SUMMARY: This new rule describes the process and requirements of an Initial Notification of Proposed Corrective Actions.

CHANGES TO RULE:

690-010-0170

Initial Notification of Proposed Corrective Actions

(1) At any time after the Commission adopts a rule designating a critical ground water area, the Commission may initiate a contested case proceeding to propose limitation on groundwater rights or limitations on Exempt Users in the designated area. A contested case hearing shall be initiated by issuance of an Initial Notification of Proposed Corrective Actions followed by a Notice of Proposed Corrective Actions. ¶

(2) An Initial Notification of Proposed Corrective Actions may be issued at any time after the Commission adopts a rule designating a critical ground water area, and prior to issuing a Notice of Proposed Corrective Actions. The Initial Notification of Proposed Corrective Actions shall identify corrective control provisions as specified in ORS 537.742(2)(a) - (f) that the Department believes will resolve the problems that resulted in the designation of a critical ground water area and will form the basis of a Notice of Proposed Corrective Actions as provided in OAR 690-010-0180. ¶

(3) The proposed corrective control provisions that limit the use of groundwater ground water in the critical ground water area that may be included in the Initial Notification of Proposed Corrective Actions are as follows: ¶

(a) A provision apportioning the permissible total withdrawal as established by rule under ORS 537.730, among the appropriators holding valid rights to ground water in the critical area in accordance with the relative dates of priority of such rights./ ¶

(b) A provision according preference, without reference to relative priorities, to withdrawals of ground water in the critical area for residential and livestock watering purposes first. Thereafter, the commission may authorize withdrawals of ground water in the critical area for other beneficial purposes, including agricultural, industrial, municipal other than residential, and recreational purposes, in such order as the commission considers advisable under the circumstances, so long as such withdrawal will not materially affect a properly designed and operating well with prior rights that penetrates the aquifer. ¶

(c) A provision reducing the permissible withdrawal of ground water by any one or more appropriators or wells in the critical area./ ¶

(d) Where two or more wells in the critical area are used by the same appropriator, a provision adjusting the total permissible withdrawal of ground water by such appropriator, or a provision forbidding the use of one or more of such wells completely./ ¶

(e) A provision requiring the abatement, in whole or part, or the sealing of any well in the critical area responsible for the admission of polluting materials into the ground water supply or responsible for the progressive impairment of the quality of the ground water supply by dispersing polluting materials that have entered the ground water supply previously./ ¶

(f) A provision requiring and specifying a system of rotation of use of ground water in the critical area. ¶

(4) In addition to proposed corrective control provisions as provided in subsection (3), the Department's Initial Notification of Proposed Corrective Actions must include: ¶

(a) Identification of the critical ground water area in which the corrective control provisions are proposed; ¶

(b) A statement describing the factors that led to the designation of the critical ground water area; ¶

(c) A description of the proposed corrective control provisions that the Department believes will resolve the problems that resulted in the designation of the critical ground water area; ¶

(d) A description of the geographic area in which corrective control provisions will be proposed; and ¶

(e) A description of how persons may request a Notice of Proposed Corrective Actions and the deadline for requesting such notice. ¶

(5) The Department shall give notice of its Initial Notice of Proposed Corrective Action(s) by: ¶

(a) Publication in a newspaper having general circulation in the area in which the corrective control provisions will be proposed, for a period of at least two weeks and not less than one publication each week. ¶

(b) Publication in the weekly notice published by the Department for four consecutive weeks. ¶

(c) First class mail to any affected local governments and to federally recognized tribes within or adjacent to the geographic area in which corrective actions are identified, and any other interested federally recognized tribes. ¶

(d) Holding a public meeting in the area, or as near as practicable to the area, in which the corrective control provisions will be proposed; and ¶

(e) Posting the Initial Notification of Proposed Corrective Actions on its website. ¶

(6) Persons requesting a copy of the Department's Notice of Proposed Corrective Actions must request a copy of the notice by the deadline specified in the Initial Notification of Proposed Corrective Actions. The request shall be

on a form provided by the Department on its website, and shall include information from the requestor that establishes whether: ¶

(a) The requestor holds a groundwater right within the area defined in the Initial Notification of Proposed Corrective Actions; ¶

(b) The requestor is an exempt user of groundwater; or ¶

(c) The requestor otherwise has an interest in the proceedings; and ¶

(d) The mailing address and electronic mail address to which the Department may mail and e-mail its Notice of Proposed Corrective Action and the requestor's preference for method of notification.

Statutory/Other Authority: ORS 536.027, ORS 537.742

Statutes/Other Implemented: ORS 537.742

ADOPT: 690-010-0180

RULE SUMMARY: This new rule describes the notice process and requirements for Notice of Proposed Corrective Actions.

CHANGES TO RULE:

690-010-0180

Notice of Proposed Corrective Actions

- (1) Following issuance and notification of the Initial Notification of Proposed Corrective Actions, and prior to implementation of any proposed corrective control provisions as may limit the use of groundwater in the critical ground water area, the Department shall issue a Notice of Proposed Corrective Actions proposing implementation of one or more corrective control provisions as specified in ORS 537.742(2)(a)- (f). ¶
- (2) The Notice of Proposed Corrective Actions is a notice for the purposes of ORS 183.415 and shall, in addition to those elements in ORS 183.415 and OAR 137-003-0505, include the following: ¶
- (a) A case caption that identifies the critical ground water area at issue including a citation to the rule establishing the critical ground water area and identification of each county in which the critical ground water area is located; ¶
- (b) A statement of the problem resulting in designation of the critical ground water area that may be addressed by the proposed control provisions the use of groundwater in the critical ground water area; ¶
- (c) A clear and concise description of the proposed corrective control provisions; ¶
- (d) A description of the area where the Director intends to implement the proposed corrective control provisions including attachment of any maps as necessary to clearly show the area of intended corrective control provisions such that groundwater right holders and exempt users located within the area of intended action may determine whether they will be affected by the proposed corrective control provisions; ¶
- (e) Identification of those groundwater right holders and exempt users whose rights to use groundwater may be limited by the proposed corrective control provisions; ¶
- (f) Findings of fact that support a conclusion that the problem(s) that resulted in designation of a critical ground water area may be corrected by implementing the corrective control provisions specified in the Notice of Proposed Corrective Actions; ¶
- (g) Reference scientific information that supports the agency's findings of fact; ¶
- (h) Conclusions of law based on the findings of fact and applicable law; ¶
- (i) An explanation of the reasoning that leads from the findings of fact to the conclusion that the problems that resulted in designation of the critical ground water area may be resolved by implementation of the corrective control provisions identified in the notice; ¶
- (j) A notice of right to a contested case hearing pursuant to ORS chapter 183.415 and OAR 137-003-0505; and ¶
- (k) A deadline for submitting a request for a contested case hearing; for persons holding a groundwater right or exempt users this deadline will be no less than 30 days after the Notice of Proposed Corrective Actions is mailed; and ¶
- (l) A deadline for filing a Petition for Party Status as provided in OAR 690-010-0190; this deadline will be no less than 30 days after the Notice or Proposed Corrective Actions is mailed. ¶
- (3) The Department shall provide notification of the Notice of Proposed Corrective Actions by: ¶
- (a) Mailing copies of the Notice of Proposed Corrective Actions by certified or registered mail to groundwater right holders and exempt users whose wells are within the identified area in which corrective control provisions are proposed and whose use of groundwater will be limited by proposed corrective control provisions but only as the Department possesses contact information or may reasonably obtain contact information. ¶
- (b) Mailing copies of the Notice of Proposed Corrective Actions by regular mail to persons who have timely requested copies of the notice and who chose mail as their preferred method of contact as provided in OAR 690-010-0170(4). ¶
- (c) Emailing copies of the Notice of Proposed Corrective Actions to persons who have timely requested copies of the notice and who chose email as their preferred method of contact as provided in OAR 690-010-0170(4). ¶
- (d) Publication in the weekly notice published by the Department for four consecutive weeks. ¶
- (e) Publication on the Department's website.
- Statutory/Other Authority: ORS 536.027, ORS 537.742
- Statutes/Other Implemented: ORS 537.742

ADOPT: 690-010-0190

RULE SUMMARY: This new rule describes the process and requirements for requests for party standing to a contested case hearing on a Notice of Proposed Corrective Action.

CHANGES TO RULE:

690-010-0190

Requests for Hearing and Petitions for Party Status

(1) Persons who hold a groundwater right whose groundwater use will be limited and exempt users whose groundwater use will be limited as described in the Notice of Proposed Corrective Actions are parties to the contested case regarding a Notice of Proposed Corrective Actions. ¶

(2) Persons who do not hold groundwater rights or persons who are not an exempt user may seek party status in the contested case regarding a Notice of Proposed Corrective Actions by filing a Petition for Party Status with the Department by the deadline specified in the Notice of Proposed Corrective Actions. ¶

(a) A Petition for Party Status must be in writing, must be consistent with the provisions in OAR 137-003-0535 and OAR 137-003-0630 and must be timely filed in the Department's Salem office by the deadline described in 690-010-180(2)(I) in the Notice of Proposed Corrective Actions. The deadline shall be at least 120 days before the date set for the contested case hearing. ¶

(b) Consistent with the provisions of OAR 137-003-0535 the Department may identify persons who shall be parties or limited parties in a contested case hearing regarding the Notice of Proposed Corrective Actions. ¶

(3) Persons who hold a groundwater right whose groundwater use will be limited and exempt users whose groundwater use will be limited as described in the Notice of Proposed Corrective Actions may request a hearing to respond to the matters asserted in the Notice of Proposed Corrective Action(s). A Request for Hearing must be in writing and filed by the deadline specified in the Notice of Proposed Corrective Actions. Requests for Hearing shall include: ¶

(a) Name and address of any petitioners; ¶

(b) Name and address of the petitioner's attorney, if any; and ¶

(c) Identification of the water right held by the petitioner or identification of the exempt well and exempt uses, owned or used by the petitioner. ¶

(d) Requests for Hearing may also include: ¶

(A) A detailed description of how the corrective control provisions in the Notice of Proposed Corrective Actions would adversely affect or aggrieve petitioner supported by an affidavit stating such facts; ¶

(B) A detailed description of how the Notice of Proposed Corrective Actions is in error or deficient and how to correct the alleged error or deficiency; ¶

(C) A detailed description of whether the problem(s) that resulted in the designation of the critical ground water area may or may not be corrected by implementing the corrective control provisions specified in the agency notice and why; and ¶

(D) Any citation of legal authority supporting the petition, if known. ¶

(4) Requests for Hearings and Petitions for Party Status shall be considered filed on the date postmarked. Requests for Hearing or Petitions for Party Status sent by facsimile or hand-delivered are considered filed when received by the Department in its Salem office. In computing the period of time for timely filing, the last day of the time period shall be included, unless it is a scheduled day of office closure, in which event the time period runs until the end of the next day that the office is open. Scheduled days of office closure include, but are not limited to, Saturdays and legal holidays identified in ORS 187.010 and 187.020, including Sundays.

Statutory/Other Authority: ORS 536.027

Statutes/Other Implemented: ORS 536.027, ORS 537.742

ADOPT: 690-010-0200

RULE SUMMARY: This new rule describes the scope of a contested case hearing on a Notice of Proposed Action.

CHANGES TO RULE:

690-010-0200

Scope of Contested Case Hearing

(1) A contested case hearing shall be conducted to establish one or more of the corrective control provisions in ORS 537.742 that limits use of groundwater in the critical ground water area as provided in the Notice of Proposed Corrective Actions. ¶

(2) Except as otherwise provided in ORS 183.417(8) the Director shall create a list of issues to be heard in the contested case and shall refer that list to the Office of Administrative Hearings at the time the Notice of Proposed Corrective Actions is referred. ¶

(a) The list of issues shall include those issues raised in a timely-filed Request for Hearing with the information provided in 690-010-190(3)(e)(A) - (D) though issues may be categorized or summarized as furthers efficient administration of the contested case. ¶

(b) Parties to the contested case may seek amendment or clarification of the list of issues consistent with the provisions of OAR 137-003-0630.

Statutory/Other Authority: ORS 536.027, ORS 537.742

Statutes/Other Implemented: ORS 537.742

ADOPT: 690-010-0210

RULE SUMMARY: This new rule describes the process and requirements of a contested case proceeding on a Notice of Proposed Corrective Action.

CHANGES TO RULE:

690-010-0210

Conduct of Contested Case

(1) The conduct of the contested case regarding the Notice of Proposed Corrective Action(s) shall be governed by OAR 137-003-0501 to 137-003-0700 except as otherwise provided in these rules. ¶

(2) The Department shall refer the contested case to the Office of Administrative Hearings as provided in OAR 137-003-0515. ¶

(3) The Department shall post on its webpage the information contained in its referral to the Office of Administrative Hearings and may also post maps, reports or any other information supporting the Notice of Proposed Corrective Actions including links to information referred to in the Notice of Proposed Corrective Actions. ¶

(4) Due to the extensive scope of the contested case hearing and the large number of parties, the availability of the information posted as provided in subsection (3), and the availability of public record requests pursuant to Oregon's Public Records Law, discovery against the Department is only as provided in OAR 137-003-0566(1)(a) - (c). ¶

(5) Service and filing of documents in the contested case hearing may be by electronic means only as directed and allowed by the Administrative Law Judge.

Statutory/Other Authority: ORS 536.027, ORS 537.742

Statutes/Other Implemented: ORS 537.742

ADOPT: 690-010-0220

RULE SUMMARY: This new rule describes the process and requirements for filing exceptions to proposed orders and the Commission's review and response to such exceptions.

CHANGES TO RULE:

690-010-0220

Exceptions to Proposed Order

(1) Exceptions to the Proposed Order issued by the Administrative Law Judge after a contested case hearing must be filed with the Department in its Salem office within 60 days following the date of service of the Proposed Order. Parties must mail or hand-deliver a hard copy of their exceptions to the Department at its Salem offices and must also email an electronic copy to all the email addresses listed on the Certificate of Service. ¶

(2) The Commission must consider timely-filed exceptions but need not individually address each exception in any final order issued. The Commission may form a subcommittee of Commission members to review the exceptions and may provide a report to the Commission prior to the Commission issuing a final order.

Statutory/Other Authority: ORS 536.027, ORS 537.742

Statutes/Other Implemented: ORS 537.742

ADOPT: 690-010-0230

RULE SUMMARY: This new rule describes the requirements for a final order issued at the conclusion of a contested case hearing.

CHANGES TO RULE:

690-010-0230

Final Order in Contested Case

(1) Upon conclusion of the contested case hearing, including the consideration of exceptions filed against a proposed order issued by the administrative law judge, the Commission shall issue a final order in contested case.

¶

(2) If, after consideration of the contested case record, the Commission finds that the factors that resulted in the designation of a critical ground water area under ORS 537.730 can be resolved by implementing one or more of the corrective control measures specified in the Notice of Proposed Corrective Actions, the Commission shall issue a final order establishing one or more of the proposed corrective control provisions which may include limitations on the use of groundwater by those holding groundwater rights or exempt users. ¶

(3) Final orders in contested case must be consistent with ORS 183.650 and OAR 137-003-0665 and directed to the named parties in the contested case proceeding. ¶

(4) Final orders in default issued to a party in the contested case hearing must be consistent with OAR 137-003-0670. ¶

(5) The Commission's final order in contested case is appealable to the Oregon Court of Appeals pursuant to ORS 183.482 and ORS 536.075.

Statutory/Other Authority: ORS 536.027, ORS 537.742

Statutes/Other Implemented: ORS 537.742

ADOPT: 690-010-0240

RULE SUMMARY: This new rule describes the procedures for making changes to rules for existing Critical Ground water Areas.

CHANGES TO RULE:

690-010-0240

Procedure for Making Changes to Existing Critical Ground Water Area

(1) Where a critical ground water area is established and described in rule only, the Commission may modify an existing critical ground water area designation by amending the basin program rules pursuant to the process in ORS 536.300 - 340 and ORS 183.335. ¶

(2) Where a critical ground water area is established by an order or proclamation that is referenced in a basin program rule, the Commission may amend the basin program rule referencing the critical ground water area order or proclamation so as to confirm or modify the order's or proclamation's provisions governing designation of the critical ground water area or the establishment of corrective control provisions. Any rulemaking as provided in subsection (2) does not amend an order or proclamation as it directs the disposition of individual rights adjudicated in the order or proclamation. ¶

(3) Insofar as critical ground water area rules, orders or proclamations are amended to establish new or amended critical area designations or new or amended corrective control measures such corrective control measures may apply: ¶

(a) To those rights previously adjudicated in a critical ground water area order or proclamation only upon completion of a contested case initiated pursuant to ORS 537.742 and ORS 183; ¶

(b) To pending groundwater applications and present groundwater rights, only upon completion of a contested case initiated pursuant to ORS 537.742 and ORS chapter 183.

Statutory/Other Authority: ORS 536.027, ORS 537.730

Statutes/Other Implemented: ORS 537.730

Groundwater Advisory Committee (GWAC) Recommendation

GWAC Member	Member Affiliation
Brandon Brown	Monitoring/Water Well Industry
Floyd Sippel	Monitoring/Water Well Industry
Ken Bentz	Groundwater Irrigator
Kenneth Masten	Groundwater Irrigator
Marshall Gannett, Vice-Chair	Hydrogeologist
Phil Brown, Chair	Hydrogeologist
Richard Smith	Domestic Well Owner
Susan Baker	Local Government
Trent Castner	Monitoring/Water Well Industry

May 2, 2023 – Division 10 Rulemaking Recommendation:

“The Groundwater Advisory Committee recommends that the Division 10 rules include a rulemaking notification requirement to notify by mail all taxlot owners that have developed or may develop groundwater, exempt or permitted, within the proposed critical groundwater area boundary. For taxlot owners within a municipal or quasi-municipal water service area, only the water provider must be notified.”

Department Response:

The Department added a new section 690-010-0130(5)(b) that requires the Department to notify all tax lot owners within the affected area, but not within a municipal or quasi-municipal water service area.

Oral and Written Comments and the Department’s Response

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Comments from Kenneth Bierly and Associates

Comment: 690-010-0110 Definitions

Tribal Interests

As a background, I understand that there are sovereign tribal governments located on, typically, sovereign lands (reservation lands). The interest of sovereign tribal governments is determined by federal treaty rights. As a result of treaty obligations, most tribes also have an interest in lands ceded by treaty for the use in usual and accustomed means. It seems that these interests have a land-based interest that should be distinguished and recognized in OAR 690-010-0150 Consultation with Federally Recognized Tribes. The rules do not recognize that groundwater has not been adjudicated in Oregon and there may be tribal rights that supersede current appropriations in groundwater reservoirs that include reservation lands. As designations of critical groundwater areas occur, the potential for such contests could arise.

I would suggest that a clear way to recognize those interests is to add "federally recognized Indian tribes" to the definitions and specifically recognize their interests in both reservation lands and ceded lands. It should be recognized that the terms "federally recognized Indian tribes" and "federally recognized tribes" are both used in OAR 690-010-0130 (4)(b) and OAR 690-010-0150. I would suggest a single definition and consistent use would help the rules.

A potential definition could be the same as used in OAR 213-030-00130 (6):

"Federally recognized Indian tribe" means one of the federally recognized tribes of Oregon, including:

- (a) Burns Paiute Tribe;
- (b) Confederated Tribes of Coos, Lower Umpqua and Siuslaw;
- (c) Confederated Tribes of Grand Ronde Community of Oregon;
- (d) Confederated Tribes of Siletz Indians of Oregon;
- (e) Confederated Tribes of the Umatilla Indian Reservation;
- (f) Confederated Tribes of the Warm Springs Indian Reservation;
- (g) Coquille Indian Tribe;
- (h) Cow Creek Band of Umpqua Tribe of Indians; and
- (i) Klamath Tribes.

Response: The Department has elected not to add a list of all federally recognized Indian tribes. Generally, the Department avoids adding rule language that can be outdated after rule adoption. Additionally, federally recognized Tribes are already a defined term in federal law.

Comment :690-010-0150 Consultation with Federally Recognized *Indian* Tribes

(1) Prior to convening the Rules Advisory Committee, the Department shall consult with any federally recognized *Indian* tribes ***with reservation lands*** within the basin and consult with any federally recognized *Indian* tribes who have ***ceded lands or have*** expressed an interest in

the proposed Critical Ground Water Area.

(2) To aid with consultation, the Department will provide the information in 690-010-0140(2)(a) - (e) to the

federally recognized *Indian* tribe ***with reservation lands in the designated area*** and ***each*** federally recognized *Indian* tribe ***that has ceded lands in the designated area and to any other federally recognized Indian tribe that has expressed an interest in the proposed Critical Ground Water Area.***

I believe that the changes identified above to the consultation rule language makes a clearer distinction of responsibilities of the Department and clarifies the interest of the tribes.

Additionally, there are individual tribal members with an ownership interest in allotted lands and other private holdings. This interest could be covered by removing "Indian tribes" from the definition of "person" and substituting "tribal members". This would refer to individual owners of allotted parcels or other parcels, not tribal ownership. However, both the 14th amendment to the U.S. Constitution and the Indian Citizenship Act of 1924 clearly recognizes the citizen (person) status of tribal members so elimination of the reference to "Indian tribes" might be more relevant.

Response: The Department incorporated parts of the suggested language into section 690-010-0150(1) – (2) of the draft rules.

Comment: 690-010-0130 Additional Requirements for Critical Groundwater Area Rulemaking Process Boundaries of Groundwater Reservoirs

The boundaries of groundwater reservoirs as described in OAR 690-101-0130(3)(a) strangely leaves out geology or hydrogeology as a defining characteristic of a groundwater reservoir. I would suggest there be some mention of the subsurface conditions that can be used to delineate a groundwater reservoir. Possible language to consider is "(3)(a) According to the presence of physical natural boundaries, hydrological conditions, ***geological structure, hydrogeologic conditions***, or recharge or discharge areas; or". I believe the proposed language would give the Department a stronger basis for designating the boundaries of a groundwater reservoir.

Response: The Department did not incorporate the suggested language. The language, as drafted, can include geological structures and hydrogeologic conditions.

Comment: 690-010-0160 Content, Filing, and Review of Adopted Critical Ground Water Area Rules and 690-010-0170 Initial Notification of Proposed Corrective Actions

I would argue that given the complexity of groundwater conditions in many areas of the state, the flexibility to tailor corrective actions to specific problem areas within a larger Critical Ground Water Area would allow the Department and groundwater users to focus the corrective action to the specific nature of the problem which may be different in different portions of a designated Critical Ground Water Area.

Current language in the draft rules is unclear whether corrective actions can be applied to subareas of the critical groundwater area or must be applied to the entire area designated. I would suggest for clarity purposes and flexibility of targeting corrective actions to specific local conditions there should be consistent language giving the agency the authority to do either.

This can be accomplished by changing OAR 690-010-0160 (2)(b) to read: "A provision determining the permissible total withdrawal of ground water in **all or part of** the critical area each day, month or year."

If the proposed approach is accepted, OAR 690-010-070 should also reflect the flexibility. It can be clarified by the following language at OAR 690-010-0170 (3) as: "The proposed corrective control provisions that limit the use of groundwater ground water in **all or part of** the critical ground water area that may be included in the Initial Notification of Proposed Corrective Actions are as follows:"

Language at OAR 690-010-0180(2)(d) seems to indicate that the flexibility to allow for different corrective actions in different parts of the critical groundwater area is intended. For clarity purposes the option for different corrective actions to suit the groundwater reservoir and groundwater use conditions on a finer scale than designation of a Critical Ground Water Area seems better suited to address site specific problems.

Response: The Department did not incorporate the suggested language change because the language in OAR 690-010-0160(2)(b) is statutory language. The Department added a new section 2 to clarify that the corrective control provisions can be applied to all the Critical Groundwater Area or the sub-area of the Critical Groundwater Area. The Department also added language to 690-010-0170(4)(a) to clarify the corrective control provisions can be applied to sub-areas.

Comments from Christopher Hall, Water League

Comment: Hi Kelly,

Thanks for sending out the info. I hope to read through the rules soon. One quick typo is in 690-010-0200:

(a) The list of issues shall include those issues raised in a timely-filed Request for Hearing with the information provided in 690-010-190(3)(e)(A) - (D) though issues may be categorized or summarized as furthers efficient administration of the contested case. ¶

The rule provision wants to reference 690-010-190(3)(d)(A) - (D)

All the best,

Chris

Response: This error has been corrected.

Form letter from 102 Residents of Klamath County

The Department received 102 letters that followed the same format and contained the same comments.

Here is the list of names of commenters signing the form letter:

1. Boudewyn deHoop	36. Karen Baker	68. Jamie Maxwell
2. Barbara King	37. Shanda Lynn	69. Kristina Mainwaring
3. Judi Dawn	C'DeBacca	70. Gabriel Mainwaring
4. Jessica Hunter	38. James Lee Treasure	71. Ian Kautzman
5. Shaun Toalw	39. Cherice F. Treasure	72. Steven Aderson
6. Bradley Rayle	40. Trent Balin	73. Fawna Anderson
7. Kenneth Moore	41. Scott Balin	74. Gabby Gregory
8. Jake Keeton	42. Scott Ballin	75. Mathew Dooley
9. Dave Snider	representing Great Western	76. Robert L Parrish
10. John Gottlieb	Farm Ranches	77. Brian Calvin
11. James Wright	43. Bryce Balin	78. John Anderson
12. Tangie Price	44. Frederick Frisendahl	79. Alexis Farley
13. Ryan Hamel	45. Lyle Archibald	80. Timothy Farley
14. David Hamel	46. Rodney C'DeBacca	81. Matt Grant
15. Cindy Hamel	47. David McNiven	82. Judith Lyon
16. Gwen Halvosen	48. Cherrese Wilson	83. Ralph Lyon
17. Shelley With	49. William Dean Wilson	84. Colleen Sharp
18. Donald Koishore	50. Alexis Waid	85. Wesley Sharp
19. Jennifer McKoen	51. Spencer Hamblid	86. Kylie Nichols
20. Jolene Moxon	52. Tim Hamblin	87. Cristina Gutierrez
21. Kasie Anderson	53. April Hamblin	88. Raylene Clumpner
22. Luke Robison	54. Laticia Eddy	89. John Clumpner
23. Sidney Marc Stanton	55. Mike Eddy	90. Andrew Nichols
24. Michael McKoen	56. Bj Blank	91. Ray Stacey
25. Cynthia Ann Moore	57. Rebecca Hastin	92. Travis Laub
26. Michael Moore	58. Sarah Jones	93. Brian O'Connor
27. Helene Olsen-Grant	59. Joel C Scott	94. Gina M. Lamb
28. Doyle Champlain	60. Shawna Hadwick	95. Pamela L Rodrigues
29. Carri Hudson	61. Richard A. Kirkpatrick	96. Barrie Clumpner
30. Michael Lee Pivac	62. Charles W Owen	97. Will Oxley
31. Manuela Daly	63. Rhonda Badker	98. Andrew Oxley
32. Carol Warren	64. Richard Lynn Badker	99. Jack Ginester
33. Kristen Clark	65. Michael R. Jones	100. Ryan Kliever
34. Dave Gardner	66. Randy Hadwill	101. Steve Robnett
35. Virginia L. Bustos	67. Natalle Wasson	102. Steven A. Klus

The form letter comments are listed below with responses:

1. I demand that my local elected government representatives (including special government districts as described in Oregon Revised Statute 195-020) are required to exercise their authority

as an "affected local government" in any potential discussion of a declaration of a critical groundwater area as discussed in 690-010-0140.

Response: The Department cannot require an affected local government to exercise their authority. The rule as written requires the Department to coordinate with affected local governments and requires specific information be provided to facilitate that coordination. As part of the rulemaking process affected local governments will be encouraged to participate in the rulemaking advisory committee and to provide public comment on the rules.

2. I demand that my local elected government representatives (including special government districts as described in Oregon Revised Statute 195-020) are offered the opportunity to provide facts to dispute the Oregon Water Resources Department's determination. 690-010-0140 provides no opportunity for my local elected representatives to defend or protect their constituents.

Response: The purpose of 690-010-0140 is to ensure coordination with Affected Local Governments under the Departments Division 5 rules. It is the responsibility of the counties to coordinate with local governments to ensure alignment with their comprehensive plans. The Department has added new requirements for the report to the commission under 690-010-0130(4)(c)(A)(B) to allow for members of the public to submit opposing scientific data showing that a Critical Groundwater Area designation is not needed.

3. To "coordinate" with affected local governments, as per the Oxford Learner's Dictionary, means "to organize the different parts of an activity and the people involved in it so that it works well; to reach an agreement with other people about how to work together effectively." However, these Draft Division 10 rules do not provide the affected local government any ability to interact, provide input, or provide alternative solutions so that the activity "works well" or is "effective".

Response: The purpose of 690-010-0140 is to ensure coordination with Affected Local Governments under the Departments Division 5 rules. It is the responsibility of the counties to coordinate with local governments to ensure alignment with their comprehensive plans. The Department has added new requirements for the report to the commission under 690-010-0130(4)(c)(A)(B) to allow for public comment on the draft report. As part of the rulemaking process affected local governments will be encouraged to participate in the rulemaking advisory committee and to provide public comment on the rules.

4. No less than 30 days for submitting a request for a contested case hearing described in 690-010-0180 (2) (k) and (l) is too short for most affected parties. The availability of attorneys affected local government officials, and community notification are all factors that delay an adequate request for a contested case hearing. This date needs to be extended to at least 120 days to allow for adequate analysis of the determination, consultation with attorneys, allowing for the public board, and government meetings to receive input, and drafting appropriate responses.

Response: The minimum deadline of 30 days for requesting a hearing begins at the time of the notice of proposed corrective control orders. This process cannot be initiated until after the initial notification of proposed corrective control orders has been completed which by rule must take a minimum of 28 days. This provides at minimum 58 days for parties to receive the notification and enter a request for hearing. This language allows the Department to set a reasonable timeframe for

requests based on the number of parties impacted. The Department may also review and accept late requests for hearing per OAR 137-003-0003.

5. Enforcement of a critical groundwater area designation should automatically stay until all contested case hearings are argued and the results of these hearings are published.

Response: The CGWA designation in rule does not limit or curtail individual water use. Individual water use may only be limited after a contested case hearing has been completed and a final order has been issued. A CGWA designation only allows one or more of the corrective control provisions as listed in ORS 537.735(3)(a-f). These provisions primarily prevent new water uses from being approved upon adoption of the CGWA rules. As stated previously, this does not limit individual users until after a contested case hearing is complete.

6. Third parties, without a water right (surface or groundwater) interest effecting real property owners, should not be allowed. Strike 060-010-0190 (2) in its entirety.

Response: Third parties including exempt groundwater users all have an interest in the public water resources of Oregon.

7. Groundwater sustainability is the overall necessity for such draconian measures as declaring a critical groundwater area; however, none of these proposed rules explore opportunities, nor activities to make groundwater use sustainable. Actions affected local governments could take, such as groundwater recharge, underground storage, and other opportunities should be addressed as actions taken to promote groundwater sustainability to prevent a critical groundwater area designation.

Response: ORS 537.745 provides for voluntary agreements to control in lieu of orders from the state when adopted by the Commission. All groundwater users are encouraged to use water as sustainably and efficiently as possible and should be always working towards those goals. The Department is anxious to support more efficient beneficial use of groundwater. As an example, the Department is working with FSA on a voluntary groundwater right retirement program in the Harney Basin (CREP). The Department maintains a team of experts that focus on aquifer recharge and aquifer storage and recovery (AR/ASR) as well as grant opportunities for feasibility studies. However, AR/ASR projects require that there is available surface water that can be used for these projects and many areas of the state currently do not have water available for new surface water rights to use in AR/ASR.

8. Oregon Water Resources Department must ensure that the surface water is being prioritized and delivered under Oregon water law and/or adjudicated claims before designating a critical groundwater area in areas where stored water is being released without a water right to do so.

Response: The Department routinely manages surface water and groundwater for beneficial purposes across Oregon. However, in the Klamath Basin, the Bureau of Reclamation administers the Klamath Project, in part by managing water levels in Upper Klamath Lake. The Link River Dam (which is owned by the Bureau and operated by PacifiCorp) allows for the regulation of Upper Klamath Lake elevations and controlled releases into the Klamath River. The Bureau must operate the dam consistent with the federal laws that bind it, including the federal Endangered Species Act (ESA). To the extent that operation of the dam under federal law conflicts with state law, the U.S.

District court has found that federal law preempts state law. As such, the OWRD is prevented from ordering the Bureau to cease release of water through the Link River Dam pursuant to the federal ESA. *Yurok Tribe et al., v. U.S. Bureau of Reclamation, et al.* (Case No. 19-cv-04405-WHO).

**Comments from Michael Martin from the
League of Oregon Cities (LOC) and Michael Preedin from
Central Oregon Cities Organization (COCO)**

Comments: Both COCO and LOC have a concern about the definition of “person” in draft proposed rule OAR 690-010-0110(4). As written, the definition would not include cities. As a result, cities would be precluded from multiple actions under the proposed draft rules, such as requesting notice of proposed corrective actions or requesting a contested case hearing. COCO and LOC request a revision to the proposed rule to include cities within the definition of “person.”

Response: The definition of person has been updated to include “public and private municipal corporations, political subdivisions, the state and any agencies thereof, the federal government and any agencies thereof”

Comments: The rules have added the following definition of “a surface water right with an earlier priority date” in 690-010-0120(2):

(2) For the purposes of ORS 537.730(1)(d)(A), a surface water right with an earlier priority date means a certificated and permitted water right including instream water rights, inchoate transfers and determined claims, the source of which is surface water, including springs, streams, lakes, reservoirs, rivers and a "surface water diversion" as provided in OAR 690-008-0001(4).

We have the following concerns about the new definition:

- It should say a certificated or permitted water right.

Response: The Department concurs and has made the change.

- “Determined claims” should be defined.

Response: The Department agrees and has defined “Determined claims.”

- The reference to “surface water diversion,” which is within the definition of “declined excessively” in Division 8 is confusing. Further, a rulemaking has been initiated that affects this rule division (OWRD’s Groundwater Allocation Project rulemaking includes Division 8). It is inadvisable to reference a rule that may be changed as part of that rulemaking.

Response: The Groundwater Allocation rulemaking is not proposing any substantive changes to the definitions of declined excessively or excessively declining within OAR 690-008. The inclusion of “surface water diversion” is to ensure that there are no types of surface water rights that are excluded from consideration in the CGWA process.

Comment: The OAR 690-010-120 rules have also added the following new provision:

(3) For purposes of the determination under ORS 537.730(1)(d)(B), restrictions imposed on surface water appropriations include but not limited to, scenic waterways and other types of legally protected surface water flows.

- “include” should be changed to “including”

Response: The Department concurs and has made the change

- Scenic waterways are not legally protected surface water flows; i.e. they are not water rights. While OWRD considers whether downstream scenic waterways would be impacted by a new out-of-stream allocation (water right), the agency does not regulate off other water users if scenic waterway flows are not met.

Response: A scenic waterway flow is not a water right; however, it is a restriction imposed on surface water appropriations. If the Commission finds a pattern of substantial interference between wells in an area and the scenic waterway flows, then the Commission may designate a CGWA.

Comment: COCO would also like to take this opportunity to point out that the current definition of “declined excessively” in Division 8 is problematic, and OWRD should revise it as part of the above referenced rulemaking. The definition was developed in the late 1980’s and focused on efforts to establish Critical Groundwater Areas in the Umatilla Basin. This definition is entirely unreasonable for a basin like the Deschutes. The definition of “declined excessively” includes declines of greater than 50 feet. However, in the Deschutes Basin, where the regional aquifer is approximately 1,000 feet thick, a decline of 50 feet is equivalent to approximately 5 percent of the aquifer. Such a minimal decline should clearly not be defined as “excessive.” This definition needs to be modified as part of the rulemaking affecting Division 8 for OWRD to be meeting its statutory obligations under ORS 537.525, specifically “conserving maximum supplies of ground water for agriculture, commercial, industrial, thermal, recreational and other beneficial uses. (ORS 537.525 (5).

Response: The Department acknowledges the comment, but this definition is not part of the Division 10 rulemaking.

Comments from April Snell from the Oregon Water Resources Congress

Comment: The proposed rule revisions to OAR Chapter 690, Division 10 lack a clear imperative or directive. OWRC representatives have served on numerous agency RACs and most are initiated by legislation, related budget directives, legal cases, or other specific impetus for changing existing rules. While WRD staff have attempted to justify why the rulemaking is occurring now, there does not seem to be specific, time-sensitive reason for revising now. Ostensibly, the CGWA rules may benefit from updates, as would the myriad of other OARs that WRD and other agencies use. However, the timing of choosing to embark on complex rulemaking during the same time as a full state legislative session gives credence to concerns amongst our members and other water users that this effort was designed to be less transparent. Most of the representatives on the RAC are also responsible for engaging in the state legislative session (including OWRC), which made engaging the RAC meetings

difficult. There were four RAC meetings, starting in December 2022, all of which were difficult for OWRC staff to participate in.

Response: The Division 10 rules need updating so they align with the updated process that is outlined in statute for designation of a CGWA. Groundwater level declines in basins across Oregon are impacting senior groundwater users and exempt well users. Designation of CGWAs is another option for long-term groundwater management in areas where groundwater is over-appropriated and groundwater levels are declining. The Division 10 rules help protect senior groundwater users and sustainably manage groundwater to prevent further declines which have resulted in impacts to surface water right holders, domestic well owners, and others.

Comment: Second, there is a lack of clarity on how these proposed rules would or would not impact existing Critical Groundwater Designations. WRD has said, verbally and in the written RAC materials, that the revisions to OAR Chapter 690, Division 10 would not: “create basin or subbasin specific CGWAs, limit groundwater appropriation; or implement corrective control provisions,” yet there is nothing in the proposed rule revisions that provides necessary assurances that is the case. We recommend further revising the rules to clarify these rules do not affect or apply to current critical ground water area rules, orders, or proclamations in existence prior to [the date of the final rulemaking], with the exception of OAR 690-010-240.

To further clarify how these rules would or would not impact to existing CGWAs we would also recommend adding language or specific references to existing CGWAs (under 690-010-0240, "Procedure for Making Changes to Existing Critical Ground Water Area)," given that there is a fixed number of existing critical ground water area designations established and described in rule only.

Response: The existing CGWAs were established decades ago. Groundwater level declines continue in some of these areas, and annual groundwater allocation practices in two CGWAs takes excessive staff time and adds no value to long-term, sustainable groundwater management. The Division 10 rules, specifically OAR 690-010-0240, are designed to allow the Department the ability to update and modernize groundwater management tools within existing CGWAs.

In conclusion, we urge WRD and the Commission to postpone adopting the proposed revisions to OAR Chapter 690, Division 10 and re-engage with stakeholders once the 2023 Legislative Session has concluded. There is no urgency to adopt these rules now and having further conversations about these and other groundwater rules together (rather than in silos) will result in a better outcome, or at least one that is better understood by the water user community.

Response: The Division 10 rule writing process afforded many opportunities for the public to comment on the rules. The Oregon Water Resources Department hosted four RAC meetings that were four hours long with a public comment period at the end of each meeting. On April 1, 2023, the fifty-day public comment period began. During the public comment period the Department hosted 4 public hearings across the state. The Department believes that the rule making process was transparent and afforded many opportunities for public participation.

Summarized comments on Federal water management and administration of the endangered species act (ESA): The Water Resources Department and the Water Resources Commission should manage groundwater prudently but should also recognize that a lack of surface water is the cause of groundwater declines within the Klamath Basin and should work to protect surface water rights from federal water management practices.

Specific comments:

Comment: The proposed definition of “Affected local government” appears to be derived from OAR 690-005-0015(1) and (9), which is fundamentally related to land use planning. The definition should be modified to include any public agency that is involved in water management in the area in, or overlying, a proposed critical groundwater area. Those agencies have water management planning and management responsibilities and expertise that is highly relevant to the consultation processes under the proposed OAR 690-010-0130 and 690-010-0140.

In the same manner, the proposed OAR 690-010-0140 is limited to land use planning coordination, and the proposed OAR 690-010-0150 also excludes agencies who are directly involved in water planning and management. Water system planners and operators should be consulted at the earliest possible time. Additional comments regarding this issue are below.

Response: The intent of this definition is to limit coordination to entities engaged in land use planning and ensuring that the Department meets the requirements of the State Agency Coordination Plan. The rulemaking process and specifically the Rulemaking Advisory Committee would be the appropriate place for engagement with stakeholders such as public agencies participating in water management.

Comment: “Groundwater reservoir” is an uncommon term, although we recognize that it is used in ORS 537.735. In the proposed rule, the relationship between groundwater “areas” and groundwater “reservoirs” is not clear.

Response: This definition is clear and concise and focuses solely on defining the body of water that exists underground in three-dimensional space. How a CGWA boundary will be defined and what groundwater reservoirs will be included is specified in the proposed OAR 690-010-0130(2).

Comment: The proposed definition of “person” is likely narrower than the Commission would intend, considering that corrective actions would be proposed for “persons.”

Response: The definition of person has been updated to include “public and private municipal corporations, political subdivisions, the state and any agencies thereof, the federal government and any agencies thereof”.

Comment: Proposed OAR 690-010-0140 and 690-010-0150
The proposed rules for consultations with various governmental entities prior to release of a proposed rule would exclude local agencies involved in water planning and management. Whether such agencies manage surface water, groundwater, or both, any proposed designation is likely to have implications for their activities. Further, the local agencies have interests, local knowledge, and expertise that should be considered at the earliest possible time in the process of a potential designation. The proposed rules need to be amended to provide this inclusion.

Response: The intent of coordination with affected local governments, i.e., counties, is to meet the requirements of the State Agency Coordination plan. The counties are responsible for coordinating with special districts in the creation of their comprehensive plans. The Department does not need to coordinate with local agencies. Additionally, the engagement that occurs with local entities as part of the Rule Advisory Committee process will afford water agencies the opportunity to provide feedback and ideas into the rule process.

Comment: Content, Filing, and Review of Adopted Critical Groundwater Area Rules

The proposed OAR 690-010-0160(2) identifies corrective control provisions that may be included in a critical groundwater area rule. We recognize that ORS 537.735(3) allows the inclusion of such measures. However, the Commission must not blur the lines between rulemaking and contested case proceedings. In addition, a rule must not bias a contested case proceeding by predetermining, prescribing, or influencing an outcome of the contested case proceeding. To that end, at most, the rule should generally identify the types of corrective control provisions that may be proposed for adjudication in a contested case.

Response: OAR 690-010-0160(2)(a)-(f) define what corrective controls may be put in a CGWA rule as per the statute. OAR 690-010-0170(3)(a)-(f) define what corrective controls may be implemented in an order from the Commission after a CGWA is established. The corrective controls used to establish the CGWA are different than the controls that could be placed on existing groundwater uses (through the proposed corrective control order and the contested case process) within the CGWA and as such, should not introduce bias into the contested case process.

Comment: Prevention and Mitigation of Critical Groundwater Designation

The proposed rule concerns itself only with regulatory measures that are likely to have negative effects on beneficial users of water. As reflected in the general comments above, KWUA recognizes that there are groundwater basins in need of increased levels of management. However, it is in the public interest that the Commission take a broader water management perspective. The proposed rule should be modified to address this shortcoming. Specifically, the Commission should require that the Department complete a report describing historical groundwater use and the reasons for any changes in groundwater use. In the Klamath Basin specifically, this report would bring necessary facts to light. The Commission should also require that the Department make, and report on, best efforts to alleviate the underlying reason for changes in the level of groundwater pumping. The Department and Commission should actively promote and pursue voluntary alternatives and exhaust all voluntary alternatives to critical groundwater designation or corrective measures. It does not appear that this concept has received attention to date. We are interested to have a dialogue on the matter.

Response: OAR 690-010-0130(4)(c) requires the Department to provide and present a report to the Commission that achieves the intent of these comments. ORS 537.745 provides for voluntary agreements to control in lieu of orders from the Commission when adopted by the Commission. All groundwater users are encouraged to use water as sustainably and efficiently as possible and should always be working towards those goals. The Department is anxious to support more efficient beneficial use of groundwater. As an example, the Department is working with FSA on a voluntary groundwater right retirement program in the Harney Basin (CREP). The Department maintains a team of experts that focus on Artificial Groundwater Recharge and Aquifer Storage and

Recovery (AR/ASR) as well as grant opportunities for feasibility studies. However, AR/ASR projects require that there is available surface water that can be used for these projects and many areas of the state currently do not have water available for new surface water rights to use in AR/ASR. Recharge and Aquifer Storage and Recovery (AR/ASR) as well as grant opportunities for feasibility studies. However, AR/ASR projects require that there is available surface water that can be used for these projects and many areas of the state currently do not have water available for new surface water rights to use in AR/ASR.

Comments from Gene Souza from the Klamath Irrigation District

Issue 1: The Draft Division 10 rules define an “affected local government” with a reference to ORS 197.190. In 1993, this reference was renumbered to 195.025. ORS 195.025 Regional coordination of planning activities does not address special government districts described in ORS 195.020 which eliminates special district elected officials from being required to be part of the coordination effort to address the problems.

Recommendation: Ensure the rule acknowledges both ORS 195.020 and ORS 195.025 as the correct references for the coordination and planning activities of affected local governments. Irrigation and improvement districts need to be a part of the intergovernmental coordination process.

Response: The rule as written requires the Department to coordinate with affected local governments and requires specific information be provided to facilitate that coordination in accordance with OAR 690-005 rules. The counties are responsible for coordinating with special districts in the creation of their comprehensive plans. The Department does not need to consult with special districts and improvement districts to ensure consistency with the comprehensive plans. Additionally, as part of the rulemaking process affected local governments will be encouraged to participate in the rulemaking advisory committee and to provide public comment on the rules.

Issue 2: 690-010-0140 does not address local government coordination. This section only directs the Department to inform the affected local governments; however, no interaction, sharing of facts, discussions, or “coordination” to organize the activities so that they work well or efficiently is required in the draft rules

Recommendation: Local elected representatives need the ability to coordinate the best possible outcomes for their communities. 690-010-0140 needs to be modified to ensure affected local governments have the opportunity to provide input and dispute OWRD information. Coordination requires interaction, input, and potential alternative solutions so that the process works well or is effective.

Response: The purpose of 690-010-0140 is to ensure coordination with Affected Local Governments under the Departments Division 5 rules. It is the responsibility of the counties to coordinate with local governments to ensure alignment with their comprehensive plans. The Department has added new requirements for the report to the commission under 690-010-0130(4)(c)(i)(ii) to allow for members of the public to submit opposing scientific data showing that a CGWA designation is not needed.

Issue 3: I am on the distribution list for the OWRD updates and was actively observing the initial RAC procedures in 2021. I became aware the Division 10 RAC had resumed only after the 4th meeting had already concluded. My understanding in talking with RAC members is the Draft Division 10 rules were drafted very quickly with essential RAC members distracted by the 2023 legislative session with limited time to provide detailed input to various drafts submitted by OWRD in addition to their numerous and excessive revised legislative products. My observation is this RAC process appears to have been a results-oriented process rather than a collaborative RAC process. These rules were brought to the attention of the public for comment during the busy season for agricultural producers in the Klamath Basin who will be directly impacted by the rules.

Recommendation: Delay implementation of the rules until the people these rules affect the most are available to provide public comment. 29 February 2024 would be a reasonable date to close the public comment period.

Response: The Division 10 rule writing process afforded many opportunities for the public to comment on the rules. The Oregon Water Resources Department hosted four RAC meetings that were four hours long with a public comment period at the end of each meeting. On April 1, 2023, the fifty-day public comment period began. During the public comment period the Department hosted 4 public hearings across the state. The Department believes that the rule making process was transparent and afforded many opportunities for public participation.

Issue 4: The Oregon Revised Statutes outlining the possibility of a declaration of a critical groundwater area is arbitrary without hard, known measures. Oregon legislature requirements are simply outlined in just enough detail to give someone a “gut feeling” about the issue to the commission, without clear, hard facts which can be challenged or supported with factual data. Putting this vague language into the rules is unnecessary; one can simply just refer to the governing statute. When the legislature identifies the statute's vagueness as a problem the language will change. This will require additional effort by OWRD staff and the public to enter back into the rulemaking process.

Recommendation: Eliminate repeating words in a statute that is likely to change with the implementation of the rules when the language in the statute is challenged. Simply state “per ORS...”

Response: Inclusion of the statutory language in the rules was done intentionally for clarity and ease of reading.

Issue 5: 690-010-0180 (2) (k) and (l) state no less than 30 days to submit a request for a contested hearing. This is too short of a timeline for affected parties. The perceived problem was not created in 30 days, waiting for individuals to consult with attorneys, their elected officials, and their community will not exasperate a problem.

Recommendation: Change 690-010-0180 (2) (k) and (l) to state no less than 120 days to submit a request for a contested hearing.

Response: The minimum deadline of 30 days for requesting a hearing begins at the time of the notice of proposed corrective control orders. This process cannot be initiated until after the initial notification of proposed corrective control orders has been completed which by rule must take a minimum of 28 days. This provides at minimum 58 days for parties to receive the notification and

enter a request for hearing. This language allows the Department to set a reasonable timeframe for requests based on the number of parties impacted. The Department also may review and accept late requests for hearing per OAR 137-003-0003.

Issue 6: 060-010-0190 (2) allows for non-effected parties to be a part of this process. This is a property rights issue that affects real property owners. Third parties without a water rights (either surface or ground) should not be allowed to participate in the proceedings.

Recommendation: The rule needs to identify mechanisms for how to address issues which a non-effected party may bring. This needs further refinement.

Response: Third parties, including exempt groundwater users, all have an interest in the public water resources of Oregon.

Issue 7: Utilizing draconian measures to declare a critical groundwater area should be a last resort to preserve liberty. Groundwater sustainability is the ultimate goal; however, none of the proposed rules address nor explore opportunities, or activities which make groundwater more sustainable.

Recommendation: Division 10 rules should provide alternatives affected local governments and individuals could take to make groundwater sustainable. Groundwater recharge programs, underground storage opportunities, and other actions undertaken with the authority of the affected local government must be considered in the coordination efforts to find a sustainable solution that works well and is effective.

Response: ORS 537.745 provides for voluntary agreements to control in lieu of orders from the Commission when adopted by the Commission. All groundwater users are encouraged to use water as sustainably and efficiently as possible and should always be working towards those goals. The Department is anxious to support more efficient beneficial use of groundwater. As an example, the Department is working with FSA on a voluntary groundwater right retirement program in the Harney Basin (CREP). The Department maintains a team of experts that focus on Artificial Groundwater Recharge and Aquifer Storage and Recovery (AR/ASR) as well as grant opportunities for feasibility studies. However, AR/ASR projects require that there is available surface water that can be used for these projects and many areas of the state currently do not have water available for new surface water rights to use in AR/ASR.

Issue 8: These draft rules fail to address that OWRD is failing to enforce and ensure that surface water, with water rights, is being delivered under Oregon water law and/or an adjudicated claim. In the Klamath Reclamation Project, OWRD is allowing stored water to be released, without water right to do so, downstream which is exacerbating the groundwater used in the Klamath Reclamation Project, preventing groundwater recharge, and eliminating evaporation which results in additional precipitation in the upper watershed.

Recommendation: Division 10 rules should prevent OWRD from declaring a critical groundwater area in an area where surface water is being denied from its historical location. The water from former lakes and marshlands of the Klamath Reclamation Project has been denied in excess for decades which has

created a dependence upon groundwater for stability. OWRD must ensure the return of surface water to its historic spaces before the declaration of a critical groundwater area.

Response: The Department routinely manages surface water and groundwater for beneficial purposes across Oregon. However, in the Klamath Basin, the Bureau of Reclamation administers the Klamath Project, in part by managing water levels in Upper Klamath Lake. The Link River Dam (which is owned by the Bureau and operated by PacifiCorp) allows for the regulation of Upper Klamath Lake elevations and controlled releases into the Klamath River. The Bureau must operate the dam consistent with the federal laws that bind it, including the federal Endangered Species Act (ESA). To the extent that operation of the dam under federal law conflicts with state law, the U.S. District court has found that federal law preempts state law. As such, the OWRD is prevented from ordering the Bureau to cease release of water through the Link River Dam pursuant to the federal ESA. *Yurok Tribe et al., v. U.S. Bureau of Reclamation, et al.* (Case No. 19-cv-04405-WHO).

Comments from Rep. Reschke and other legislator

Comment: As a threshold matter, the need or justification for new rules has not been adequately explained. There are currently seven (7) critical groundwater areas in Oregon. **If OWRD believes the existing rules are legally inadequate, it raises serious questions regarding the legal sufficiency of the existing designations.** Regardless, the problems OWRD is seeking to address through the new rules should clearly identify the problem trying to be solved so that stakeholders understand the motives behind the rule changes and whether the proposed changes effectively address those identified problems. **Without a clear statement of the problem** the rules are designed to address, **there is no yardstick** by which the proposed rules may be measured.

Response: The critical groundwater area statutes were amended in 1991 and the Division 10 rules have not been updated since the legislature made changes to the process for designation of a CGWA. The existing CCGWAs were all designated prior to the updated statutes in 1991 and followed the laws and rules at the time they were designated. The previous rules required that CGWA designations were made by the State Engineer via order. The new process outlined in statute (passed in 1991) requires that the CGWA designation be made by the Water Resource Commission via the basin program rules and corrective control provisions limiting the use of groundwater be issued in order and go through a contested case process.

Comment: We are also concerned about the lack of public engagement on the proposed rules. Although OWRD has held several public forums throughout the state, it has provided notice of these events through the newspaper, and **the events have generally been poorly attended by water rights holders.** We think the lack of meaningful engagement by those subject to regulation is problematic and would encourage OWRD to undertake further efforts to engage the regulated community before proceeding with rule-making. For a topic this important to water users, OWRD should consider notifying affected rights holders through individualized communications to water rights holders in the areas where meetings are to be held.

Response: The Division 10 rule writing process afforded many opportunities for the public to comment on the rules. The Oregon Water Resources Department hosted four RAC meetings that were four hours long with a public comment period at the end of each meeting. On April 1, 2023, the fifty-day public comment period began. During the public comment period the Department

hosted 4 public hearings across the state. The Department believes that the rule making process was transparent and afforded many opportunities for public participation. In the future when The Oregon Water Resource Department initiates a Critical Groundwater Area designation the Department will engage with the public prior to the rulemaking, during the rulemaking, and after.

Comment: We also believe it is imperative that any new rules adopted by the agency protect existing water rights owners from arbitrary regulation. Before issuing a water right, existing law requires OWRD to make findings regarding (1) water availability; (2) potential for injury to other water rights; and (3) the potential for interference with surface water rights. Once OWRD has made these findings through a quasi-judicial process and issued water rights based on them, OWRD is responsible for these findings, and they cannot be arbitrarily changed through a rulemaking process that is not similarly quasi-judicial in nature. Farmers and ranchers have relied on OWRD's findings and the access to water they have been granted to support their operations and livelihoods. Any new rules adopted by the agency should not arbitrarily override OWRD's prior quasi-judicial determinations and should otherwise protect existing water rights from arbitrary regulation.

Comment: Relatedly, it is imperative that the due process rights of all water rights holders be protected. OWRD has previously tried to regulate off wells in the Klamath Basin and a Court found that the rules the Department relied upon to do that violated water rights holders due process rights. We are concerned the proposed rules do not do enough to ensure interested parties are afforded due process, both for the designation of Critical Groundwater Areas and for the purpose of identifying corrective control actions (i.e., regulation). For example, proposed 690-010-0130(3) provides: "(3) For purposes of subsection (2)(b), the Department may rely upon **any available records**, including, but not limited to, reports, studies, maps, data, and **model results.**" **The Department's use of modeling results should be eliminated.** Having previously determined on an individual well basis that water is available to support existing water rights and that these rights will not cause injury or substantial interference, due process requires OWRD to provide contrary findings on an individual well basis before it can propose regulation of a groundwater right duly issued by the Department.

Response: The designation of a CGWA in the basin program rules does not limit an individual groundwater right holder's right to use water. In order to limit individual groundwater right holder's water use, the Commission must issue a proposed corrective control order and that order must go through a contested case hearing before it can be enforced. This provides due process for individual right holders.

Comment: We also encourage OWRD to consider the basins likely to be impacted in developing rules. For example, OWRD has talked about attempting to implement critical groundwater areas in Harney County and the Klamath Basin. The Department needs to be more specific and transparent with stakeholders regarding the areas of the state that are likely to be impacted by these rules, and seriously evaluate the fiscal impact.

Response: Division 10 rules outline the process for which the Department must take to establish future CGWAs and for revising existing CGWAs in the state. No new CGWA will be designated in this Division 10 rulemaking, if adopted. In the future and under these rules, when the Department initiates a Critical Groundwater Area designation process for a specified area of state, the Division 10 rules require engagement with the communities prior to the rulemaking process. As generally part of any rulemaking process, a statement of fiscal impact will be developed with input from stakeholders in the area impacted by the rule.

Comment: Additionally, OWRD should recognize that unique circumstances in various areas of the state may make designations of critical groundwater areas more or less appropriate. For example, in the Klamath Basin, groundwater use in Oregon is already heavily regulated, whereas groundwater use immediately across the border in California is not. In light of this circumstance, it is difficult to understand why Oregon would advance administrative rules to further restrict groundwater usage in Oregon without first undertaking efforts to restrict excess groundwater use in California through equitable apportionment of the groundwater resource, or by other means. Of course, while this is an extremely important issue for consideration in the Klamath Basin, similar considerations are not present in other geographical regions of the state. In our estimation, geographically specific considerations need to be appropriately taken into account with respect to any new rules.

Response: As part of the process of proposing corrective control orders, the Department "... shall identify corrective control provisions as specified in ORS 537.742(2)(a) – (f) that the Department believes will resolve the problems that resulted in the designation of a critical groundwater area..." This requirement in rule ensures that the Department and the Commission will review the unique situation of each basin, the groundwater reservoirs, and water uses involved during the process of proposing corrective control provisions. In basins where the groundwater reservoir is shared by more than one state, the Department will engage with the other state to look for co-management opportunities. The Department is currently engaging with the California Department of Water Resources (for the Klamath Basin) and the Washington Department of Ecology for the Walla Walla Basin.

In summary, **the legislators signed to this letter urge OWRD to delay further action on these rules until the problems they are designed to address are clearly identified, more meaningful stakeholder input has been obtained, and the other issues identified herein are more carefully considered.**

Comments from Lauren Poor from the Oregon Farm Bureau

Comment: First, OFB is disheartened by OWRD’s insistence to push forward with multiple Rules Advisory Committee (RAC) processes alongside the 2023 legislative session. Many of the affected membership group’s RAC participants were unable to attend meetings because of legislative session overlap and could not devote the time, attention, and resources to the process that the development of amended Division 10 rules deserved. When RAC members expressed frustration about the process, the comments were dismissed by staff in the interest of pushing forward with the expedited timeline.

Response: The Division 10 rule writing process afforded many opportunities for the public to comment on the rules. The Oregon Water Resources Department hosted four RAC meetings that were four hours long with a public comment period at the end of each meeting. On April 1, 2023, the fifty-day public comment period began. During the public comment period the Department hosted 4 public hearings across the state. The Department believes that the rule making process was transparent and afforded many opportunities for public participation.

Comment: While most of the draft rule updates appear to be administrative in nature and are meant to align the rules better with the existing statute, because of the overlap with legislative session and the complex nature of Oregon Water Law, it is imperative that the OWRD adheres to its representations

described during the RAC process that these rules are truly meant to conform the CGWA processes with ORS 537.730-537.742. Additionally, OFB would like to see further clarification that these rules only apply to future CGWA designations. OFB encourages the OWRD to provide an update to the Commission, and stakeholders, how the updated rules have only conformed to statute, streamlined the CGWA designation process, provided clarity to water right holders and members of the public and not expanded OWRD's authority.

Response: The existing CGWAs were established decades ago. Groundwater level declines continue in some of these areas, and annual groundwater allocation practices in two CGWAs takes excessive staff time and adds no value to long-term, sustainable groundwater management. The Division 10 rules, specifically OAR 690-010-0240, are designed to allow the Department the ability to update and modernize groundwater management tools within existing CGWAs.

Comment: Finally, if the Oregon Water Resources Commission ("Commission") wishes to make changes to a CGWA designation it must follow the process set forth in statute for designation of a CGWA. Otherwise, the Commission will circumvent the statutory process required when a CGWA is created. Though the statutes do not provide guidance about CGWA amendment, no other authority is given by the State Legislature to the Commission or OWRD to amend CGWA designations by other means. Further, the Legislature could not have intended to require a specific process to rules designating a CGWA, including a contested case hearing, only to allow the agency to make an "end run" around the required process to change the designation later. As such, and to avoid confusion, OFB requests that the Commission removes the new draft rule section 690-010-0240 in its entirety from the proposed draft rules. Because the Commission cannot approve new rules that are outside the scope of the authority given to them by the Legislature and they are required to follow the processes as prescribed by ORS 537.730-537.742, it is redundant to restate them here and these rules create potential for amendment of CGWA outside of the statutorily outlined process.

Response: The Department believes that ORS 537.730 – 537.742 authorizes the modification of existing Critical Groundwater Areas (CGWA). As the Oregon Farm Bureau points out, the modification of CGWAs is essentially creating a new CGWA; the Department will need to go through the CGWA designation process outlined in the Division 10 rules. The Department has added language to 690-010-0240(1) clarifying that the Division 10 process is required for modification.

Comments from Lisa Brown from Water Watch

1. OAR 690-010-0120(1)(d)(A)

"(A) An appropriator of surface water, or a surface water ~~whose water~~ right, which has an earlier priority date; or ¶"

This is consistent with OAR 690-010-0120(2), which refers to the term "surface water right" in OAR 690-010-0120(1)(d)(A):

"(2) For the purposes of ORS 537.730(1)(d)(A), a surface water right with an earlier priority date means a certificated and permitted water right including instream water rights, inchoate transfers and determined claims, the source of which is surface water, including springs, streams, lakes, reservoirs, rivers and a "surface water diversion" as provided in OAR 690-008-0001(4). ¶"

Response: This language is a direct copy from the statute and for that reason we did not make the suggested change.

2. OAR 690-010-0130(4)(c)

“(c) Provide and present to the Commission a report, based on the best available science and information, identifying and characterizing the groundwater reservoirs subject to the proposed critical ground water designation; stating ~~states~~ any findings the Department is proposing to make under ORS 537.730(1)(a) - (g); and if applicable, stating ~~states~~ the Department's proposal for any of the corrective control provisions under ORS 537.735(3)(a) - (f). ¶”

Response: This is a grammatical correction, and it has been incorporated in the proposed rules.

3. OAR 690-010-0140

“Land Use Planning Coordination with Affected Local Government

(1) Prior to notification of the proposed rules under ORS 183.335, the Department shall coordinate with the affected local government pursuant to the applicable provisions under ORS Chapter 197 (State Agency Planning Responsibilities), OAR Chapter 690, Division 005 (Compliance With Statewide Planning Goals, Compatibility With Comprehensive Plans, And Coordination On Land Use Matters), and these rules. ¶

(2) To facilitate coordination as described in the State Agency Coordination Program, the Department shall provide the following information to affected local governments: ¶

~~(a) Boundaries of the proposed critical ground water area; ¶~~

~~(b) A list of any groundwater reservoirs located either in whole or in part within the proposed critical ground water area; ¶~~

~~(c) A list of subsections under ORS 537.730 relied upon for the designation of the proposed critical ground water area; ¶~~

(d) A copy of the report presented to the commission in OAR 690-010-0130(5)(c); ¶

~~(e) A list of any proposed corrective control provisions to be included in the proposed critical ground water area rule under ORS 537.735.”~~

Reason for edit: the struck-through items appear redundant to the contents of the report (see OAR 690-010-0130(4)(c)). To the extent a description of information deviates from the report content requirements, it risks creating confusion and placing an extra burden on the department. Further, the land use coordination process should not be used to provide information to counties (or any other entity) that is not publicly available, or to afford counties the ability to interfere in the establishment of a Critical Ground Water Area.

Response: The intent of this rule is to meet the obligations of the State Agency Coordination Plan by providing the information necessary for affected local governments that perform land use planning functions to understand the impacts of the proposed CGWA designation. This suggestion shortens, simplifies, and reduces duplication in the rules and the change was incorporated into the proposed rules.

4. OAR 690-010-0180

These suggested edits correct what appear to be inadvertently omitted words.

a) OAR 690-010-0180(2)(b)

“A statement of the problem resulting in designation of the critical ground water area that may be addressed by the proposed control provisions **limiting** the use of groundwater in the critical ground water area; ¶”

b) OAR 690-010-0180(2)(g)

“(g) Reference **to** scientific information that supports the agency's findings of fact; ¶”

Response: This is a grammatical correction, and it has been incorporated in the proposed rules.

5. OAR 690-010-0190

WaterWatch requests that the following sub-section be inserted after OAR 690-010-0190(2)(b):

“(c) In discharging its duty pursuant to OAR 137-003-0535, within 30 days after receiving a timely filed Petition for Party Status, the Department shall issue and serve on the person who timely filed the Petition for Party Status a decision that grants participation as a party, grants participation as a limited party, or denies participation.”

The way the proposed rules are written, a person or entity that files a Petition for Party Status may not know in a timely manner – or ever – whether its petition has been granted. In Oregon, all water from all sources – including groundwater – belongs to the public. ORS 537.110. Participation in these processes should not be limited to only those holding water rights. Allowing people and entities to file Petitions for Party Status, but not requiring the agency to decide those petitions, risks doing just that. The agency should be required to grant, deny, or grant in part, each petition for party status and to do so in a timely manner that provides petitioners who are granted party status, or limited party status, time to prepare for the contested case. The proposed rules are deficient and should be corrected to require the Department to issue a timely decision on each timely filed Petition for Party Status. ¶

Response: This recommendation is inconsistent with OAR 137-003-0535 and un-attainable timeline for the Department.

6. OAR 690-010-0210(4)

~~“(4) Due to the extensive scope of the contested case hearing and the large number of parties, the availability of the information posted as provided in subsection (3), and the availability of public record requests pursuant to Oregon's Public Records Law, discovery against the Department is only as provided in OAR 137-003-0566(1)(a) – (c). ¶”~~

Limits on discovery can be addressed in the case and should not be in rule. Further, public records requests are not the same as, and are not a substitute for, discovery as described in the rule.

Response: WRD has made a policy choice to not allow requests for admissions or interrogatories. Allowing these forms of discovery requests would place an undue burden on the agency. OAR 137-

003-0566(3) authorizes the agency to limit a party's ability to request discovery, and the rule's explanation supports exercise of that allowance.

Comments from JR Cook from the Northeast Oregon Water Association

Comment: From the beginning of the rulemaking process, NOWA has had concerns that this rulemaking effort could inadvertently set the stage for vacating and re-doing the existing critical ground water designations that have already been completed in the Umatilla Basin. These designations have been in place for many years and were completed under then-existing statutes, rules, and Department policies. The designations have also been the subject of various lawsuits. *See, e.g., Doherty v. Oregon Water Resources Director*, 308 Or. 543, 783 P.2d 519 (1989) (upholding Director's order designating 274 square miles in Umatilla and Morrow counties as critical ground water areas).

In the wake of these prior designations, landowners, water users, local agencies, and local communities have come to rely on the designations. In particular, this reliance extends to the current boundaries for the various designations, the duties of water users located within the designations, the methods for determining the sustainable annual yields (SAYs), and the distribution of the SAYs, among other things. *See generally* Umatilla Basin Program, OAR Ch. 690, Div. 507. Hundreds of millions of dollars have been invested in the Umatilla Basin over the last several decades with the designations in mind, with many more millions of dollars in investments planned for the future that will also take the designations into account.

As such, NOWA feels that it is absolutely essential that the current Division 10 rulemaking be limited to future, new ground water designations, and that the new rules should not be interpreted or applied in any way to upset, alter, or otherwise re-do not only the existing ground water designations that have long been in place, but the duties of water users, methods for determining the SAYs, the distribution of the SAYs, and other components of the existing designations. There have been statements made by the Department during the RAC process that the proposed rules are only intended to clarify the process for designating a new critical ground water area, and that the proposed rules do not impact current critical ground water designations or basin-specific rules. While these statements are helpful as part of the rulemaking history and express the intention of the Department as part of the RAC process, we appreciate that the Department has also attempted to include more definitive language in the text of the current version of the draft rule itself, namely in proposed rule 690-010-0240. Any further confirmation of the Department's position, whether as part of its staff report and recommendation to the Commission or otherwise, would be appreciated. Having this clarity in the record of the Commission's decision will help to avoid confusion and potential misuse of the rules later.

Response: The existing CGWAs were established decades ago. Groundwater level declines continue in some of these areas, and annual groundwater allocation practices in two CGWAs takes excessive staff time and add no value to long-term, sustainable groundwater management. ORS 537.730 - 537.735 authorizes the Department to modify existing CGWA. However, in order to modify existing CGWA, the Department will need to go through the Division 10 process because the Department is essentially creating a new CGWA.

Comment: First, to avoid any potential for confusion, we would again recommend that a statement similar to those made by the Department during the course of the RAC process be included in the rule itself. We would propose the statement be included in proposed rule 690-010-0100, entitled "**Purpose,**"

as well as in the Statement of Need for the rulemaking. Again, consistent with the Department's prior statements, the rule language should read: "*Except for OAR 690-010-0240, these rules do not affect or apply to current critical ground water area rules, orders, or proclamations in existence prior to [the date of the final rulemaking].*"

Response: These rules do not modify existing CGWA designations in rule or order in any way. However, they are intended to apply to future modification or amendment of existing CGWAs and are intended to be used to update those designations where necessary.

Comment: Second, with respect to the proposed rule 690-010-0240, entitled "**Procedure for Making Changes to Existing Critical Ground Water Area,**" given that there is a finite list of existing critical ground water area designations established and described in rule only, we would request that as part of the rule history, the Department list these existing critical ground water areas. We are not aware that the rule history sets forth this list.

We also propose the following redline edits (additions shown with underlined text, deletions shown with strike-through text) to proposed rule 690-010-0240:

"(2) Where a critical ground water area is established by an order or proclamation that is referenced in a basin program rule, the Commission may amend the basin program rule referencing the critical ground water area order or proclamation so as to ~~confirm or modify~~ correctly reference or incorporate the order's or proclamation's provisions governing designation of the critical ground water area or the establishment of corrective control provisions. Any rulemaking as provided in subsection (2) does not amend an order or proclamation ~~as it directs the disposition of individual rights adjudicated in the order or proclamation~~ and in the event of any conflict or inconsistency between an amended basin program rule referencing a critical around water area order or proclamation and the underlying critical around water area order or proclamation, the underlying critical around water area order or proclamation shall be controlling."

Comments: First, we do not understand why or under what circumstances the Commission would amend a basin program rule referencing a critical ground water area order or proclamation to "confirm" the order's provisions, and thus, we propose deleting this language.

Response: There may be instances where a CGWA order or proclamation does not need to have the corrective control provisions changed and the Department wishes to change the administrative burden on the Department and the water users to meet the requirements of those provisions. An example is the allocation process in the Stage Gulch CGWA where the administrative burden could be reduced while maintaining the existing corrective control provisions.

Comment: Second, it's unclear how the Commission may amend a basin program rule referencing a critical ground water area order so as to "modify" any of the underlying order or proclamation's provisions. At most, the Commission could amend a basin program rule referencing a critical ground water area order or proclamation to correctly reference or incorporate the order or proclamation's provisions. Otherwise, any rulemaking to amend or modify an order or proclamation would necessarily involve at least the potential for the disposition of individual rights originally adjudicated in the order or proclamation. Given this potential, a rulemaking under subsection (2) should not be allowed to result in any amendment to the referenced critical ground water area order or proclamation. Instead, any amendment to amend or modify an

underlying order or proclamation should be subject to subsection (3), discussed below.

Response: The proposed version of OAR 690-010-0240(2) states: “Any rulemaking as provided in subsection (2) does not amend an order or proclamation as it directs the disposition of individual rights adjudicated in the order or proclamation.” This provision in the rules satisfies the concern expressed related to modification of a CGWA order or proclamation. Any modification or amendment of an order or proclamation is subject to section 3. As part of review, we did identify a reference error and have made the appropriate changes in the rule to refer to Section (3) instead of Subsection (2).

Comment: *"(3) Insofar as critical ground water area rules, orders or proclamations are amended to establish new or amended critical ground water area designations or new or amended corrective control measures such corrective control measures may apply:*

"(a) To those rights previously adjudicated in a critical ground water area order or proclamation only upon completion of a contested case initiated pursuant to ORS 537.742 and ORS 183;

"(b) To pending ground_water applications and present groundwater rights, only upon completion of a contested case initiated pursuant to ORS 537.742 and ORS ~~chapter~~ 183."

Comment: We would propose that the term "rights" be used in subsection (3)(b), consistent with the usage in subsection (3)(a), so as to include both surface water and ground water rights, as well as other rights previously adjudicated.

Response: These rules do not affect surface water rights and so the change was made to increase specificity by adding the term “groundwater” in front of the word “right” in subsection (a). The other suggested changes were primarily grammatical, or style related and were incorporated into the rules.

Comments from Harmony Burrigh

Comment: 690-010-120

(1) (a) – (g) – This is likely a style choice, but I question the value of word for word inclusion of the statutory text – I notice there are a number of sections that include statutory language verbatim.

Response: Inclusion of the statutory language in the rules was done intentionally for clarity and ease of reading.

Comment: (4)(a) Consult with **affected** federally recognized Indian tribes **in Oregon** – *Please review this language with LCIS to ensure it is correct*

Response: The Department added “In Oregon” as suggested.

Comment: (5) How will exempt users be notified?

Response: The Department added a new requirement to OAR 690-010-0130(5)(b) that requires notification of all tax lot owners within the affected area not within a municipal or quasi-municipal water service area.

Comment: (6) shall hold at least one public hearing within each county – *Do not limit this, more than one may be warranted*

Response: The Department agrees and has made the change in the proposed rules.

Comment: 690-010-0150

Please consult with LCIS on this language – this should be limited to affected Oregon tribes

Response: The Department added the language to limit only to Oregon Tribes.

Comment: 690-010-0160

(c) What about the disposition of pending transfers? Will transfers into and out of the CGWA be affected by these rules?

Response: The disposition of existing and future transfers will move forward under the current rules and statutes governing water right transfers.

Comment: 690-010-0170

(5) A copy should be sent to all affected groundwater users – both permitted and exempt

Response: The Oregon Water Resources Department agrees and have added a requirement to notify by first class mail a copy of the initial notification of proposed corrective control orders to property owners of tax lots within the affected area as defined in 690-010-0170(4)(a).

Comment: 690-010-0160

(2)(a) This may be too restrictive – make sure that areas with CGWA designations can still meet some current and future needs (for example, group domestic wells) – there needs to be some flexibility accounted for in rule – perhaps requiring offset water or a mitigation plan?

Response: This is a direct quote from the statute. When establishing CGWAs the Department and the Commission will consider the unique situations within the proposed CGWA with the intent to allow for effective water management.

Comment: My name is Eric and I represent Bonanza view Dairy.

I'm sure the OWRD has every good intention to help themselves, like they always do.....however this idea of limiting the use of ground water (wells) to "preserve the long-term viability of the ecosystem" is just a fancy fabricated lie. Dont try to camouflage the actual goal behind "restrictions" on ground water. Which is exactly this; The OWRD's actual goal is to choke out the men and women who work hard, to put food in your mouths! Its absolutely ridiculous! The amount of water that gets dumped into the ocean from the Klamath river alone in one day; is enough water for all of the farmers in the klamath basin for an entire growing season!!! Now you want to control our ground water!!?? If this "water restriction" were to happen all farmers, dairy farmers, and all those who are involved in agriculture will than be told how much water they can use, if they can use any at all!! Resulting in many hardworking people losing their livelihoods to the power hungry snakes who have no interest in saving our ecosystem. Their only interest is for themselves.

Let's not forget, WE are the ones who own the water. To restrict the agricultural community or anyone in this beautiful state, of our water is wrong! I can also ensure you, it'd be a terrible mistake to bite the hand that's feeds you.

Sincerely,

Dairy farmer

Response: The intent of the Division 10 rules is to make the CGWA process transparent and straightforward for Oregonians and to ensure the due process rights of water right holders are respected.

Comments from Barbara Cannady

Comment: As a lowly landowner and certificate holder, I will address my comments from the perspective of the coffee shop in conversation with my neighbors. As I am in my winter season, my personal concern is for those who will have to live with the results of your decisions and will address them in numerical order.

A LACK OF TRUST: Most of my neighbors that began with your process dropped out with the entertainment of the one pool concept, which they considered in the "educated idiot" realm. By the time the recognition of multiple water tables and zones was reached, my neighbors had already withdrawn with the belief that "they are going to do what they are going to do!" And in fairness to that thought, we have been told that scientific data has been submitted and dismissed by the Oregon Water Resource Department (OWRD) because it did not fit the desired narrative outcome.

WHY "NEW" RULES WHEN "HISTORIC RULES" HAVE NEVER BEEN ENFORCED? Harney County irrigators still recognize the "Five Year Rule" whether enforced or not. Simple, it works and "everyone" understands it. It is widely believed that the adjudication and management of water rights is the core justification of the establishment and existence of the OWRD. Unfortunately, it is also accepted that the OWRD has never taken responsibility for monitoring the irrigation well portion of their duties, while expanding their role in empire like directions to other projects.

Somewhere between 2002 and 2006, Ivan Gall appeared at a meeting in Burns to announce that, due to lack of staff, OWRD would no longer monitor irrigation activities. The only way that a non-operational well's permit would be challenged would be by complaint, requiring a \$800 non-refundable fee, with no guarantee of how the complaint would be addressed. No written documentation of this Departmental decision was sent to Harney County permit holders. Meanwhile, filing complaints was discouraged.

This also excused OWRD for never performing the duties of this obligation in the first place, leaving untold numbers of permits in place from wells that had been abandoned, or in some cases never drilled. Consequently, these permits are still transferable and can be reactivated with the older priority dates by the new permit holders. To their credit, the OWRD has disclosed that they were aware of the over allocation of permits by 2010. That said, the OWRD continued making bank on permit applications, selling water we did not have. This expansion continues to create stress within our communities as junior water right holders, that should not have been approved in the first place, wish to challenge senior water right holders to "share" their resources on the basis of power and money.

GOOD FAITH: To succeed in good faith with this process, the OWRD must acknowledge their responsibility for the creation of our current status of over allocation and be accountable to current State Laws. Any "new rules" should be preceded by implementation of the "existing rules", shutting down wells previous to 2010 if necessary.

Response: These comments refer to the Department's ongoing Division 512 rule update and are out of the scope of the Division 10 rules. The Department is working hard to ensure the public is engaged effectively during the Harney County CGWA designation process.

Comments from Barbara Cannady Second

Comment: A LACK OF TRUST: Most of my neighbors that began with your process dropped out with the entertainment of the one pool concept, which they considered in the "educated idiot" realm. By the time the recognition of multiple water tables and zones was reached, my neighbors had already withdrawn with the belief that "they" are going to do what "they" are going to do!" And in fairness to that thought, we have been told that scientific data has been submitted and dismissed by the Oregon Water Resource Department (OWRD) because it did not fit the desired narrative outcome.

WHY "NEW" RULES WHEN "HISTORIC RULES" HAVE NEVER BEEN ENFORCED? Harney County irrigators still recognize the "Five Year Rule" whether enforced or not. Simple, it works and "everyone" understands it. It is widely believed that the adjudication and management of water rights is the core justification of the establishment and existence of the OWRD. Unfortunately, it is also accepted that the OWRD has never taken responsibility for monitoring the irrigation well portion of their duties, while expanding their role in empire like directions to other projects.

Somewhere between 2002 and 2006, Ivan Gall appeared at a meeting in Burns to announce that, due to lack of staff, OWRD would no longer monitor irrigation activities. The only way that a non-operational well's permit would be challenged would be by complaint, requiring a \$800 non-refundable fee, with no guarantee of how the complaint would be addressed. No written documentation of this Departmental decision was sent to Harney County permit holders. Meanwhile, filing complaints was discouraged. This also excused OWRD for never performing the duties of this obligation in the first place, leaving untold numbers of permits in place from wells that had been abandoned, or in some cases never drilled.

Consequently, these permits are still transferable and can be reactivated with the older priority dates by new permit hold. To their credit, the OWRD has disclosed that they were aware of the over allocation of permits by 2010. That said, the OWRD continued making bank on permit applications, selling water we did not have. This expansion continues to create stress within our communities as junior water right holders, that should not have been approved in the first place, wish to challenge senior water right holders to “share” their resources on the basis of power and money.

GOOD FAITH: To succeed in good faith with this process, the OWRD must acknowledge their responsibility for the creation of our current crisis status of over allocation and be accountable to current State Laws. Any “new rules” should be preceded by implementation of the “existing rules”. This meaning to shut down wells from the last approved back to 2010, and then measure. Further reductions as necessary to stabilize the water tables by areas may be necessary. **No one can expect OWRD to successfully implement new “complicated” rules when there is a history of not implementing the “simple” rules in current law.**

COMPENSATION FOR LOSS OF INVESTMENT: Although the current planning process has always been punitive to irrigators (with suggested new requirements, regulations and oversight) it should be recognized that as long as permits were issued “everyone” felt that they were in compliance. Yes, newer applicants knew the rules when they entered the arena, but they might also feel that they are legally justified in asking for compensation for their investments if their permits are retroactively pulled. After listening to Graham Thomas’s explanation of the new CREP rules at 5-25-23 water meeting in Burns, it seems that compensation might be available to most while removing the water right from permanent status.

Response: These comments refer to the Department’s ongoing Division 512 rule update and are out of the scope of the Division 10 rules. The Department is working hard to ensure the public is engaged effectively during the Harney County CGWA designation process.

Comments from Clayton Dumont Jr from the Klamath Tribes

- 1) Proposed rule 690-010-0110(1) should be clarified to ensure that any irrigation district organized under ORS Chapter 545 is eligible to be treated as an “affected local government” where geographically appropriate under these Division 10 rules. While the Tribes do not always share the perspectives of the irrigation districts in the Klamath Basin, they are important stakeholders whose input should be considered in the process of making a critical groundwater designation.

Response: The definition of affected local governments is specifically limited to entities that have land use planning responsibilities for the purposes of coordination as part of the State Agency Coordination Plan. The appropriate place for stakeholders such as irrigation districts to be included in the process is through participation in the Rulemaking Advisory Committee and the public comment period defined in ORS 183.333.

- 2) The word “evidence” in proposed rule 690-010-0110(6) should be “evidenced”.

Response: This reference did not exist in the proposed rules and the word evidence does not appear anywhere in the proposed rules.

3) Proposed rule 690-010-0160(2)(a)-(f) recapitulate the corrective actions identified in ORS 537.735(a)-(f). Consequently, the lead-in clause at proposed rule 690-010-0160(2) should read “These corrective controls provision include:” not “These corrective controls- [sic] provisions may include:” as the first sentence of -0160(2) already states that one or more of the conditions may be included in a critical groundwater area rule, and the second clause simply refers to the contents of ORS 537.735, which does include each of those possible corrective control provisions.

Response: The proposed rules were modified to correct the grammatical errors in the rules.

4) Proposed rule 690-010-0160(5) states that if the Oregon Water Resources Commission adopts a critical groundwater area rule, OWRD must then review the rule no less often than once every three years. The statutory authority identified for this rule includes ORS 537.780. Yet subsection (3) of that statute provides that it is the Commission not OWRD that is to perform such a rule review. The proposed Division 10 administrative rules should not introduce inconsistencies with the overlying statutes.

Response: The Department agrees with this comment and the appropriate change was made in the proposed rules.

5) It is not clear what the addition of the phrase “and any interested federally recognized tribes” adds to the notice provision requirement of proposed rule 690-010-0170(5)(c) that is not already covered by the phrase “to federally recognized tribes”.

Response: The Department agrees with these comments and modified the rules so that the notification will be sent to all federally recognized tribes.

6) The term “substantial information” used in proposed rule 690-010-0180(2)(g) should be defined either in proposed rule 690-010-0110 or by cross-reference to an appropriate statutory section or administrative rule or the word “substantial” should be deleted. Ambiguity regarding the sorts of information that may be relied on to support the promulgation of a corrective action should be avoided, particularly where that ambiguity could potentially restrict the universe of cognizable information.

Response: “Substantial information” was not used in the proposed rules that were sent out for public comment. As part of the RAC process this language was removed and replaced with “(g) Reference to scientific information that supports the agency’s findings of fact;”

7) The cross-reference in proposed rule 690-010-0180(3)(b) appears to be incorrect, though it is not readily apparent what the correct cross-reference should be. In addition, this subsection should specifically require OWRD to provide the notice of proposed corrective actions to federally recognized Indian tribes within or adjacent to the geographic area in which the proposed corrective actions are to take effect.

Response: The cross-reference was incorrect and has been changed in the proposed rules to OAR 690-010-0170(6). To further address this comment, we added a subsection to OAR 690-010-0180(3) requiring notice be sent to federally recognized Indian tribes within Oregon.

8) We propose a new subsection (c) to proposed rule 690-010-0190(2) which would read: "As a matter of comity, a petition for party status made by any federally recognized Indian tribe with water rights within or adjacent to the geographic area in which the proposed corrective actions are to take effect shall be granted by the Department."

Response: The Department must follow the contested case process defined in OAR 137-003. OAR 137-003 does not allow the Department to add language to rules specifying that a group will automatically be party to a case. If the Tribes are not named in the order and wish to be party, the Tribes must submit a petition for party status according to OAR 137-003-0525.

9) Proposed rule 690-010-0240(1) is difficult to understand as there does not appear to be a necessary connection between an adopted critical groundwater area designation rule and any specific basin program rule. It is therefore unclear how a basin program rule amendment would necessarily bring about the modification of a critical groundwater designation rule. Nothing in the proposed Division 10 rules clearly incorporates a critical groundwater designation rule into a basin program rule framework.

Response: The CGWA statutes do not require the Department put CGWA designation rules into the basin program rules. Existing CGWA designations exist in rule, in order, in proclamation, or in a combination of those and the Division 10 rules are written to allow modification of those existing CGWAs. Adding them to basin program rules is an organizational choice versus a legal requirement.

Comments from Brad Graff

Brad Graff Comments

Comment: I want to provide a comment on the upcoming rules change. Per the draft posted online, the designation of a critical groundwater area is overly broad, non specific, and open to significant interpretation...

for example, one of the criteria is ground water levels are declining or have declined excessively. How will this be measured? how much is excessive? If levels decline by .01% in 1 year, is this declining? and therefore subject being "critical"? Water levels are not 100% steady... If they decline by x%, what if they raise by x% the next year... do the rules specify it is no longer "critical".

i am very concerned that these broad criteria could be used to classify a LARGE number of areas as critical... I would request the commission to be more specific and practical on what is allowed and the criteria that are used.

thank you
Brad Graff
13610 NW Skyline Blvd, Portland, Or 97231

Response: OAR 690-008 contains the definitions for excessively declining (3 feet per year for 10 years) and declined excessively (50 feet from the highest known water level). The Department will use the best available science to determine if a groundwater reservoir or parts of that groundwater reservoir are excessively declining or have declined excessively.

Comments from James L. Buchal Representing the Sprague River Cattle Company

Comment:**A. Legal Background:**

In Oregon's water code, ORS 537.535—.746 regulates the use and appropriation of groundwater. First, ORS 537.535—.630 provide a process for obtaining groundwater rights. Next, ORS 537.665—.720 provide a process for adjudicating groundwater rights. Finally, ORS 537.730—.742 provide a process for OWRD's designation of critical groundwater areas and imposition of "corrective controls" consistent with a CGWA determination. These three statutory processes—the appropriation of groundwater, adjudication of groundwater rights, and designation of critical groundwater areas—are all intertwined. Therefore, Oregon law requires that the provisions of ORS Chapter 537 be read in context with one another, such that the designation of critical groundwater areas exists as a corollary to the process for adjudicating groundwater rights.

B. CGWA Designations Must Be Preceded by Groundwater Adjudications.

Unfortunately, the proposed Division 10 rules ignore the very critical framework of ORS Chapter 537. Oregon's critical groundwater statutes, read in context with the remainder of ORS Chapter 537, reveal that critical groundwater designations must be preceded by groundwater adjudications. ORS 537.735 states that a CGWA rule must indicate which ground water reservoirs are located within a proposed CGWA. ORS 537.665, although contained within a separate portion of the statute, provides the only process in Chapter 537 for identifying groundwater reservoirs. ORS 537.665 further provides that, before OWRD may make any final determination on the depth and boundaries of a groundwater reservoir, there should be a final determination of the rights to appropriate the water from the reservoir. Read in context, a critical groundwater designation pursuant to ORS 537.735 must follow the process for identifying reservoirs explained in ORS 537.665. This process includes a full adjudication of groundwater rights in a given reservoir.

ORS 537.735 states that a CGWA rule must indicate which ground water reservoirs are located within a proposed CGWA. ORS 537.665, although contained within a separate portion of the statute, provides the only process in Chapter 537 for identifying groundwater reservoirs. ORS 537.665 further provides that, before OWRD may make any final determination on the depth and boundaries of a groundwater reservoir, there should be a final determination of the rights to appropriate the water from the reservoir.

Read in context, a critical groundwater designation pursuant to ORS 537.735 must follow the process for identifying reservoirs explained in ORS 537.665. This process includes a full adjudication of groundwater rights in a given reservoir.

As proposed, the Division 10 rules ignore the provisions of ORS Chapter 537 pertaining to identifying and locating groundwater reservoirs. Instead of the process described in ORS 537.665, proposed OAR 690-010-0110 provides that groundwater reservoirs may be "ascertained or reasonably inferred" using "the presence of physical natural boundaries, hydrological conditions, or recharge or discharge areas" or "[a]dministratively by defining an affected area that does not have boundaries defined by natural features." See proposed OAR 690-010-0110; proposed OAR 690-010-0130.

As a matter of statutory interpretation, ORS 537.735 should be read in context with the surrounding sections, including ORS 537.665. See *Dep't of Land Conservation & Dev. v. Yamhill Cnty.*, 151 Or. App. 367, 372, 949 P.2d 1245, 1248 (1997) (“the linguistic tenability of a proffered interpretation of a statutory term does not make the interpretation “plausible” if a different interpretation that is also linguistically supportable is decisively more consistent with the sense and purpose of the statute and its surrounding language.”). Reading the two statutes in context reveals that “reservoirs” for purposes of ORS 537.735 et seq. must be identified following the procedures outlined in ORS 537.665, which includes a full adjudication of identified reservoirs. Such a reading is also supported by good policy, and was likely the intent of the legislature in enacting ORS 537.735 et seq.

it is good policy to conduct groundwater adjudications prior to designating corrective controls. The process of adjudicating groundwater rights discovers lawful, and unlawful, uses of groundwater, and limits the quantity of groundwater appropriated to no more than what is lawfully supported. Thus, adjudications can be the first step to decreasing total groundwater appropriations, while simultaneously protecting existing lawful appropriations. Once an adjudication has been completed and unlawful appropriations have been halted, it is only then sensible to designate critical groundwater areas if such a designation is still justified. Through this two-step process, lawful appropriations are only reduced through corrective controls under the CGWA process after any and all unlawful appropriations have been eliminated under the adjudication process. Lawful appropriators are therefore protected from being regulated on account of unlawful appropriations.

The proposed Division 10 rules ignore statutory context, intent, and good policy by allowing for CGWA designations to proceed without first conducting groundwater adjudications in affected reservoirs. Therefore, SRCC urges OWRD to revise the proposed rules to give effect to ORS 537.735 et seq. as read in context with the preceding sections of Chapter 537. Among other things, this requires that the proposed rules ensure that the findings of fact and order of determination set forth in ORS 537.665 are made before any ground water reservoir is included in a critical ground water area.

Specifically, “ground water reservoir” should be defined to be not what “may be ascertained or reasonably inferred as provided in OAR 690-010-0130” (proposed OAR 609-010-0110(3)), but as “a body of ground water identified after investigation pursuant to ORS 537.665 and findings pursuant to ORS 537.685.” And proposed OAR 690-010-0120(1) should be amended to state that the area may be designated if “ground water reservoirs in the area have been identified pursuant to ORS 537.665, and findings of fact and an order of determination have been made pursuant to ORS 537.685” as well as meeting the predicates of ORS 537.730(1)(a)-(g). In addition, proposed OAR 690-010-0130(3) should be removed, as the exterior areas of ground water reservoirs are not to be “reasonably inferred or ascertained” by arbitrary administrative fiat, as proposed, but in accordance with the careful investigation promised by ORS 537.665. Finally, SRCC notes a typographic error in proposed OAR 690-010-0200(a), which should refer to 690-010-190(3)(d)(A)-(D), not subsection (3)(e).

Response: The adjudication of groundwater does not need to precede the designation of a Critical Groundwater Area. If the intent of legislators were for the Commission to adjudicate groundwater (per ORS 537.665 – 700) prior to a Critical Groundwater Area (per ORS 537.730 – 735) then the statutory language would explicitly say so. Neither ORS 537.730 nor ORS 537.665 obligates the Commission to define the characteristics of the reservoir prior to the designation of a critical groundwater area. Additionally, ORS 537.665 – 700 does not require adjudication of pre-1955 groundwater rights prior to a designation. The order of presentation of statutes under ORS 537

does not represent legislative intent, instead it represents how the Legislative Counsel Committee organized the statutes. ORS 537.735(1)(a) requires the Commission to include within the boundaries of the CGWA those groundwater reservoirs that have been determined under ORS 537.665.

Comments from Carollo Law Group Representing the Upper Klamath Basin

A. Legal Background.

In Oregon’s water code, ORS 537.535—.746 regulates the use and appropriation of groundwater. First, ORS 537.535—.630 provide a process for obtaining groundwater rights. Next, ORS 537.665—.720 provide a process for adjudicating groundwater rights. Finally, ORS 537.730—.742 provide a process for OWRD’s designation of critical groundwater areas and imposition of “corrective controls” consistent with a CGWA determination.

ORS 537.730 et seq. establishes two very distinct regulatory mechanisms for designating CGWA’s and regulating groundwater appropriations: (1) a *quasi-legislative* mechanism for designating a CGWA and limiting *new appropriations* of groundwater (ORS 537.730-537.735); and (2) a *quasi-judicial* mechanism for limiting groundwater use by *existing water right holders* within a designated CGWA (ORS 537.742).³

In the case of CGWA designations, ORS 537.730 authorizes the Commission to designate by rule a CGWA based on findings by the Department that certain circumstances are present, such as different forms of substantial interference. *See, e.g.*, ORS 537.730(1)(b) (“The Water Resources Commission by rule may designate an area of the state a critical ground water area if: [...] [t]he Water Resources Department *finds* a pattern of substantial interference”) (emphasis added). The text and context of ORS 537.730 authorizes the Commission to quasi-legislate, through rulemaking, the designation of a CGWA based merely on factual findings by the Department, though the Commission must also take into account information presented at the public hearing required by ORS 537.730(2). This rulemaking serves as a property encumbrance within the area deemed a CGWA. ORS 537.740. In a rule designating a CGWA, ORS 537.735(3) authorizes the Commission to adopt corrective control provisions that primarily restrict or regulate the issuance of new water rights, but not the use of *existing* water rights. *See* ORS 537.735(3)(a)-(c). Although this statutory scheme may present some of its own constitutional concerns,⁴ it is clear that the statutory authorities in ORS 537.730-537.735 are directed at providing the Commission quasi- legislative authority to designate CGWAs, and regulate future new appropriations of ground water, based largely on information provided by the Department to the Commission.

While the designation process, and regulation of prospective new uses of groundwater, is quintessentially a quasi-legislative process, i.e., policymaking in nature, the Commission’s authority to impose limitations on groundwater use by existing water right holders is very different. The statutory scheme requires that the Commission’s authority to regulate in this realm be exercised strictly through quasi-judicial procedures. Indeed, ORS 537.742 is focused on the limitation of groundwater use by existing water right holders, *see* ORS 537.742(2)(a)-(f), and the statute explicitly requires that such corrective control measures affecting existing water right holders may only be imposed through a “final order” issued after a “contested case proceeding.”

The fact that the Legislature delegated *legislative* authority to the Commission to impose “corrective control provisions” applicable to new appropriations and water rights under ORS

537.735(3), but conspicuously required that parallel “corrective control measures” applicable to *existing* water rights under ORS 537.742(2) only be imposed through *adjudicatory* procedures, makes it plain and obvious that the Legislature made a very deliberate and conscious choice to ensure that the due process rights of existing water right holders be honored and respected.

The due process clause of the Fourteenth Amendment to the United States Constitution provides: “nor shall any State deprive any person of life, liberty, or property, without due process of law.” In evaluating due process claims, “[t]he first issue is whether the state has deprived a person of a liberty or property interest within the meaning of the Due Process Clause. If it has, the second is what process is due.” *Stogsdill v. Board, of Parole*, 342 Or. 332, 336 (2007), citing *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005). When a state deprives a person of property without due process, it can be subject to liability for a “taking” without just compensation in violation of the Fifth Amendment of the United States Constitution. See *Klamath Irrigation v. United States*, 129 Fed. Cl. 722, 730 (2016) (citations omitted).

A water right in Oregon is a “vested property interest which cannot be divested without due process of law.” *Skinner v. Jordan Valley Irr. Dist.*, 137 Or. 480, 491, *opinion modified on other grounds on denial of reh’g*, 137 Or. 480 (1931) (citations omitted). Therefore, actions by OWRD which restrict use of a persons’ water rights, or which result in encumbrances in one’s property, implicate due process. *Connecticut v. Doehr*, 501 U.S. 1, 12, 111 S. Ct. 2105, 2113, 115 L. Ed. 2d 1 (1991) (“even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection”). When such property restrictions or encumbrances are levied by a state without supplying a party with a meaningful procedural opportunity to protect their rights, due process is violated. *Id.*

B. The Proposed Rules Allow the Creation of Property Encumbrances Without Due Process.

OWRD’s proposed Division 10 rules dictate that the designation of a critical groundwater area occurs through a rulemaking. However, unique to CGWA designations, rules designating critical groundwater areas are filed with the county clerk in the counties affected by the designation. See proposed OAR 690-010-0160. By recording the rules designating a CGWA in the affected-counties’ records, a CGWA designation becomes a de facto encumbrance on properties located within the CGWA. Because CGWA designations encumber existing property, due process is implicated whenever OWRD proposes to designate a CGWA. *Connecticut v. Doehr*, 501 U.S. at 12.

Unfortunately, the proposed Division 10 rules do little to ensure that due process is protected during the designation of a critical groundwater area. In fact, with the exception of the “hearing” provided during the development of a CGWA designation (see proposed OAR 690-010- 0130), designation of a CGWA simply follows standard rulemaking procedures. Yet, rulemaking procedures are not sufficient to protect due process rights. See, e.g., *Brooks v. OWRD*, Marion County Circuit Court, No. 19CV27798 (OWRD violated due process when it promulgated rules, following rulemaking procedures, that automatically restricted the use of certain water rights). Therefore, where, as here, a CGWA designation constitutes a property encumbrance, OWRD needs to provide more process than simple rulemaking procedures to ensure that due process rights are satisfied.

Because the Division 10 rules, as proposed, allow for property encumbrances to be created without due process of law, the proposed rules are ultra vires. Upper Klamath Landowners therefore

encourage OWRD to supplement the procedural steps which must be followed prior to a CGWA designation to ensure that landowners' due process rights are sufficiently protected

Response: Pursuant to ORS 183.400(4) the department needs to ensure that the rulemaking record contains “all documents necessary to demonstrate compliance with applicable rulemaking procedures.” Under 690-010-0130(4)(c)(i) – (iii) the Department will provide a report to the commission demonstrating the restriction is necessary after review of the factors in ORS 537.730. This report will also meet the standards under ORS 537.780(2) which requires the commission to adopt a rule restricting groundwater use only if it “is based on substantial evidence in the record of the Water Resources Department to justify the imposition of the restriction.” The Department added language making it clear that this report will be supported by “substantial evidence” and added a process by which a draft copy of the report would be available to the public and would allow for public comment to be accepted, reviewed, and considered prior to presenting a final report to the Commission.

C. The Proposed Rules Improperly Limit the Scope of the Contested Case Hearing, Violating Due Process.

Under the proposed Division 10 rules and ORS Chapter 537, the creation of a CGWA and the implementation of corrective controls occurs through a bifurcated process. Under this process, CGWAs are designated by rule, while corrective controls affecting existing groundwater rights are implemented following contested case hearings.

The contested case process is singularly designed to ensure that parties to a contested case are afforded due process. *O'Neil v. Nat'l Union Fire*, 152 Or. App. 497, 502, 954 P.2d 847, 850 (1998) (“Implicit in the APA is that a contested case hearing is a *de novo*, full due process and quasi judicial hearing”). Unfortunately, the proposed Division 10 rules openly attempt to limit due process rights within the contested case process itself. Most notably, the proposed Division 10 rules attempt to reduce OWRD's burden of proof with regards to identifying and locating groundwater reservoirs, and the proposed rules eliminate rights of discovery against the Department. Both of these constitute due process limitations, which in turn will result in due process violations.

Starting with OWRD's burden of proof, OWRD's burden in a contested case should be to prove the location of groundwater reservoirs by substantial evidence. *See* ORS 183.482. In the proposed rules OWRD limits this burden significantly, declaring (but not explaining) that OWRD can sufficiently prove the location of groundwater reservoirs through evidence used to “reasonably ascertain” the location of said reservoirs. *See* proposed OAR 690-010-0130. The “reasonably ascertained” standard is extremely light, making it nearly impossible for parties to prove that OWRD incorrectly identified groundwater reservoirs. In substance, by rule OWRD has created an *irrebuttable presumption* that whatever reservoirs it identifies as containing a CGWA are true and correct.

Perhaps most notably, the proposed Division 10 rules then bar parties' discovery rights against OWRD in a contested case. *See* proposed OAR 690-010-0210. The Department's justification for limiting discovery is: (1) OWRD will post the information supporting implementation of corrective controls on its website; (2) the large number of potential parties to a contested case would make discovery too burdensome, and; (3) Oregon public records law allows for public record requests from OWRD prior to the contested case. *Id.* None of these excuses are convincing, much less lawful, reasons for restricting discovery.

Regarding OWRD's first justification for barring discovery, it's unquestionable that OWRD's public disclosure of information *supporting* corrective controls does nothing to protect due process. Pursuant to the proposed Division 10 rule OAR 690-010-0210, OWRD will have no responsibility to produce potentially exculpatory evidence for parties to use in a contested case, even if such evidence would have been readily discoverable. For OWRD to provide a fair and lawful contested case process, OWRD must disclose, or be willing to disclose, *all* evidence and materials in its possession that pertain to the corrective controls being proposed; whether that evidence supports *or opposes* the proposed controls.

OWRD's second justification for barring discovery is similarly unconvincing. As long as OWRD produces, or is willing to produce, all evidence in its possession pertaining to the corrective controls being proposed, the Department may not need to respond to all discovery requests individually. A blanket disclosure of all relevant materials during discovery may satisfy the discovery needs of each party to the contested case, and, as explained below, will be less burdensome to the Department than the current process outlined in the proposed rules.

OWRD's third justification for barring discovery blatantly disregards due process. Here, OWRD is claiming that the availability of public records requests supports limiting discovery. However, because public records requests occur through different channels than contested cases, there could be no guarantee that relevant and necessary public records requests would be completed by OWRD in time for the records produced to be used in the contested case. In fact, OWRD would be incentivized to draw-out the production of public records until after the contested case process was completed, or nearing completion. Moreover, unlike discovery, parties will be required to pay for public records requests, which will disincentivize some parties from obtaining materials essential to their defense in the contested case process. *See, e.g. United States v. U.S. Dist. Ct., Cent. Dist. of Cal., Los Angeles, Cal.*, 717 F.2d 478, 481 (9th Cir. 1983) (federal courts have recognized that federal public records law "did not replace the traditional rules of discovery.").

OWRD's reliance on public records laws as reasoning for limiting discovery illustrates the baselessness of its concern that discovery would be unduly burdensome given the number of parties to the contested case. It can be assumed that, without the availability of discovery, parties to a contested case will submit many different public records requests to the agency, seeking expedited consideration of those requests so that the Department's records may be used in the contested case. This will be more burdensome to OWRD than discovery. As explained above, if OWRD is truly concerned with the burdens of discovery, the Division 10 rules should simply explain that OWRD will produce *all information* pertaining to proposed corrective controls through discovery at the inception of the contested case process. This information would constitute everything considered by the agency leading to its proposed corrective controls, whether the information supported or opposed the corrective controls.

OWRD's approach to its burden of proof and discovery in the Division 10 rules, both together and separate, constitute violations of due process for parties to future contested case proceedings. Therefore, Upper Klamath Landowners urge OWRD to modify the proposed rules to recognize (1) that OWRD's burden for identifying groundwater reservoirs should be to identify reservoirs based on substantial evidence in the record, and (2) that OWRD should produce, through discovery, all documents and materials considered by OWRD, including evidence contrary to OWRD's position at the inception of the contested case process. This would protect due process allowing for fair and manageable

contested case proceedings.

Finally, protecting water rights as property rights requires more substantial findings than a finding that corrective control provisions restricting property use “may” correct problems that resulted in designation of a critical ground water area. The term “may” as utilized in the proposed OAR should be replaced by “will.” *E.g.* proposed OAR 690-010-180(1)(f), (i); 690-010- 0190(3)(d)(C). Specific findings linking the affected property rights to the problem should also be required in the final order in the contested case proceedings. Specifically, an additional subsection should be added to proposed OAR 690-010-0230 stating:

“(2) The final order shall specify:

(a) The identity of the ground water reservoir from which each party’s water right subject to the proposed corrective actions is withdrawing;

(b) The current level of each ground water reservoir in the critical area and whether and when withdrawals from such reservoir are forecast to cause its level to be below the lowest permissible water level for such reservoir (and if no lowest permissible water level has been established, the lowest permissible water level for such reservoir); and

(c) On a reservoir-by-reservoir basis, whether the corrective actions proposed in the Notice of Proposed Corrective Action(s) will resolve the problems that resulted in the designation of the critical groundwater area.

In no case shall any final order implement corrective actions limiting the use of any water right unless the party is withdrawing from a groundwater reservoir not forecasted to reach the lowest permissible water level within the next twenty years.”

Upper Klamath Landowners implore OWRD to protect due process rights during the contested case process consistent with the foregoing.

Response: The Department will post all information pertaining to the CGWA on its website for the public to review. The Department has the authority to limit discovery pursuant to OAR 137-003-0566(2): “An agency may provide by rule that some or all discovery methods under this section do not apply to a specified program or category of cases if: it finds that the availability of discovery would unduly complicate or interfere with the hearing process in the program or cases, because of the volume of the applicable caseload and the need for speed and informality in that process, and that alternative procedures for the sharing of relevant information are sufficient to ensure the fundamental fairness of the proceedings.” Regardless of the Department choice to limit discovery, the Department will still need to provide to the parties all documents the agency plans to offer into evidence.

If a party requests a public record, the Department generally has 15 business days after receiving the request to respond. If the department does not meet the deadline for response, the requester may request a continuance in the contested case if they are not able to obtain materials requested in a timely fashion.

D. Due Process Protections Within the CGWA Statutes Are Without Effect Pursuant to the Proposed Rules.

As explained in subsection (B) above, even the designation of a CGWA by rule implicates due process because it creates a property encumbrance on lands within a CGWA. Nevertheless, the proposed Division 10 rules do nothing to ensure that due process demands are satisfied prior to the designation of CGWA's. This error could be remedied if OWRD's proposed Division 10 rules specified the effect of the pre-CGWA-designation "hearing" mandated by statute.

The designation of a CGWA, by rule, differs slightly from other rulemaking procedures in that ORS 537.730 requires that "a hearing on a critical ground water declaration shall occur" prior to the designation of a CGWA. The proposed rules reflect ORS 537.730, providing "the Department shall hold a public hearing within each county in which the proposed critical ground water area lies." Proposed OAR 690-010-0130.

Unfortunately, the proposed rules do not provide any instruction for the content and structure of the hearing. The proposed rules do not specify whether persons will be able to provide testimony at the hearing, whether OWRD will take and consider evidence at the hearing, or whether the hearing will be a forum for examination or cross examination of OWRD personnel, etc. Thus, there's no indication in the proposed rules that the hearing will provide any type of due process to affected landowners.

The proposed rules simply need more instruction on the content, importance, and procedure of the pre-CGWA designation hearing. To ensure that persons' interests are adequately protected prior to a CGWA designation, the hearing should allow persons to submit testimony, evaluate and contest OWRD's evidence supporting a CGWA designation, and should require that OWRD duly consider the testimony and evidence presented at the hearing.

Response: Under 690-010-0130(4)(c)(i) – (iii) the Department will provide a report to the Commission demonstrating the restriction is necessary after review of the factors in ORS 537.730. This report will also meet the standards under ORS 537.780(2) which requires the Commission to adopt a rule restricting groundwater use only if it "is based on substantial evidence in the record of the Water Resources Department to justify the imposition of the restriction." The Department added language making it clear that this report will be supported by "substantial evidence." The Department will post this report online for the public to review and comment on. The Department will accept comments from the day of posting to the end of the public comment period.

E. Scenic Waterways Do Not Constitute a Restriction of Existing Surface Water Appropriations.

The proposed Division 10 rules provide OWRD a process for restricting existing groundwater appropriations on the basis of scenic waterway designations. This violates Oregon law, and the proposed rules should clarify that scenic waterway designations are not grounds for limiting existing groundwater appropriations.

Proposed OAR 690-010-0120 provides that a critical groundwater area can be designated when OWRD finds a pattern of substantial interference between wells in the area in question and restrictions "imposed on surface water appropriation[s]." The rule then clarifies that "restrictions imposed on

surface water appropriations' include[s] but [is] not limited to, scenic waterways[.]” Id.

The proposed rules later provide that OWRD may implement corrective controls on existing appropriations when “the Department believes [corrective controls] will resolve the problems that resulted in the designation of a critical ground water area.” Proposed OAR 690-010- 0170. Putting proposed OAR 690-010-0120 and OAR 690-010-0170 together reveals that the proposed rules empower OWRD to restrict existing groundwater appropriations on the basis of a scenic waterway designation. This is at odds with Oregon law.

Oregon water law provides that the designation of a scenic waterway can affect the issuance of new water rights within or above a scenic waterway. See ORS 536.028. However, scenic waterways are not a tool by which OWRD can regulate existing water rights. Instead, scenic waterway designations are to be considered in applications for new water rights, or modifications of existing water rights. See, e.g. OAR 690-051-0030; OAR 690-310-0260; OAR 690-315-0040.

Unfortunately, the proposed Division 10 rules create a work-around, wherein existing water rights can be regulated based on scenic waterway designations. For instance, under the proposed rules OWRD could, following a contested case hearing, limit the appropriation available for a pre-1900s groundwater right because doing so would “resolve the problems that resulted in the designation of a critical ground water area,” even if the “problems” were interference between existing groundwater appropriations and scenic waterway designations. This would be contrary to law, because Oregon does not allow existing appropriators to be regulated on account of scenic waterway designations.

The proposed rules should clarify that scenic waterway designations may only be used to limit future appropriations, or future modifications of existing appropriations, to ensure compliance with Oregon law.

Response: If the Department finds a pattern of substantial interference between wells within the area in question and scenic waterways flows, it may use that factor to consider designation of a CGWA pursuant to ORS 390.835(9)(g).

Comments from Carollo Law Group Representing Harney County

A. Legal Background

In Oregon’s water code, ORS 537.535—.746 regulates the use and appropriation of groundwater. First, ORS 537.535—.630 provide a process for obtaining groundwater rights. Next, ORS 537.665—.720 provide a process for adjudicating groundwater rights. Finally, ORS 537.730—.742 provide a process for OWRD’s designation of critical groundwater areas and imposition of “corrective controls” consistent with a CGWA determination.

ORS 537.730 et seq. establishes two very distinct regulatory mechanisms for designating CGWA’s and regulating groundwater appropriations: (1) a *quasi-legislative* mechanism for designating a CGWA and limiting *new appropriations* of groundwater (ORS 537.730-537.735); and (2) a *quasi-judicial* mechanism for limiting groundwater use by *existing water right holders* within a designated CGWA (ORS 537.742).¹

In the case of CGWA designations, ORS 537.730 authorizes the Commission to designate by rule a CGWA based on findings by the Department that certain circumstances are present, such as different forms of substantial interference. See, e.g., ORS 537.730(1)(b) (“The Water Resources Commission by

rule may designate an area of the state a critical ground water area if: [...] [t]he Water Resources Department *finds* a pattern of substantial interference”) (emphasis added). The text and context of ORS 537.730 authorizes the Commission to quasi-legislate, through rulemaking, the designation of a CGWA based merely on factual findings by the Department, though the Commission must also take into account information presented at the public hearing required by ORS 537.730(2). This rulemaking serves as a property encumbrance within the area deemed a CGWA. ORS 537.740. In a rule designating a CGWA, ORS 537.735(3) authorizes the Commission to adopt corrective control provisions that primarily restrict or regulate the issuance of new water rights, but not the use of *existing* water rights. See ORS 537.735(3)(a)-(c). Although this statutory scheme may present some of its own constitutional concerns,² it is clear that the statutory authorities in ORS 537.730-537.735 are directed at providing the Commission quasi- legislative authority to designate CGWAs, and regulate future new appropriations of ground water, based largely on information provided by the Department to the Commission.

While the designation process, and regulation of prospective new uses of groundwater, is quintessentially a quasi-legislative process, i.e., policymaking in nature, the Commission’s authority to impose limitations on groundwater use by existing water right holders is very different. The statutory scheme requires that the Commission’s authority to regulate in this realm be exercised strictly through quasi-judicial procedures. Indeed, ORS 537.742 is focused on the limitation of groundwater use by existing water right holders, see ORS 537.742(2)(a)-(f), and the statute explicitly requires that such corrective control measures affecting existing water right holders may only be imposed through a “final order” issued after a “contested case proceeding.”

The fact that the Legislature delegated *legislative* authority to the Commission to impose “corrective control provisions” applicable to *new* appropriations and water rights under ORS 537.735(3), but conspicuously required that parallel “corrective control measures” applicable to *existing* water rights under ORS 537.742(2) only be imposed through *adjudicatory* procedures, makes it plain and obvious that the Legislature made a very deliberate and conscious choice to ensure that the due process rights of existing water right holders be honored and respected.

The due process clause of the Fourteenth Amendment to the United States Constitution provides: “nor shall any State deprive any person of life, liberty, or property, without due process of law.” In evaluating due process claims, “[t]he first issue is whether the state has deprived a person of a liberty or property interest within the meaning of the Due Process Clause. If it has, the second is what process is due.” *Stogsdill v. Board, of Parole*, 342 Or. 332, 336 (2007), citing *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005). When a state deprives a person of property without due process, it can be subject to liability for a “taking” without just compensation in violation of the Fifth Amendment of the United States Constitution. See *Klamath Irrigation v. United States*, 129 Fed. Cl. 722, 730 (2016) (citations omitted).

A water right in Oregon is a “vested property interest which cannot be divested without due process of law.” *Skinner v. Jordan Valley Irr. Dist.*, 137 Or. 480, 491, *opinion modified on other grounds on denial of reh'g*, 137 Or. 480 (1931) (citations omitted). Therefore, actions by OWRD which restrict use of a persons’ water rights, or which result in encumbrances in one’s property, implicate due process. *Connecticut v. Doehr*, 501 U.S. 1, 12, 111 S. Ct. 2105, 2113, 115 L. Ed. 2d 1 (1991) (“even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection”). When such property restrictions or encumbrances are levied by a state without supplying a party with a meaningful procedural opportunity to protect their rights, due process is violated. *Id.*

Harney County's comprehensive plan places great importance on water availability. The Comprehensive Plan has a preservation goal of developing and managing the County's lands and waters in a manner that will enhance, where possible, the production and public enjoyment of wildlife. The Comprehensive Plan also states that the County "shall recognize the development limitations imposed by the carrying capacities of natural resources; i.e. surface and ground water capabilities, soils geology, etc." However, the County also recognizes that "water will continue to be a primary driving force in the economy. Water is available for municipal and industrial growth; however without the development of new sources or conservation, the opportunities for increased agricultural production are limited." Therefore, the Comprehensive Plan for Harney County appreciates and strives to balance competing uses of water. Consistent with this, Harney County urges the proposed Division 10 rules to provide for equity to all affected parties, provide early consultation opportunities for affected counties, and protect due process interests to the greatest degree possible.

- B. The Proposed Rules Should Ensure that Counties are Consulted at the Earliest Possible Stage in the CGWA Designation Process.

The proposed Division 10 rules provide that OWRD must consult with affected local governments, including counties, prior to providing public notice of a CGWA-designation rulemaking. To facilitate this consultation, the proposed rules instruct OWRD to provide the boundaries of the proposed CGWA designation, a list of the groundwater reservoirs within that area, the reasoning for the proposed designation, the information relied on by OWRD for the designation, and the proposed corrective controls to be included in the designation rules. See Proposed OAR 690-010-0140. Harney County appreciates this commitment to consultation.

Harney County is concerned, however, that affected local governments may be second on the consultation agenda prior to the designation of a CGWA. While affected local governments must be consulted prior to public notice of a proposed rulemaking, nearby federally recognized tribes must be consulted before the Rule Advisory Committee for the designation is convened. Thus, the proposed rules require consultation with nearby tribes *long before* consultation with affected local governments is required.

At minimum, affected local governments and federally recognized tribes should be consulted on equal footing. That is, affected local governments should be consulted at least as early in the CGWA designation process as federally recognized tribes. Because local governments can be so significantly affected by CGWA designations in a variety of ways, from economic development to tourism opportunities to community growth, Harney County implores OWRD to modify the proposed rules so that affected local governments are consulted at the earliest stage of the CGWA process, before rules advisory committees are being convened and once OWRD has decided to propose a CGWA designation. Through this early consultation, affected local governments can provide insight on the challenges facing affected areas, the resources of greatest value, and support or modifications to proposed CGWAs.

Response: The Department agrees and changed the timeline for coordination with affected local governments to prior to the first RAC meeting.

- C. The Proposed Rules Should Better Protect the Due Process Rights of Potentially- Affected Persons.

Irrespective of the competing interests in any CGWA designation or implementation of corrective controls, the due process rights of those parties affected should be protected to the greatest extent possible. Unfortunately, the proposed rules fail in this regard. As a result, the proposed rules would allow the designation of CGWAs and imposition of corrective controls without allowing affected parties to present vital evidence and information to OWRD. Harney County urges OWRD to address these issues in the final rules.

1. The Proposed Rules Allow the Creation of Property Encumbrances Without Due Process.

OWRD's proposed Division 10 rules dictate that the designation of a critical groundwater area occurs through a rulemaking. However, unique to CGWA designations, rules designating critical groundwater areas are filed with the county clerk in the counties affected by the designation. See proposed OAR 690-010-0160. By recording the rules designating a CGWA in county records, a CGWA designation becomes a *de facto* encumbrance on properties located within the CGWA. Harney County certainly believes that CGWA designations filed with the county are akin to property encumbrances because of the CGWA's affect, or potential affect, on land uses. In fact, the designation of a CGWA can affect Harney County's application of its comprehensive plan, which requires water availability for future municipal and industrial growth. Because CGWA designations encumber existing property, due process is implicated whenever OWRD proposes to designate a CGWA. *Connecticut v. Doehr*, 501 U.S. at 12.

Unfortunately, the proposed Division 10 rules do little to ensure that due process is protected during the designation of a critical groundwater area. In fact, with the exception of the "hearing" provided during the development of a CGWA designation (see proposed OAR 690-010-0130), designation of a CGWA simply follows standard rulemaking procedures.³ Yet, rulemaking procedures are not sufficient to protect due process rights. See, e.g. *See Brooks v. OWRD*, Marion County Circuit Court, No. 19CV27798 (OWRD violated due process when it promulgated rules, following rulemaking procedures, that automatically restricted the use of certain water rights). Therefore, where, as here, a CGWA designation constitutes a property encumbrance, OWRD needs to provide more process than simple rulemaking procedures to ensure that due process rights are satisfied.

Because the Division 10 rules, as proposed, allow for property encumbrances to be created without due process of law, the proposed rules are *ultra vires*. Harney County therefore encourages OWRD to supplement the procedural steps which must be followed prior to a CGWA designation to ensure that due process rights are sufficiently protected.

Response: Pursuant to ORS 183.400(4) the department needs to ensure that the rulemaking record contains "all documents necessary to demonstrate compliance with applicable rulemaking procedures." Under 690-010-0130(4)(c)(i) – (iii) the Department will provide a report to the commission demonstrating the restriction is necessary after review of the factors in ORS 537.730. This report will also meet the standards under ORS 537.780(2) which requires the commission to adopt a rule restricting groundwater use only if it "is based on substantial evidence in the record of the Water Resources Department to justify the imposition of the restriction." The Department added language making it clear that this report will be supported by "substantial evidence" and added a process by which a draft copy of the report would be available to the public and would allow for

public comment to be accepted, reviewed, and considered prior to presenting a final report to the Commission.

2. The Proposed Rules Improperly Limit the Scope of the Contested Case Hearing, Violating Due Process.

Under the proposed Division 10 rules and ORS Chapter 537, the creation of a CGWA and the implementation of corrective controls occurs through a bifurcated process. Under this process, CGWAs are designated by rule, while corrective controls affecting existing groundwater rights are implemented following contested case hearings.

The contested case process is singularly designed to ensure that parties are afforded due process. *O'Neil v. Nat'l Union Fire*, 152 Or. App. 497, 502, 954 P.2d 847, 850 (1998) (“Implicit in the APA is that a contested case hearing is a *de novo*, full due process and quasi judicial hearing”). Unfortunately, the proposed Division 10 rules openly attempt to limit due process rights within the contested case process itself. Most notably, the proposed Division 10 rules attempt to reduce OWRD’s burden of proof with regards to identifying and locating groundwater reservoirs, and the proposed rules eliminate rights of discovery against the Department. Both of these constitute due process limitations, which in turn will result in due process violations.

Starting with OWRD’s burden of proof, OWRD’s burden in a contested case should be to prove the location of groundwater reservoirs by substantial evidence. See ORS 183.482. In the proposed rules, OWRD limits this burden significantly, declaring (but not explaining) that OWRD can sufficiently prove the location of groundwater reservoirs through evidence used to “reasonably ascertain” the location of said reservoirs. See proposed OAR 690-010-0130. The “reasonably ascertained” standard is extremely light, making it nearly impossible for parties to prove that OWRD incorrectly identified groundwater reservoirs. In substance, by rule OWRD has created an irrebuttable presumption that whatever reservoirs it identifies as containing a CGWA are true and correct.

Perhaps most notably, the proposed Division 10 rules then bar parties’ discovery rights against OWRD in a contested case. See proposed OAR 690-010-0210. The Department’s justification for limiting discovery is: (1) OWRD will post the information supporting implementation of corrective controls on its website; (2) the large number of potential parties to a contested case would make discovery too burdensome, and; (3) Oregon public records law allows for public record requests from OWRD prior to the contested case. *Id.* None of these excuses are convincing, much less lawful, reasons for restricting discovery.

Regarding OWRD’s first justification for barring discovery, it’s unquestionable that OWRD’s public disclosure of information *supporting* corrective controls does nothing to protect due process. Pursuant to the proposed Division 10 rule OAR 690-010-0210, OWRD will have no responsibility to produce potentially exculpatory evidence for parties to use in a contested case, even if such evidence would have been readily discoverable. For OWRD to provide a fair and lawful contested case process, OWRD must disclose, through discovery, all evidence and materials in its possession that pertain to the corrective controls being proposed, whether that evidence supports *or opposes* the proposed controls. This will ensure that the public is able to review the best evidence supporting or opposing corrective

controls, and will lead to more informed decision making.

OWRD's second justification for barring discovery is similarly unconvincing. As long as during discovery OWRD produces all evidence in its possession pertaining to the corrective controls being proposed, the Department may not need to respond to all discovery requests individually. This will be less burdensome to the Department than the current process outlined in the proposed rules.

OWRD's third justification for barring discovery disregards due process. Here, OWRD is claiming that the availability of public records requests supports limiting discovery. However, because public records requests occur through different channels than contested cases, there could be no guarantee that relevant and necessary public records requests would be completed by OWRD in time for the records produced to be used in the contested case. In fact, OWRD would be incentivized to draw-out the production of public records until after the contested case process was completed, or nearing completion. Moreover, unlike discovery, parties will be required to pay for public records requests, which will disincentivize some parties from obtaining materials essential to their defense in the contested case process. *See, e.g. United States v. U.S. Dist. Ct., Cent. Dist. Of Cal., Los Angeles, Cal., 717 F.2d 478, 481 (9th Cir. 1983)* (federal courts have recognized that federal public records law "did not replace the traditional rules of discovery.").

OWRD's reliance on public records laws as reasoning for limiting discovery illustrates the baselessness of its concern that discovery would be unduly burdensome given the number of parties to the contested case. It can be assumed that, without the availability of discovery, parties to a contested case will submit many different public records requests to the agency, seeking expedited consideration of those requests so that the Department's records may be used in the contested case. This will be more burdensome to OWRD than discovery.

OWRD's approach to its burden of proof and discovery in the Division 10 rules, both together and separate, constitute violations of due process for parties to future contested case proceedings. Moreover, the proposed rules set the stage for the type of uninformed decision making which should be avoided at all costs in this critical, and sensitive, process. Therefore, Harney County urges OWRD to modify the proposed rules to recognize (1) that OWRD's burden for identifying groundwater reservoirs should be to identify reservoirs based on substantial evidence in the record, and (2) that OWRD should produce everything directly or indirectly considered by OWRD, including those records contrary to OWRD's position, through discovery at the inception of the contested case process. This would protect due process allowing for fair and manageable contested case proceedings and informed decision making.

Response: The Department will post all information pertaining to the CGWA on its website for the public to review. The Department has the authority to limit discovery pursuant to OAR 137-003-0566(2): "An agency may provide by rule that some or all discovery methods under this section do not apply to a specified program or category of cases if: it finds that the availability of discovery would unduly complicate or interfere with the hearing process in the program or cases, because of the volume of the applicable caseload and the need for speed and informality in that process, and that alternative procedures for the sharing of relevant information are sufficient to ensure the fundamental fairness of the proceedings." Regardless of the Department choice to limit discovery, the Department will still need to provide to the parties all documents the agency plans to offer into evidence.

If a party requests a public record, in general, the Department, in general, has 15 business days after receiving the request to respond. If the department does not meet the deadline for response, the requester may request a continuance in the contested case if they are not able to obtain materials requested in a timely fashion.

3. Due Process Protections Within the CGWA Statutes Are Without Effect Pursuant to the Proposed Rules.

As explained above, even the designation of a CGWA by rule implicates due process because it creates a property encumbrance on lands within a CGWA. Nevertheless, the proposed Division 10 rules do not ensure that due process demands are satisfied prior to the designation of CGWAs. This error could be remedied if OWRD's proposed Division 10 rules specified the effect of the pre-CGWA-designation "hearing" mandated by statute.

The designation of a CGWA, by rule, differs slightly from other rulemaking procedures in that ORS 537.730 requires that "a hearing on a critical ground water declaration shall occur" prior to the designation of a CGWA. The proposed rules reflect ORS 537.730, providing "the Department shall hold a public hearing within each county in which the proposed critical ground water area lies." Proposed OAR 690-010-0130.

Unfortunately, the proposed rules do not provide any instruction for the content and structure of the hearing. The proposed rules do not specify whether persons will be able to provide testimony at the hearing, whether OWRD will take and consider evidence at the hearing, whether the hearing will be a forum for examination or cross examination of OWRD personnel, or whether county officials will be able to testify at the hearing, etc. Thus, there's no indication in the proposed rules that the hearing will provide any type of due process.

The proposed rules simply need more instruction on the content, importance, and procedure of the pre-CGWA designation hearing. To ensure that persons' interests are adequately protected prior to a CGWA designation, the hearing should allow persons and the affected counties to submit testimony, evaluate and contest OWRD's evidence supporting a CGWA designation, and should require that OWRD duly consider the testimony and evidence presented at the hearing.

Response: Under 690-010-0130(4)(c)(i) – (iii) the Department will provide a report to the Commission demonstrating the restriction is necessary after review of the factors in ORS 537.730. This report will also meet the standards under ORS 537.780(2) which requires the Commission to adopt a rule restricting groundwater use only if it "is based on substantial evidence in the record of the Water Resources Department to justify the imposition of the restriction." The Department added language making it clear that this report will be supported by "substantial evidence." The Department will post this report online for the public to review and comment on. The Department will accept comments from the day of posting to the end of the public comment period.

Scenic Waterways Do Not Constitute a Restriction of Existing Surface Water Appropriations.

The proposed Division 10 rules provide OWRD a process for restricting existing groundwater

appropriations on the basis of scenic waterway designations. This violates Oregon law, and the proposed rules should clarify that scenic waterway designations are not grounds for limiting existing groundwater appropriations.

Proposed OAR 690-010-0120 provides that a critical groundwater area can be designated when OWRD finds a pattern of substantial interference between wells in the area in question and restrictions “imposed on surface water appropriation[s].” The rule then clarifies that “restrictions imposed on surface water appropriations’ include[s] but [is] not limited to, scenic waterways[.]” *Id.*

The proposed rules later provide that OWRD may implement corrective controls on existing appropriations when “the Department believes [corrective controls] will resolve the problems that resulted in the designation of a critical ground water area.” Proposed OAR 690-010- 0170. Putting proposed OAR 690-010-0120 and OAR 690-010-0170 together reveals that the proposed rules empower OWRD to restrict existing groundwater appropriations on the basis of a scenic waterway designation. This is at odds with Oregon law.

Oregon water law provides that the designation of a scenic waterway can affect the issuance of new water rights within or above a scenic waterway. *See* ORS 536.028. However, scenic waterways are not a tool by which OWRD can regulate existing water rights. Instead, scenic waterway designations are to be considered in applications for new water rights, or *modifications* of existing water rights. *See, e.g.* OAR 690-051-0030; OAR 690-310-0260; OAR 690-315-0040.

Unfortunately, the proposed Division 10 rules create a work-around, wherein existing water rights can be regulated based on scenic waterway designations. For instance, under the proposed rules OWRD could, following a contested case hearing, limit the appropriation available for a pre-1900’s groundwater right because doing so would “resolve the problems that resulted in the designation of a critical ground water area,” even if the “problems” were interference between existing groundwater appropriations and scenic waterway designations. Although Harney County treasures its scenic waterways, regulating existing water rights because of scenic waterway designations would be contrary to law.

The proposed rules should clarify that scenic waterway designations may only be used to limit future appropriations, or future modifications of existing appropriations, to ensure compliance with Oregon law.

Response: If the Department finds a pattern of substantial interference between wells with conditions under ORS 390.835(9)(g) within the area in question and scenic waterways flows, it may use that factor to consider designation of a CGWA. Subsequent corrective control measures may restrict groundwater rights containing a condition allowing the regulation of the use, if data discloses that the appropriation will measurably reduce scenic waterway flows that were in effect when the groundwater right was issued pursuant to ORS 390.835(9)(g).

Public Hearing May 4, 2023 Klamath Falls: Paul Simmons Comments:

I am Paul Simmons. I am the executive director and Council of Klamath Water Users Association. Klamath Water Users Association is a nonprofit organization formed in 1953, 70 years ago,

and it's members are irrigation districts and other water delivery agencies that serve water from upper Klamath lakes and the Klamath River And the Klamath project. Roughly 170,000 acres in all. Uh, we will be submitting written comments in a timely way on the rule. I wanna focus on something that I think is more important and more important for the state, for the Commission, for OWRD to hear and think about and act upon. The, um, the land, and the landowners and the Klamath project are being severely damaged by federal administration of the Endangered Species Act. It's destroying farms. It's destroying families. It's destroying communities. t's destroying wildlife and it's doing damage to our groundwater basins. I am not saying that OWRD or the Commission, that there should not manage groundwater prudently. I'm not necessarily saying that there shouldn't be new regulations, but for now I it's just critical for the state to take a more holistic, a thoughtful approach to integrated water management. In Klamath County, we are, uh, seeing in recent years, we've seen as much as 90% of the runoff. The Klamath County go down the Klamath River to the ocean in California. That's exclusively because of federal administration at the Endangered Species Act. The State of Oregon's approach to that seems to be passive acquiescence or passive enablement without any concern for the citizens of Klamath County, our industry, our agriculture, or our wildlife. It is... From here to uh Merrill, Malin, Midland The reason for groundwater declines is the Endangered Species Act. That's the sole reason. When ESA regulations started in earnest, groundwater use started in earnest. And ESA regulation becomes reasonable. It'll be possible to manage groundwater in a more appropriate manner. Again, I don't, um, I don't say that the stage shouldn't care about our groundwater basins. It should but, um. Like I said, it's federal water management that's causing this and we just can't let that be forgotten. And Oregon needs to play a role to protect all water uses in the county. So again will submit written comments. Appreciate the time. Appreciate the opportunity. Thank you.

Response: The Endangered Species Act (ESA) and federal reservoir water management is outside of the scope of Division 10 rules, as are specific conditions in the Klamath Basin as this rulemaking is not establishing a CGWA in Klamath. The Department has a responsibility to manage groundwater. The Division 10 rules provide the procedures for establishing a CGWA and associated controls, and does not establish a CGWA. Specific factors for a basin should be discussed if a CGWA process is started within your basin.

Public Hearing May 4, 2023, Klamath Falls: Chairman Clayton Dumont Jr. Comments:

So, I'm Clayton DuMont, Jr. I'm chairman and the Klamath tribes and I wanna thank you for the opportunity to comment on the proposed rules. And we're very much in favor of the critical groundwater designation for our area. I think it should have happened a long time ago. Think the process is taking far too long. We seeded much of Oregon and a large portion of Northern California, in our Treaty of 1864 for the right to be able to hunt, fish, gather and live well on our reservation land, which at the time was nearly 2,000,000 acres at the time of our federal termination and status, was down to about 800,000 acres since, uh. Several court cases during the 70s and 80s have affirmed that those rights have continued and exists. We've had adjudicated enforceable water rights within those reservation boundaries uh, and enjoy those now they're in stream water rights and they're tied to the protection of those treaty resources. One of the things that has happened since we have been enforcing or making calls on surface waters is that folks have responded by mining groundwater. Uh, if you look at some graphs that I have got, here's one showing at 30% reduction in inflows into Upper Klamath Lake in since the, uh, 1980s. We've also got graphs showing that test wells up on Klamath Marsh that we share with USGS. Nothing but steady declines in groundwater as the mining of that, uh, source continues. So

we know that the inflows into Lower Klamath Lake are not simply tied to groundwater mining, but we believe in the hydrology shows that it's a significant contribution to the problem. Even if we were able to do the kinds of restoration work on surface waters that we're all trying to do, which is the restorations of wetlands and holding more water in the environment longer, the mining of groundwater will undermine that. We're also concerned about pumping below the lake. Umm, you've got a whole lot of subsidence that's going on down in the project lands at this point, uh, even if again we're able to restore wetlands in a way that might aid the Klamath River, take pressure off of the lake so that we don't have unnatural conflicts between species, between upriver uh downriver tribes and our own tribe, and conflict over whether to keep water in the lake or in the river, wet lands would help with that. But if the mining of groundwater in the project continues, there's not gonna be any way to restore wetlands. So we think that mining groundwater is a mistake. We want this to be speeded up. We want to aid the wildlife refuges and understand that we can't do that unless we get control of the groundwater mining, but also like to urge Oregon to do what they can to lobby California because it's slow as the groundwater designation is here. As long as the process is, it's better than what there is in California. So that's what I got to say. Thank you for the opportunity.

Response: The Department will consider the best available data when making a determination regarding designation of a CGWA. Part of the Division 10 rules requires the Department to consult with any federally recognized Indian tribes in Oregon regarding the proposed CGWA . The Department is currently working with the State of California on interstate groundwater management. The first area of focus for CGWA designation will be the in the Harney Basin.

Public Hearing May 4, 2023, Klamath Falls: Steve Worth Comments:

My name is Steve Worth. I'm a fourth generation rancher out in Swan Lake Valley. This is the first I've heard of it, and so I can't really give it intelligent opinion on what you said, but all those rules it to me, I've been to plenty of government meetings and it's a token meeting because it's a done deal and that's all I have to say.

Response: The adoption of the Division 10 rules will not create any new CGWAs or amend any existing CGWAs. The Division 10 rules are the procedures the Department must follow for designation of a new CGWA and apply to any CGWA that would be established around the state. Should a CGWA be designated in your area, more meetings would be held in your area.

Public Hearing May 4, 2023, Klamath Falls: Glen Barret Comments:

So I'm Glen Barrett. I have a ranch out in Bonanza area and I'm also President of water polite and will be right submitting written comments. Just a couple of comments. I sat through some of your uh RAC meetings and whatnot. And it appears that I, um questioned the severity of the out of compliance from the original rules. And listening through the public or through your committee meetings, it seems like they're being these are being written to justify the mean and or the means justify the end. And um, so you can regulate more. Uh and I, I cautioned especially in the Klamath Basin to um, Just the over regulation in this area with ESA and whatnot like Paul is saying is significant and I think, um, I think taking a subjective view through your language is wrong. I think uh, like the pattern of interference, I think that seems to be somewhat of a subjective type of measurement, and we aren't measuring the full reach of the river. You might measure certain individual springs, and I think that needs to be more

defined. I also have an issue and I brought this up in your hearings before is that um, there are various areas that the state, not just Oregon, California, but Oregon, Washington and Oregon, Idaho where groundwaters connected or appears to be connected. And I don't believe that Oregon, the state of Oregon, should regulate those waters in the state before there is a comprehensive plan with the neighboring state. Think it'd be unfair and unjust to the uh farmers or the users and Oregon, so that's what I have and I'll be submitting more written comments.

Response: Under the current Division 10 rules a CGWA designation is made by the State Engineer via order. In 1991 the CGWA statutes were amended to have the Commission designate a CGWA through a rulemaking process. It also requires a contested case process when restricting groundwater use within the designated area. The new rules ensure public engagement through the designation process via rule adoption and ensure that due process rights are protected. The term "pattern of substantial interference" is a statutory term from ORS 537.730(1)(a) – (g). The Department will use the best available science to determine if a pattern of substantial interference exists in a specific situation. The Department is working with the State of California on interstate groundwater management.

Public Hearing May 8, 2023, Salem: Representative Reschke Comments

All right, thank you. For the record, my name is E. Werner Reschke and I am the state representative for House District 55, which encompasses Southern Deschutes County, all of Northern Klamath County and Eastern Klamath County. Thank you for the opportunity to testify today. I'll be brief, but we will follow up with a submitted letter before the deadline of May 22nd at 5:00 pm. To begin with, I found out about this rulemaking just on Friday, so I'm playing a bit of catch up. The way I found out was from a lobbyist who told me that OWRD had a public hearing in Klamath County, which I resent, represent, and concerning groundwater and only 5 people showed up. That's right 5. That told me a few things. Either this meeting was not well publicized. I've heard it was sent out on the department's list served email service but if you are not subscribed, you're not going to get the notification. I believe an issue as important as water in my district ought require a individual letter to each water user or at least each potentially impacted water user. With a hot button of water in my district, 5 is far from representative of a proper turnout for a public hearing of this importance. Or the explanation, the other explanation I can come up with is for the lack of attendance is we are entering irrigation season. Farmers and ranchers are setting up wheel lines, getting pivots ready, doing a lot of prep work so thy can farm. This is probably the worst time possible to hold a public hearing in an Ag community, for those who work the land for a living. So given that, here are a few thoughts I would like to put on record. First, what is the specific problems that OWRD had with current rules? Again, only aware of this on Friday. I've been unable to find the justification for the new rules, except, the old ones are out of date. I guess I'd like to better understand why the rules that have been in place for years, if not decades, why they don't work now? I think OWRD needs to clearly identify the specific problems they've encountered with respect to the current rules concerning critical groundwater. Second, what basins may be impacted? I think I have an answer to that question. I'm pretty sure Klamath would be close to, if not at the top of the list. While this a statewide effort, I'm not naive enough to think these changes won't impact Klamath or Deschutes County groundwater users. In Klamath County we've been down this road before with Division 9 and 25 rules, shutting off 140 groundwater users which saw the departments suffer lawsuit losses so great, had come to the legislature, during the interim and beg for more funding. Let's slow down and make sure we get this right. And 5 people showing up to a public hearing about water in my district isn't right, it isn't even close. Third, California vs. Oregon, until, in the Klamath Basin at least, we have a compact with

California regulating Oregon groundwater users would mean next to nothing if preserving this natural resource, except Oregon irrigators will be severely impacted. As fertile farmland is turned into brown dustbowls. While a few miles away the fields will be green as a spring morning. Finally, I see the term Oregon Water Resources Department finds a pattern in the pros Division 10 rules. But that's not defined. What's the objective standard? What is the definition of a pattern? In closing I would ask OWRD to pump the brakes. This feels a bit slimy to me. It feels as if the Department is checking a box, quote "held public hearings," end quote and is ready to go onto the next step. It feels like the current statute is in the way of the particular goals the Department has and these quote "updates" that Division 10 rules will help OWRD get to where they want to go, sans any legislative changes. Please re think your efforts. You've been sued before and it costs the state a lot of money because you didn't listen to the people in the areas you were regulating. Please follow not just the letter of the law, but the spirit of the law. Re-hold these public hearings but first make sure everyone is clearly informed before you do. In each basin you should easily be able to fill an auditorium, unless that's not the goal. Thank you.

Response: Representative Reschke submitted a written comment elaborating on his oral comments. Please see our response above.

Public Hearing May 8, 2023, Salem: Christopher Hall Comments

One last thing I am going to say is just a note here, under um, chapter 690 division 10 provisions 0170, initial notification of proposed corrective actions I made this comment once before, I am going to make it again. First, under number 3 it says, "Limits the use of groundwater " so it is just a duplicate note there. But, uh, provision 3B under this section, um, it basically says that a provision according preference without reference to relative priorities, to withdrawals of groundwater in the critical area for residential livestock watering purposes first. Meaning that if a critical groundwater area is designated and in corrective control provisions are um, sought to be imposed that, um, water for domestic and livestock will be preference first. Then further in this same paragraph it says that it shall be done in such order as the commission considers advisable under the circumstances so long as such withdrawal will not materially effect the properly designated, designed, and operating well with prior rights that penetrates the aquifer. So you can't have, you can't have it both. You can't have uh, a preference for domestic drinking water and livestock water but then defer to the seniority of a well essentially which may be doing something else. Like, you know agriculture or irrigation or whatever. Uh, we discussed how this is an inconsistency in the statute tracking this inconsistency in the rule doesn't really make it any better. That's really the only main issue that I have that I would like for our elected representatives uh, to and Senators to address and hopefully revise this rule. Uh, thank you very much.

Response: The Department made the correction to the grammatical error. Section 690-010-0170(3)(b) is statutory language from ORS 537.742(2)(b) and the Department cannot change that language through rulemaking.

Public Hearing May 8, 2023, Salem: Gene Souza Comments

Good Afternoon. My name is Gene Souza and I am the Executive Director for the Klamath Irrigation District. I run a quasi-municipal corporation formed under former revised statute 545. KID provides surface water to more than 1200 agricultural producers and an additional 1800 water users here in the Klamath Basin. As my representative just mentioned. My district does not own any groundwater wells

however, we are definitely involved in integrating with the surface water/ groundwater interaction. And as Oregon Water Resources Department fails to uphold the surface water rights here in the Klamath County, uh, from water stored in upper Klamath Lake and unnaturally diverting it away from the area above Keno downriver and allowing that to happen the groundwater problems here in the Klamath Basin are exasperated. I pointed out this to Ivan Gall in several interactions and I'll provide it further written testimony. I do have concerns with Division 10 proposed rules, in designated critical groundwater area in that first, the current rules reference Oregon revised statute 197.190. This reference was outdated in 1993. If Oregon revised statute 195.025 regional coordination of planning activities is a reference that Oregon revised statute uh is going to look at, then KID really has a serious problem moving forward with this government interactive process. Which was not included in ORS 197.190. My recommendation here is that Oregon Water Resource Department acknowledges their error, in the reference material it includes both Oregon Revised Statute 195.020 and Oregon Revised Statute 195.025. For the correct references including activities by the effected local governments. Irrigation in approved districts need to be part of this inter government coordination process. My second issue is what Christopher Hall just said in his testimony. I am on the distribution list for Oregon revised statute for Oregon Water Resources Department updates and was actively observing the RAC procedures in 2021. When the RAC reformed this past fall I was not notified. I did not get an automatic notification no one reached out to me saying that this was going on, the only reason why I knew it was going on is because a lobbyist reached out to me that they had resumed and at that point the 4th meeting had already occurred/concluded. I did not have the opportunity to observe, or understand where these division 10 rules were going. As members that I had looking at division 10 rules and their input to put into that, uh, my understanding is those individuals were distracted by this legislative session. As we are looking at a full session my uh, representatives that are attempting to help promote agricultural needs here in the Klamath Basin were trying to understand what Oregon Water Resource Department was doing, and Oregon Water Resource Department would present these rules is my understanding for them to quickly read while they are doing other legislative activities, process and then get back to them. So this dual process of having a rule making in conjunction with a legislative session was not very effective. As uh, E. Warner spoke to you earlier, uh, I would also ask that the farmers of the Klamath Basin who need to provide public comment to this uh, were not available for the one meeting you had in the Klamath Basin. I would ask you to lay and return public comment to 29 February 2024, would be reasonable to allow the farmers to get through their irrigation season to get their crops to market and allow them to review these rules prior to them going into effect and provide additional public comment. The characterization of critical groundwater are in your uh, statue here is arbitrary, without hard known measures. E. Werner talked about this. 690-010-0120 requirements are simply outlined and detailed enough to have someone with a gut feeling, not clear hard facts which can challenge uh, that those gut feeling with factual data. I would recommend that you adjust your rules to clearly identify what is measurable so that governments understand the standard, that there is no personal bias or political agendas that can be uh, uh, harnessed or weaponized against the people that are trying to further our communities and protect our resources. I'll submit future written comments, thank you.

Response: Gene Souza submitted written comments on behalf of Klamath Irrigation District that expanded on his oral comments. Please see our response above.

Jay Weiner, Kelly do you happen to know if chairman Dumont is on the meeting? Because I would defer to him. Umm, let me look... Uh, he is not, no. Ok, then I will provide public comment. I am the water lawyer for the Klamath Tribes. And we will certainly be submitting written, but we would urge OWRD to move as quickly as possible to get these rules in place. These are not the rules that will actually lead to a critical groundwater designation in any specific place including the Klamath Basin where we desperately need one. These are the rules for how OWRD will go about making basin or geographically specific rules. And without these rules in place there is no opportunity to begin to have the kind of stakeholder discussions that need to happen to get geographically based critical groundwater area designations in place. In particular in the Klamath basin. Uh, we desperately need groundwater regulations especially in the upper Klamath basin. Where the effects of unregulated groundwater use certainly land not only on the Klamath tribes, and our determined claims, but they also very directly affect both the quantity and the timing of water that flows from the upper basin to and to the upper Klamath Lake with detrimental effects to water users in the Klamath project. And so we would strongly encourage OWRD to move ahead quickly here to finalize these rules and to move the next step which would be determining the areas in which critical groundwater designations would be warranted and doing the work to figure out what those designations and restrictions on groundwater use ought to look like. Thank you.

Response: The Division 10 rules will be adopted in September 2023. The first area that will be discussed for CGWA designation is in Harney County.

Public Hearing May 8, 2023, Salem: Glenn Barret Comments

Yes, I am Glen Barrett. I am president of Water For Life, and I testified in Klamath as well, and as well as sat in, uh, on several of your uh, workshop committees that you had. I believe you had four workshops. Uh, again earlier on Representative Reschke was talking about asking why we really need to uh, have new rules, that the old rules I think are probably sufficient, that's my opinion. I think it appears that uh, these rules are written for a means of uh, self-prescribed regulations that you can't get to with division 9's as you have had trouble with in the past. I think we also need to define what a pattern of interference or potential interference with surface water is. And um, I think it's too subjective. Also, we have not talked about the fiscal impact of the proposed rules and what is the real definition of fiscal impact as we start regulating uh groundwater. As regard to neighboring states, I think um, there needs to be a definition of equitable apportionment between Oregon and the neighboring states and um, I think that can be a real deficit for Oregon water users if we start regulating Oregon prior to having a compact agreement with the neighboring state. As far as uh, there has been several farmers uh, criticize Chris Hall for his comments and I too take exception to those rules or those comments. Um, yes you are going to have push back from those people that are impacted, coming up with comments like that just further divide the water users of Oregon instead of sitting down and coming up with comment sense, uh, common sense um, common sense solutions. So I thank you for allowing us to testify, I too think that um, participation was lacking. Um, not many people just read the Herald News or local papers anymore and it should have been distributed a little bit better or a lot better than it was. And um Water For Life will be submitting further comments, thank you. Thank you.

Response: Under the current Division 10 rules a CGWA designation is made by the State Engineer via order. In 1991, the CGWA statutes were amended to have the Commission designate a CGWA through a rulemaking process. It also requires a contested case process when restricting groundwater use within the designated area. The new rules ensure public engagement through the

designation process via rule adoption and ensure that due process rights are protected. The term “pattern of substantial interference” is a statutory term from ORS 537.730(1)(a) – (g). The Department will use the best available science to determine if a pattern of substantial interference exists in a specific situation. Regarding water use between California and Oregon, the Department is working with the State of California on interstate groundwater management.

Public Hearing May 8, 2023, Salem: Lindsey Ray, Judy Parker, Bill Walker, Dianna Worth, Katherine Brookshire, Jim Herron, Cameron Duncan, Justin Erie, Roger Nicholson Comments

The above individuals expressed concern on how the May 4 public hearing in Klamath was publicized and stated that the Department’s public outreach were not effective enough. The May 8, 2023, hearing was the first time these individuals had heard about the Division 10 rules and asked the Department to hold another hearing in Klamath and send out notification to all groundwater users.

Response: The Department extended the public comment period by five additional days to allow for more comment on these statewide rules to accommodate those concerned. The Department made the decision not to hold another public hearing in Klamath because the rules are of statewide impact and requestors still had the opportunity to attend the hybrid meeting in Salem. The Salem public hearing had both an in-person and virtual attendance option, which provided the opportunity for any person in the state to join and provide public comment. The rulemaking process was publicized in the Bulletin as required and a press release was sent to media around the state. All RAC members were also notified as many of them represent associations impacted by the rules. The public could also comment at any time during the public comment period and at the end of every RAC meeting. The Department is looking into how to better inform communities of public hearings that have statewide impacts.

Water Resources Department
Chapter 690
Division 10

APPROPRIATION AND USE OF GROUND WATER RULES TO DESIGNATE AND LIMIT
GROUNDWATER USE WITHIN A CRITICAL GROUNDWATER AREA

~~90-010-0045~~ ~~Hearings and Protests~~

~~Rules and regulations governing the filing of protests or petitions and procedures to be followed in hearings as required by ORS Chapter 183 and division 1.~~

~~Statutory/Other Authority: ORS 536, 543~~

~~Statutes/Other Implemented:~~

Rule Summary: Rule repealed to align division with statute.

~~690-010-0050~~ ~~Initiation of Proceeding for Determination of a Critical Groundwater Area — Notification~~

~~(1) A proceeding for the determination of a critical ground water area shall be initiated by a Notification from the Water Resources Director.~~

~~(2) The Notification shall include:~~

~~(a) A description of the proposed exterior boundaries of the area for which, the proceeding is initiated, referenced to the U.S. Public Lands Survey;~~

~~(b) Citation to the specific statutory provision or provisions under which the proceeding is brought;~~

~~(c) The preliminary findings indicating why the area described may be a critical ground water area;~~

~~(d) A general description of the nature of the ground water reservoir which is the subject of the determination;~~

~~(e) The effective date and duration of the Notification. In no case shall the Notification have a duration greater than 270 days;~~

~~(f) A statement concerning applications in the area and reservoir in question which were filed in the Water Resources Department prior to the effective date of the Notification, but which had~~

~~not received permits prior to that date. Such statement shall explain the applicants' options which include:~~

~~(A) Withdrawing the application with refund of any submitted recording fees; or~~

~~(B) Requesting deferral of action on the application until a determination of a critical ground water area; or~~

~~(C) Requesting a hearing on the application with the understanding that permit denial will result in rejection of the application. Failure to request a specific option will result in the department taking no action on the application until the Commission takes action on the area in question.~~

~~(g) A statement concerning applications in the area and reservoir in question which are submitted on or after the effective date of the Notification. The statement shall explain the applicants' options which include:~~

~~(A) Withdrawing the application with refund of all related fees; or~~

~~(B) Requesting deferral of permit action until a determination of a critical ground water area; or~~

~~(C) Requesting a hearing on the application with the understanding that permit denial will result in rejection of the application. Failure to request a specific option will result in the department taking no action on the application until the Commission takes action on the area in question.~~

~~(h) Upon receipt of a request for hearing under subsection (2)(f) or (g) of this rule, the Director shall schedule and conduct the hearing.~~

~~(3) The Notification shall be distributed by:~~

~~(a) Publication at least once each week for two consecutive weeks in a newspaper having general circulation in the area in question;~~

~~(b) Mailing by regular or certified mail to each legal claimant or appropriator of ground water in the area in question;~~

~~(c) Mailing by regular or certified mail to each applicant for a permit to appropriate water from the ground water reservoir and area in question;~~

~~(d) Mailing by regular or certified mail to the governing body and planning department(s) of the affected local governments within which all or part of the area in question is located;~~

~~(e) Mailing by regular or certified mail to each licensed water well constructor licensed to construct wells in the State of Oregon;~~

~~(f) Mailing by regular or certified mail to the state legislative delegates representing the people of the area in question.~~

~~(4) The Notification initiating a proceeding for determination of a critical ground water area shall be recorded in the Special Order Record of the Water Resources Director.~~

~~Statutory/Other Authority: ORS 183, 197, 536, 537~~

~~Statutes/Other Implemented:~~

Rule Summary: Rule repealed to align division with statute.

690-010-0053 Process Options

~~Within 270 days of the issuance of Notification, the Commission shall:~~

~~(1) Determine that a critical ground water area is not warranted and inform those parties who received the Notification of the Commission's determination.~~

~~(2) Conduct a public hearing to withdraw the ground water from further appropriation as authorized by ORS 536.410.~~

~~(3) Conduct a public hearing to amend the appropriate basin program to classify the ground water in question as authorized by ORS 536.310 and 536.340.~~

~~(4) Complete sections 2 and/or 3 of this rule and proceed at some future date with additional hearings necessary to fulfill the requirements of ORS 537.730 and issue a critical ground water area order.~~

~~(5) Conduct a public hearing and issue a critical ground water area order and/or adopt rules.~~

~~Statutory/Other Authority: ORS 197, 536~~

~~Statutes/Other Implemented:~~

Rule Summary: Rule repealed to align division with statute.

690-010-0054 Public Hearing Requirements

~~(1) At least one public hearing shall be held within or near the proposed critical ground water area.~~

~~(2) Notice of any hearing associated with critical ground water area proceedings shall be distributed as provided in OAR 690-010-0050(3).~~

~~Statutory/Other Authority: ORS 197, 536~~

~~Statutes/Other Implemented:~~

~~Rule Summary: Rule repealed to align division with statute.~~

~~**690-010-0070 Local Government Coordination**~~

~~(1) Proceedings for the determination of a critical ground water area include Notification, rulemaking, the issuance or modification of an order, or other related activities.~~

~~(2) The Director and Commission shall assure that proceedings for the determination of a critical ground water area meet the requirements established in OAR 690-005-0045 (Standards for Goal Compliance and Compatibility with Comprehensive Plans). Further, the Commission shall:~~

~~(a) Upon notification, request the planning director of affected local governments to submit applicable policies, provisions, or procedures from acknowledged comprehensive plans which address and provide guidance for mitigating ground water problems;~~

~~(b) Accommodate comprehensive plans (i.e., areas of planned growth and priority land uses) to the extent possible within the physical constraints of the ground water resource and the Commission's responsibilities under ORS 537.525, in adopting rules or issuing orders to manage or control water use in established or potential critical ground water area;~~

~~(c) Instruct the planning directors of affected local governments how comprehensive plans, maps, ordinances, and/or land use approval procedures may need to be amended to:~~

~~(A) Reflect the physical constraints of ground water resources in the critical area;~~

~~(B) Ensure compliance with restrictions in the Notification, withdrawal order, classification, or critical ground water area order; and~~

~~(C) Reduce the potential for future ground water problems within affected localities.~~

~~(d) Consider how local government participation could enhance the effectiveness of managing the area;~~

~~(e) Distribute the final critical ground water area rule and/or order to the county clerk and the planning director(s) of affected local governments.~~

~~(3) In the event of a land use dispute, as defined in OAR 690-005-0015 (Definitions), the Director and Commission shall follow procedures in 690-005-0040 (Resolution of Land Use Disputes).~~

~~Statutory/Other Authority: ORS 197, 536~~

~~Statutes/Other Implemented:~~

Rule Summary: Rule repealed to align division with statute.

690-010-0100 Purpose

The purpose of these rules is to guide implementation of the critical groundwater area statutes, ORS 537.730 to 537.742.

Statutory/Other Authority: ORS 536.027, 537.7830

Statutes/Others Implemented: ORS 537.730, ~~ORS 537.735, ORS 537.740, ORS 537.742~~

Rule Summary: This new rule describes the purpose of OAR Chapter 690 Division 10.

690-010-0110 Definitions

In addition to the definitions in OAR 690-008-0001, the following definitions apply to critical groundwater area designations conducted pursuant to ORS 537.730 to 537.742 and these rules, unless the context requires otherwise:

(1) “Affected local government” means any city, county, or metropolitan service district formed under ORS Chapter 268 or an association of local governments performing land use planning functions under ORS 195.025 located within the boundaries of the proposed critical groundwater area.

(2) “Department” means the Water Resources Department.

(3) “Director” means the Water Resources Director.

(4) “Commission” means the Water Resources Commission.

(5) “Groundwater right” means a permit, certificate, decree, or certificate of groundwater registration as provided in ORS 537.610 authorizing the appropriation and use of groundwater.

(6) “Groundwater reservoir” means a designated body of standing or moving groundwater having exterior boundaries which may be ascertained or reasonably inferred as provided in OAR 690-010-0130.

(7) “Person” means individuals, corporations, associations, firms, partnerships, limited liability companies, joint stock companies, public and private municipal corporations, political subdivisions, the state, and any agencies thereof, the federal government and any agencies thereof and federally recognized Indian tribes.

(8) “Exempt User” means any person who exercises the right to use groundwater pursuant to the exemption in ORS 537.545.

(9) “Determined claim” means a water right in the Klamath Basin determined and established in an order of determination certified by the Water Resources Director under ORS 539.130.

Statutory/Other Authority: ORS 536.027, 537.78~~30~~

Statutes/Others Implemented: ORS 537.730-537.742, 537.525, 537.780, ORS 536-537, 539.130~~ORS 537.730, ORS 537.735, ORS 537.740, ORS 537.742~~

Rule Summary: This new rule defines terms used in OAR Chapter 690 Division 10 and ORS 537.730 to 537.742.

690-010-0120 Required Criteria for Designation of Critical Groundwater Area

(1) The Commission may adopt rules to designate an area of the state a critical groundwater area if any of the requirements under ORS 537.730(1)(a)–(g) are met. These requirements are:

- (a) Ground-water levels in the area in question are declining or have declined excessively;
- (b) The Water Resources Department finds a pattern of substantial interference between wells within the area in question;
- (c) The department finds a pattern of interference or potential interference between wells of ground-water claimants or appropriators within the area in question with the production of geothermal resources from an area regulated under ORS chapter 522;
- (d) The department finds a pattern of substantial interference between wells within the area in question and:
 - (A) An appropriator of surface water whose water right has an earlier priority date; or
 - (B) A restriction imposed on surface water appropriation or a minimum perennial streamflow that has an effective date earlier than the priority date of the ground-water appropriation

(e) The available ground-water supply in the area in question is being or is about to be overdrawn;

(f) The purity of the ground-water in the area in question has been or reasonably may be expected to become polluted to an extent contrary to the public welfare, health and safety; or

(g) Ground-water temperatures in the area in question are expected to be, are being or have been substantially altered except as specified in ORS 537.796.

(2) For the purposes of ORS 537.730(1)(d)(A), a surface water right with an earlier priority date means a certificated ~~or and~~ permitted water right including instream water rights ~~and~~, inchoate transfers, ~~a and~~ determined claims, or a right evidenced by court decree, the source of which is surface water, including springs, streams, lakes, reservoirs, rivers and a “surface water diversion” as provided in OAR 690-008-0001(4)(A).

(3) For purposes of the determination under ORS 537.730(1)(d)(B), ‘restrictions imposed on surface water appropriations’ include but are not limited to, scenic waterways and other types of legally protected surface water flows.

Statutory/Other Authority: ORS 536.027, 537.7830

Statutes/Others Implemented: ORS 537.730-537.742, 537.525, 537.780, ORS 536-537, ORS 390.835~~ORS 537.730~~

Rule Summary: This new rule incorporates and clarifies the statutory requirements under ORS 537.730 for designating an area of the state a critical groundwater area.

690-010-0130 Additional Requirements for Critical Groundwater Area Rulemaking Process

(1) The rulemaking process for designation of a critical groundwater area is governed by the applicable provisions under ORS Chapter 183, ORS 537.730 to 537.742, OAR Chapter 690 Divisions 001 and 005, and these rules.

(2) A rule adopted by the Water Resources Commission shall:

(a) Define the boundaries of the critical groundwater area and shall indicate which of the groundwater reservoirs located either in whole or in part within the area in question are included within the critical groundwater area. Any number of groundwater reservoirs which either wholly or partially overlie one another may be included within the same critical groundwater area-;

(b) Contain a provision requiring a periodic review of conditions in the critical groundwater area. The review shall be in sufficient detail to evaluate the continuing need for the critical groundwater area designation and shall occur no less frequently than once every 10 years.

(3) For the purposes of ORS 537.735(1)(a) the exterior boundaries of a critical groundwater area may be reasonably inferred or ascertained:

(a) According to the presence of physical natural boundaries, hydrological conditions, or recharge or discharge areas; or

(b) Administratively by defining an affected area that does not have boundaries defined by natural features.

(c) Additionally, to the extent that sub-areas wholly contained within the designated cCritical gGroundwater aArea must be defined to allow for implementation of corrective control provisions, these sub-area boundaries will also be reasonably inferred or ascertained as in 690-010-0130 (3)(a) or (3)(b).

(d) To the extent that a critical groundwater area includes groundwater reservoirs located in whole or in part within the critical groundwater area, identification of the groundwater reservoir shall be considered a tentative determination unless the groundwater reservoir has been adjudicated to a final determination pursuant to ORS 537.665 – 700.

(4) In addition to the requirements under section (1), prior to Commission adoption of a rule designating a critical groundwater area, the Department shall:

(a) Coordinate with ~~the~~ affected local governments s using the process described in OAR 690-010-0140; and

(b) ~~Engage~~ Consult, as described in OAR 690-010-0150, with any federally recognized Indian tribes in Oregon;

(c) ~~Prior to convening a rules advisory committee pursuant to ORS 183.333, the Department shall prepare a draft report based on the best available science and information, identifying the criteria met under ORS 537.730(1)(a) – (g), identifying and characterizing the groundwater reservoirs subject to the proposed critical groundwater area designation and identifying corrective control measures likely to resolve the problems that resulted in the recommendation to designate a critical groundwater area. The draft report shall be posted on the Department’s webpage until the end of the public comment period:~~

(A) Until the close of the public comment period, and consistent with ORS 183.335, the Department shall solicit and accept information and comments from the public regarding the draft report;

(B) The Department shall review the information and comments received and present a final report to the Commission that includes the Department's findings and conclusions and includes an assessment of the information and comments received;

(C) The report's findings and conclusions with respect to designation of a critical groundwater area shall be supported by substantial evidence that justifies the designation.

~~Provide and present to the Commission a report, based on the best available science and information, identifying and characterizing the groundwater reservoirs subject to the proposed critical ground water area designation. The report will include which criteria states any findings the Department is proposing to make under ORS 537.730(1)(a) – (g) have been met and if applicable, states the Department's proposal for any of the the list of corrective control provisions the Department may consider under ORS 537.735(3)(a) – (f).~~

~~(d) The Department shall post the report presented to the Commission on the Department's website at least 60 days prior to the public hearing as provided in section (6) of this rule.~~

(5) In addition to the notice requirements under ORS 183.335, the Department shall give notice of the proposed rules by regular mail to:

(a) The owners of record of all groundwater registrations, inchoate transfers, permits and certificates for groundwater use within the affected area. For the purpose of providing notice by regular mail, the Department may rely upon the available county tax lot ownership information for parcels underlying or overlapping with water right places of use in the proposed critical groundwater area.

(b) All tax lot owners within the affected area, and not within a municipal or quasi-municipal water service area.

~~(c) For the purpose of providing notice by regular mail, the Department may rely upon the available county tax lot ownership information for parcels underlying or overlapping with water right places of use in the proposed critical groundwater area.~~

(c) Each well constructor licensed under ORS 537.747.

(6) At least 60 days after notice of the proposed rules is provided under ORS 183.335, ORS 537.730(3) and these rules, the Department shall hold at least one public hearing within each county in which the proposed critical groundwater area lies. Notice of the hearing shall be provided in a manner consistent with ORS 537.730(3) and ORS 183.335(3)(b).

(7) As of the effective date of the 2023 amendments to these OAR Chapter 690, Division 010 rules, the Department had convened a Rulemaking Advisory Committee to consider adoption of a critical groundwater area in the Malheur Lake Basin (OAR Chapter 690, Division 512). These amended Division 010 rules, OAR 690-010-0100 through OAR 690-010-0240, apply to the proposal and adoption of any critical groundwater area rules arising from the already convened Rulemaking Advisory Committee, except as follows: The Department shall post the draft report required by OAR 690-010-0130(4)(c), initiate coordination with affected local governments as provided in OAR 690-010-0140(1), and initiate engagement with applicable federally recognized Indian tribes as provided in OAR 690-010-0150(1), no less than 60 days before issuing a notice of proposed rulemaking pursuant to ORS 183.335.

Statutory/Other Authority: ORS 536.027, 537.730, ~~537.735, 537.742~~80

Statutes/Others Implemented: ORS 537.730-537.742, 537.525, 537.780, ORS 183, ORS 536-537~~ORS 183.335, 537.730, 537.780~~

Rule Summary: This new rule describes the additional requirements of the rulemaking process applicable to rulemaking actions to designate an area of the state a critical groundwater area. This new rule specifies how the OAR Chapter 690, Division 10 rules will be applied to the Department's ongoing OAR Chapter 690, Division 512 rulemaking.

690-010-0140 Land Use Planning Coordination with Affected Local Government

(1) Prior to convening a Rules Advisory Committee under ORS 183.333-, the Department shall initiate coordination with ~~the~~ affected local governments pursuant to the applicable provisions under ORS Chapter 197 (State Agency Planning Responsibilities), OAR Chapter 690, Division 005 (Compliance With Statewide Planning Goals, Compatibility With Comprehensive Plans, And Coordination On Land Use Matters), and these rules.

(2) To facilitate coordination as described in the State Agency Coordination Program, the Department shall provide a copy of the draft report that will be posted on the Department's website under OAR 690-010-0130(4)(c)(B).

Statutory/Other Authority: ORS 536.027, 537.7830

Statutes/Others Implemented: ORS 537.730-537.742, 537.525, 537.780, ORS 183, ORS 197, ORS 536-537~~ORS 537.730, 537.735~~

Rule Summary: This new rule describes the process and requirements of coordination with affected local governments ~~to adoption of a rule designating~~ regarding designating an area of the state a critical groundwater area.

690-010-0150 ~~Consultation-Engagement~~ with Federally Recognized Indian Tribes

(1) Prior to convening the Rules Advisory Committee under ORS 183.333, the ~~d~~Department shall initiate ~~consult~~engagement with any federally recognized Indian tribes with reservation lands within the proposed critical groundwater area boundary -and ~~consult~~engage with any federally recognized Indian tribes in Oregon who have expressed an interest in the proposed critical groundwater area.

(2) To aid with ~~the consultation~~engagement the ~~d~~Department will provide a copy of the draft report that will be posted on the Department's website ~~in~~under OAR 690-010-0130(4)(c)(B).

Statutory/Other Authority: ORS 536.027, 537.7830

Statutes/ Other Implemented: ORS 537.730-537.742, 537.525, 537.780, ORS 183, ORS 536-537~~ORS 536.027, 537.730~~

Rule Summary: This new rule describes the ~~consultation~~engagement process with ~~a f~~Federally ~~r~~Recognized Indian ~~t~~Tribes ~~within the basin~~.

690-010-0160 Content, Filing, and Review of Adopted Critical Groundwater Area Rules

(1) Any rule adopted by the Commission under ORS 537.730 and these rules shall ~~meet~~ include the requirements of ORS 537.735. Corrective control measures that limit or otherwise restrict existing rights or uses of groundwater in a critical groundwater area may be implemented only as consistent with the provisions of ORS 537.742, ORS 183, and OAR 690-010-0170 – 0230.

(2) A critical groundwater area rule may include any one or more of the corrective control provisions under ORS 537.735(3)(a)–(f) that may be applied to the entire critical groundwater area or to designated subareas of the critical groundwater area. These corrective controls provisions ~~may~~ include:

(a) A provision closing the critical groundwater area to any further appropriation of groundwater, in which event the commission shall thereafter refuse to accept any application for a permit to appropriate groundwater located within such critical area;:-

(b) A provision determining the permissible total withdrawal of groundwater in the critical area each day, month or year;:-

(c) The disposition of any application for a water right permit for the use of water in the area that is pending at the time the commission initiates the rulemaking process or that is received during the rulemaking process;

(d) Any one or more provisions making such additional requirements as are necessary to protect the public welfare, health and safety in accordance with the intent, purposes and requirements of ORS 537.505 to 537.795 and 537.992;

(e) A provision closing all or part of the critical groundwater area to further appropriation of groundwater for its thermal characteristics;

(f) A provision determining the permissible change in thermal characteristics of groundwater in all or part of the critical groundwater area each day, month or year. Insofar as may be reasonably done, the Water Resources Director shall apportion the permissible total temperature impact among those appropriators whose exercise of valid rights in the critical area affect the thermal characteristics of the groundwater, in accordance with the relative dates of priority of such rights.

(3) The Department shall file a copy of any rules designating a critical groundwater area with the Secretary of State as provided in ORS 183.355 and with the county clerk of each county within which any part of a critical groundwater area lies, and the county clerk shall record the designation in the deed records of the county.

(4) The Department shall conduct a periodic review of conditions within the critical groundwater area no less than once every 10 years to evaluate the continuing need for the critical groundwater area.

(5) In addition to the requirements of section (4), if the Commission adopts a critical groundwater area rule that limits groundwater use, the ~~Department~~ Commission shall review the rule at least once every three years. The review process shall include public notice and an opportunity to comment on the rule.

Statutory/Other Authority: ORS 536.027, 537.783

Statutes/Others Implemented: ORS 537.730-537.742, 537.525, 537.780, ORS 183, ORS 536-537~~ORS 537.730, 537.735, 537.740, 537.780~~

Rule Summary: This new rule incorporates the statutory requirements for a rule designating an area of the state a critical groundwater area, references the available corrective control provisions, outlines the timing of rule filing under ORS 537.740, and describes the required frequency of rule review.

(1) At any time after the Commission adopts a rule designating a critical groundwater area, the Commission may initiate a contested case proceeding to propose limitation on existing groundwater rights or limitations on existing Exempt Users in the designated area. A contested case hearing shall be initiated by issuance of an Initial Notification of Proposed Corrective Control Orders followed by a Notice of Proposed Corrective Control Orders.

(2) An Initial Notification of Proposed Corrective Control Orders may be issued at any time after the Commission adopts a rule designating a critical groundwater area, and prior to issuing a Notice of Proposed Corrective Control Orders. The Initial Notification of Proposed Corrective Control Orders shall identify corrective control provisions as specified in ORS 537.742(2)(a) – (f) that the Department believes will resolve the problems that resulted in the designation of a critical groundwater area and will form the basis of a Notice of Proposed Corrective Control Orders as provided in OAR 690-010-0180.

(3) The proposed corrective control provisions that limit the use of groundwater in the critical groundwater area that may be included in the Initial Notification of Proposed Corrective Control Orders are as follows:

(a) A provision apportioning the permissible total withdrawal as established by rule under ORS 537.730, among the appropriators holding valid rights to groundwater in the critical area in accordance with the relative dates of priority of such rights:-

(b) A provision according preference, without reference to relative priorities, to withdrawals of groundwater in the critical area for residential and livestock watering purposes first. Thereafter, the commission may authorize withdrawals of ground water in the critical area for other beneficial purposes, including agricultural, industrial, municipal other than residential, and recreational purposes, in such order as the commission considers advisable under the circumstances, so long as such withdrawal will not materially affect a properly designed and operating well with prior rights that penetrates the aquifer:-

(c) A provision reducing the permissible withdrawal of groundwater by any one or more appropriators or wells in the critical area:-

(d) Where two or more wells in the critical area are used by the same appropriator, a provision adjusting the total permissible withdrawal of groundwater by such appropriator, or a provision forbidding the use of one or more of such wells completely:-

(e) A provision requiring the abatement, in whole or part, or the sealing of any well in the critical area responsible for the admission of polluting materials into the groundwater supply or responsible for the progressive impairment of the quality of the groundwater supply by dispersing polluting materials that have entered the groundwater supply previously:-

(f) A provision requiring and specifying a system of rotation of use of groundwater in the critical area.

(4) In addition to proposed corrective control provisions as provided in subsection (3), the Department's Initial Notification of Proposed Corrective Control Orders must include:

(a) Identification of the critical groundwater area or sub-areas in which the corrective control provisions are proposed;

(b) A statement describing the factors that led to the designation of the critical groundwater area;

(c) A description of the proposed corrective control provisions that the Department believes will resolve the problems that resulted in the designation of the critical groundwater area;

(d) A description of the geographic area in which corrective control provisions will be proposed; and

(e) A description of how persons may request a Notice of Proposed Corrective Control Orders and the deadline for requesting such notice.

(5) The Department shall give notice of its Initial Notice of Proposed Corrective Control Orders by:

(a) Publication in a newspaper having general circulation in the area in which the corrective control provisions will be proposed, for a period of at least two weeks and not less than one publication each week;

(b) Publication in the weekly notice published by the Department for four consecutive weeks;

(c) First class mail to any affected local governments and to all federally recognized Indian tribes within Oregon; ~~or adjacent to the geographic area in which corrective actions are identified, and any other interested federally recognized tribes.~~

(d) Regular mail to the owners of record of all groundwater registrations, inchoate transfers, permits and certificates for groundwater use within the affected area. For the purpose of providing notice by regular mail, the Department may rely upon the available county tax lot ownership information for parcels underlying or overlapping with water right places of use in the proposed critical groundwater area;

(e) Holding a public meeting in the area, or as near as practicable to the area, in which the corrective control provisions will be proposed and;

(fe) Posting the Initial Notification of Proposed Corrective Control Orders on its website.;

(6) Persons requesting a copy of the Department's Notice of Proposed Corrective Control Orders must request a copy of the notice by the deadline specified in the Initial Notification of Proposed Corrective Control Orders. The request shall be on a form provided by the Department on its website, and shall include information from the requestor that establishes whether:

(a) The requester holds a groundwater right within the area defined in the Initial Notification of Proposed Corrective Control Orders;

(b) The requester is an exempt user of groundwater; or

(c) The requester otherwise has an interest in the proceedings; and

(d) The mailing address and electronic mail address to which the Department may mail and e-mail its Notice of Proposed Corrective Control Orders and the requestor's preference for method of notification.

Statutory/Other Authority: ORS 536.027, 537.780~~42~~

Statutes/Others Implemented: ORS 537.730-537.742, 537.525, 537.780, ORS 183, ORS 536-537~~ORS 537.742~~

Rule Summary: This new rule describes the process and requirements of an Initial Notification of Proposed Corrective Control Orders.

690-010-0180 Notice of Proposed Corrective Control Orders

(1) Following issuance and notification of the Initial Notification of Proposed Corrective Control Orders, and prior to implementation of any proposed corrective control provisions as may limit the use of groundwater in the critical groundwater area, the Department shall issue a Notice of Proposed Corrective Control Orders proposing implementation of one or more corrective control provisions as specified in ORS 537.742(2)(a)– (f).

(2) The Notice of Proposed Corrective Control Orders is a notice for the purposes of ORS 183.415 and shall, in addition to those elements in ORS 183.415 and OAR 137-003-0505, include the following:

- (a) A case caption that identifies the critical groundwater area at issue including a citation to the rule establishing the critical groundwater area and identification of each county in which the critical groundwater area is located;
- (b) A statement of the problem resulting in designation of the critical groundwater area that may be addressed by the proposed corrective control provisions limiting the use of groundwater in the critical groundwater area;
- (c) A clear and concise description of the proposed corrective control provisions;
- (d) A description of the area where the Director intends to implement the proposed corrective control provisions including attachment of any maps as necessary to clearly show the area of intended corrective control provisions such that groundwater right holders and exempt users located within the area of intended action may determine whether they will be affected by the proposed corrective control provisions;
- (e) Identification of those groundwater right holders and exempt users whose rights to use groundwater may be limited or otherwise restricted by the proposed corrective control provisions;
- (f) Findings of fact that support a conclusion that the problem(s) that resulted in designation of a critical groundwater area may be corrected by implementing the corrective control provisions specified in the Notice of Proposed Corrective Control Orders;
- (g) Reference to scientific information that supports the agency's findings of fact;
- (h) Conclusions of law based on the findings of fact and applicable law;
- (i) An explanation of the reasoning that leads from the findings of fact to the conclusion that the problems that resulted in designation of the critical groundwater area may be resolved by implementation of the corrective control provisions identified in the notice;
- (j) A notice of right to a contested case hearing pursuant to ORS chapter 183.415 and OAR 137-003-0505; ~~and~~
- (k) A deadline for ~~submitting a~~ filing a Notice of Party Status, as provided in OAR 690-010-0190 by request for a contested case hearing; ~~for~~ persons holding a groundwater right or exempt users this deadline will be no less than 30 days after the Notice of Proposed Corrective Control Orders is mailed; and
- (l) A deadline for filing a Petition for Party Status as provided in OAR 690-010-0190; this deadline will be no less than 30 days after the Notice ~~of~~ Proposed Corrective Control Orders is mailed.

(3) The Department shall provide notification of the Notice of Proposed Corrective Control Orders by:

(a) Mailing copies of the Notice of Proposed Corrective Control Orders by certified or registered mail to groundwater right holders and exempt users whose wells are within the identified area in which corrective control provisions are proposed and whose use of groundwater will be limited by proposed corrective control provisions but only as the Department possesses contact information or may reasonably obtain contact information;

(b) First class mail to any affected local governments and to federally recognized Indian Tribes within Oregon;

(c) Mailing copies of the Notice of Proposed Corrective Control Orders by regular mail to persons who have timely requested copies of the notice and who chose mail as their preferred method of contact as provided in OAR 690-010-0170(64);

(d) Emailing copies of the Notice of Proposed Corrective Control Orders to persons who have timely requested copies of the notice and who chose email as their preferred method of contact as provided in OAR 690-010-0170(6);

(e) Publication in the weekly notice published by the Department for four consecutive weeks;

(f) Publication on the Department's website.

Statutory/Other Authority: ORS 536.027, 537.742, 537.780

Statutes/Others Implemented: ORS 537.730-537.742, 537.525, 537.780, ORS 183, ORS 536-537, ORS 537.742

Rule Summary: This new rule describes the notice process and requirements for Notice of Proposed Corrective Control Orders.

690-010-0190 Requests for Hearing Notices of Party Status and Petitions for Party Status

(1) For the purposes of this rule, the definition of "person" excludes a state agency as "agency" is defined in ORS 183.310(1).

(2) Notice of Party Status. Persons who hold a groundwater right whose groundwater use will be limited and exempt users whose groundwater use will be limited as described in the Notice of Proposed Corrective Control Orders will be deemed to have been named parties to the

contested case upon filing a complete, written Notice of Party Status with the Department by the deadline specified in the Notice of Proposed Corrective Control Order. A Notice of Party Status shall include:

(a) Name and address of any petitioners;

(b) Name and address of the petitioner's attorney, if any; and

(c) Identification of the water right held by the petitioner or identification of the exempt well and exempt uses, owned or used by the petitioner.

(d) A Notice of Party Status may also include:

(A) A detailed description of how the corrective control provisions in the Notice of Proposed Corrective Control Orders would adversely affect or aggrieve petitioner supported by an affidavit stating such facts;

(B) A detailed description of how the Notice of Proposed Corrective Control Orders is in error or deficient and how to correct the alleged error or deficiency;

(C) A detailed description of whether the problem(s) that resulted in the designation of the critical ground water area may or may not be corrected by implementing the corrective control provisions specified in the agency notice and why; and

(D) Any citation of legal authority supporting the petition, if known.

~~Persons who hold a groundwater right whose groundwater use will be limited and exempt users whose groundwater use will be limited as described in the Notice of Proposed Corrective are parties to the contested case regarding a Notice of Proposed Corrective Control Orders.~~

(3) Petition for Party Status. ~~Persons who do not hold groundwater rights or persons who are not an exempt user~~ Any other persons may seek party status in the contested case regarding a Notice of Proposed Corrective Control Orders by filing a Petition for Party Status with the Department by the deadline specified in the Notice of Proposed Corrective Control Order:-

(a) A Petition for Party Status must be in writing, must be consistent with the provisions in OAR 137-003-0535 and OAR 137-003-0630 and must be timely filed in the Department's Salem office by the deadline described in 690-010-0180(2)(l) in the Notice of Proposed Corrective Control Orders. The deadline shall be at least 120 days before the date set for the contested case hearing;

(b) Consistent with the provisions of OAR 137-003-0535 the Department may identify persons who shall be parties or limited parties in a contested case hearing regarding the Notice of Proposed Corrective ~~Actions~~Control Orders.

~~(f) Persons who hold a groundwater right whose groundwater use will be limited and exempt users whose groundwater use will be limited as described in the Notice of Proposed Corrective may request a hearing to respond to the matters asserted in the Notice of Proposed Corrective. A Request for Hearing must be in writing and filed by the deadline specified in the Notice of Proposed Corrective. Requests for Hearing shall include:~~

~~(a) Name and address of any petitioners;~~

~~(b) Name and address of the petitioner's attorney, if any; and~~

~~(c) Identification of the water right held by the petitioner or identification of the exempt well and exempt uses, owned or used by the petitioner.~~

~~(d) Requests for Hearing may also include:~~

~~(A) A detailed description of how the corrective control provisions in the Notice of Proposed Corrective would adversely affect or aggrieve petitioner supported by an affidavit stating such facts;~~

~~(B) A detailed description of how the Notice of Proposed Corrective is in error or deficient and how to correct the alleged error or deficiency;~~

~~(C) A detailed description of whether the problem(s) that resulted in the designation of the critical groundwater area may or may not be corrected by implementing the corrective control provisions specified in the agency notice and why; and~~

~~(D) Any citation of legal authority supporting the petition, if known.~~

(4) Requests for Hearings, Notice of Party Status and Petitions for Party Status shall be considered filed on the date postmarked. ~~Requests for Hearing Notices of Party Status~~ or Petitions for Party Status sent by facsimile or hand-delivered are considered filed when received by the Department in its Salem office. In computing the period of time for timely filing, the last day of the time period shall be included, unless it is a scheduled day of office closure, in which event the time period runs until the end of the next day that the office is open. Scheduled days of office closure include, but are not limited to, Saturdays and legal holidays identified in ORS 187.010 and 187.020, including Sundays.

(6) State Agency Party Status. Any state agency seeking to request a hearing or petition for party status must follow the procedures in OAR 137-003-0540. A state agency seeking party status may notify the Oregon Water Resources Department of its intent to seek party status before the contested case is referred to the Office of Administrative Hearings.

Statutory/Other Authority: ORS 536.027, 537.~~742~~780

Statutes/Others Implemented: ORS 537.730-537.742, 537.525, 537.780, ORS 183, ORS 536-537~~ORS 537.742~~

Rule Summary: This new rule describes the process for affected groundwater users to request a hearing and for anyone else who wishes to participate in the contested case hearing to petition for party status. ~~This new rule describes the process-contested case hearing Notice of Proposed Corrective-~~

690-010-0200 Scope of Contested Case Hearing

(1) A contested case hearing shall be conducted to establish one or more of the corrective control provisions in ORS 537.742 that limits use of groundwater in the critical groundwater area as provided in the Notice of Proposed Corrective Control Orders.

(2) Except as otherwise provided in ORS 183.417(8) the Director shall create a list of issues to be heard in the contested case and shall refer that list to the Office of Administrative Hearings at the time the Notice of Proposed Corrective ~~Actions~~Control Orders is referred:-

(a) The list of issues shall include those issues raised in a timely-filed Notice of Party Status Request for Hearing with the information provided in 690-010-190(2)(d)(A) - (D) though issues may be categorized or summarized as furthers efficient administration of the contested case;-

(b) Parties to the contested case may seek amendment or clarification of the list of issues consistent with the provisions of OAR 137-003-0630.

Statutory/Other Authority: ORS 536.027, 537.~~780~~42

Statutes/Others Implemented: ORS 537.730-537.742, 537.525, 537.780, ORS 183, ORS 536-537~~ORS 537.742~~

Rule Summary: This new rule describes the scope of a contested case hearing on a Notice of Proposed Corrective Control Orders.~~Action~~.

690-010-0210 Conduct of Contested Case

(1) The conduct of the contested case regarding the Notice of Proposed Corrective Control Orders shall be governed by OAR 137-003-0501 to 137-003-0700 except as otherwise provided in these rules.

(2) The Department shall refer the contested case to the Office of Administrative Hearings as provided in OAR 137-003-0515.

(3) The Department shall post on its webpage the information contained in its referral to the Office of Administrative Hearings and may also post maps, reports or any other information that supports or otherwise is relevant to the Notice of Proposed Corrective Control Orders including links to information referred to in the Notice of Proposed Corrective Control Orders.

~~(4) Due to the extensive scope of the contested case hearing and the large number of parties, the availability of the information posted as provided in subsection (3), and the availability of public record requests pursuant to Oregon's Public Records Law, discovery against the Department is only as provided in OAR 137-003-0566(1)(a)-(c). Discovery against the Department is only as provided in OAR 137-003-0566(1)(a)-(c). Pursuant to OAR 137-003-0566(2), the Department finds that availability of other discovery methods would unduly complicate or interfere with the hearing process, because of the large number of parties and extensive scope of the hearing, and the need for speed and informality in that process, and that alternative procedures for the sharing of relevant information (including the availability of the information posted as provided in subsection (3) and the availability of public records requests pursuant to Oregon's Public Records Law), are sufficient to ensure the fundamental fairness of the proceedings~~

(5) Service and filing of documents in the contested case hearing may be by electronic means only as directed and allowed by the Administrative Law Judge.

Statutory/Other Authority: ORS 536.027, 537.~~742~~780

Statutes/Others Implemented: ORS 537.730-537.742, 537.525, 537.780, ORS 183, ORS 536-537~~ORS 537.742~~

Rule Summary: This new rule describes the process and requirements of a contested case proceeding on a Notice of Proposed Corrective Control Orders.

690-010-0220 Exceptions to Proposed Order

(1) Exceptions to the Proposed Order issued by the Administrative Law Judge after a contested case hearing must be filed with the Department in its Salem office within 60 days following the date of service of the Proposed Order. Parties must mail or hand-deliver a hard copy of their exceptions to the Department at its Salem offices and must also email an electronic copy to all the email addresses listed on the Certificate of Service.

(2) The Commission must consider timely-filed exceptions but need not individually address each exception in any final order issued. The Commission may form a subcommittee of Commission members to review the exceptions and may provide a report to the Commission prior to the Commission issuing a final order.

Statutory/Other Authority: ORS 536.027, 537.~~780~~42

Statutes/Others Implemented: ORS 537.730-537.742, 537.525, 537.780, ORS 183, ORS 536-537~~ORS 537.742~~

Rule Summary: This new rule describes the process and requirements for filing exceptions to proposed orders and the Commission's review and response to such exceptions.

690-010-0230 Final Order in Contested Case

(1) Upon conclusion of the contested case hearing, including the consideration of exceptions filed against a proposed order issued by the administrative law judge, the Commission shall issue a final order in contested case.

(2) If, after consideration of the contested case record, the Commission finds that the factors that resulted in the designation of a critical groundwater area under ORS 537.730 can be resolved by implementing one or more of the corrective control measures specified in the Notice of Proposed Corrective Control Orders, the Commission shall issue a final order establishing one or more of the proposed corrective control provisions provided in ORS 537.742.

(3) Final orders in contested case must be consistent with ORS 183.650 and OAR 137-003-0665 and directed to the named parties in the contested case proceeding.

(4) Final orders in default issued to a party in the contested case hearing must be consistent with OAR 137-003-0670.

(5) If no person or state agency files a timely Notice of Party Status, Petition for Party Status, or state agency request for party status, the Commission shall issue a final order in default consistent with OAR 137-003-0670.

(6) The Commission's final order in contested case is appealable to the Oregon Court of Appeals pursuant to ORS 183.482 and ORS 536.075.

Statutory/Other Authority: ORS 536.027, 537.780~~42~~

Statutes/Others Implemented: ORS 537.730-537.742, 537.525, 537.780, ORS 183, ORS 536-537~~ORS 537.742~~

Rule Summary: This new rule describes the requirements for a final order issued at the conclusion of a contested case hearing.

690-010-0240 Procedure for Making Changes to Existing Critical Groundwater Area

(1) Where a critical groundwater area is established and described in rule only, and the Commission seeks to expand, alter or reduce the boundaries of the existing critical groundwater area, the Commission must follow the processes for establishing a new critical groundwater area as provided in ORS 537.730 – 735 and OAR 690-010. ~~the Commission may modify an existing critical ground water area designation by amending the basin program rules pursuant to the process in ORS 536.300 – 340 and ORS Chapter 183.335.~~

(2) Where a critical groundwater area is established by an order or proclamation that is referenced in a basin program rule, the Commission may amend the basin program rule referencing the critical groundwater area order or proclamation so as to confirm ~~or modify~~ the order's or proclamation's provisions governing designation of the critical groundwater area or the establishment of corrective control provisions and may alter or modify a designated critical groundwater area only as consistent with subsection (1). Any rulemaking as provided in this subsection does not amend an order or proclamation as it directs the disposition of individual rights adjudicated in the order or proclamation.

(3) Insofar as critical groundwater area rules, orders or proclamations are amended to establish new or amended critical groundwater area designations or new or amended corrective control measures, such corrective control measures may apply:

(a) To those groundwater rights previously adjudicated in a critical groundwater area order or proclamation only upon completion of a contested case initiated pursuant to ORS 537.742 and ORS 183;

(b) To pending groundwater applications and present groundwater rights, only upon completion of a contested case initiated pursuant to ORS 537.742 and ORS 183.

Statutory/Other Authority: ORS 536.027, 537.7830

Statutes/Others Implemented: ORS 537.730 537.742, 537.525, 537.780, ORS 183, ORS 536-537

Rule Summary: This new rule describes the procedures for making changes to rules for existing Critical Groundwater Areas.