Oregon
Tina Kotek, Governor

Water Resources Department
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MEMORANDUM

TO: Water Resources Commission

FROM: Douglas E. Woodcock, Acting Director

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

I. Purpose for Addendum

This addendum provides updated public comment information received as a result of The Department's reopening of the Public Comment Period from September 22, 2023 through September 25, 2023 for the Division 10 final proposed rules.

II. Extension of Public Comment Period

The Department extended the public comment period after substantive concerns were raised after the publishing of the proposed draft rules slated for adoption on the September Commission agenda. In an effort to collect additional public comment, The Department extended the Public Comment Period to allow for review and comment upon the revised proposed rules.

III. Summary of Additional Public Comments Received and Department Response

The Department received five comments from the following entities and individuals:

1. Carollo law Group
2. Casey McClellan
3. The Nature Conservancy
4. Water Watch
5. Water League

Summary of the comments received and Department responses are as follows:

Comment: 690-010-0130(3)(d) improperly connects Division 10 to the adjudication of groundwater reservoirs under ORS 537.665. There was specific concerns with the words "groundwater reservoir shall be considered a tentative determination", The commentors recommended removing the language from the rules.

Response: The intent of 690-010-0130(3)(d) was to demonstrate that a Critical Groundwater Area would be considered tentatively adjudicated to meet the requirements under ORS 537.665. The Department agrees with the commentors that the proposed rule tied two unrelated processes together and the language should be removed.

Comment: Affected local governments should not be coordinated with prior to the RAC. Coordination prior to the RAC can lead to a closed-door process where agreements are made between The Department and the affected local government.

Response: The language as written requires the Department to **initiate** the coordination prior to the RAC. The purpose of the coordination is to ensure the Department's CGWA process is aligned with the State Agency Coordination Plan. As such, the Department will not be revising this language in the rules.

Comment: The version of the rules posted on the notice of proposed rulemaking made all groundwater rights and exempt rights holders automatic parties to the contested case. Why do the version of the rules sent to the Water Resources Commission require the parties to file "Notice of Party Status" to opt into the contested case.

Response: The rules filed in the notice made groundwater rights holders and exempt right holders automatic parties to the contested case but in the same rules the Department required the rights holders to request a hearing to be apart of the contested case. The Department found that these two requirements were contradictory to each other. The Department made the decision to require those interested in seeking party status, request to opt-into the contested case process. The decision was made to alleviate the potential issue during the contested case process, that if any of the parties does not attend the hearing, the Administrative Law Judge may choose to not hold a hearing creating unintentional delays in the resolution of the case. With the potential for numerous parties, the likelihood of this occurrence happening would be high.

Comment: The report requirement that been added to OAR 690-010-0130(4)(C) creates substantive and procedural requirements that will hamper the CGWA process.

Response: The Department believes the report, as proposed, provides a transparent, consistent, and defensible process for establishing a CGWAs across the state.

IV. Impact on Proposed Rules

After receiving and reviewing the five additional written comments, the Department would like to propose modifying language of the rules as drafted and within the Item C Division 10 Rulemaking Final staff report to delete 690-010-0130(3)(d) in its entirety.

The Department proposes to amend language, underlined and denoted in red, to section 690-010-0190:

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

(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.

The Department proposes amending the numbering from 690-010-0190(6) to 690-010-0190**(5)**.

V. Alternatives

The Commission may consider the following alternatives:

1. Adopt the final proposed rules as written in the Item C Division 10 Rulemaking Final staff report.
2. Adopt modified final proposed rules that remove section 690-010-0130(3)(d), amends 690-010-0190(2) and renumbers 690-010-0190(6) to 690-010-0190(5).
3. Not adopt rules and request the Department further evaluate the issue.

VIII. Acting Director's Recommendation

The Acting Director recommends Alternative 2. Adopt modified final proposed rules that removes section 690-010-0130(3)(d), amends 690-010-0190(2) and renumbers 690-010-0190(6) to 690-010-0190(5) from the proposed draft rules contained in Item C Division 10 Rulemaking Final Staff Report.

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September 25, 2023

Via Email and US Mail

Oregon Water Resources Commission
725 Summer St. NE
Suite A
Salem, Oregon 97301

Re: Comments of Upper Klamath Landowners in Opposition to Division 10 Rulemaking

Sprague River Resource Foundation, Inc., Fort Klamath Critical Habitat Landowners, Inc., Water for Life, Inc., Productive Timberland LLC, the Mosby Family Trust, and Sprague River Cattle Company (together, "Upper Klamath Landowners") offer the following comments on the Commission Draft of the proposed Division 10 critical groundwater area rules. Upper Klamath Landowners submitted comments in opposition to the Division 10 rules on May 18, 2023. The issues raised in those comments went unaddressed in preparation of the Commission Draft, and therefore Upper Klamath Landowners raise and herein incorporate the prior-submitted comments. In addition, the Commission Draft contains new modifications to the proposed Division 10 rules. These modifications create new issues with the Division 10 rules, further establishing the damaging effect of these proposed rules.[1] Upper Klamath Landowners therefore submit these comments to address the new issues created by the Commission Draft of the Division 10 rules.

I. THE EFFECT OF "TENTATIVE" RESERVOIR DETERMINATIONS IS UNCLEAR

In one significant change to proposed OAR 690-010-0130, the rule states that "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" (emphasis added). The effect and purpose of this draft change is uncertain. What is certain, however, is that the Division 10 rules—and the identification of groundwater reservoirs—must be premised on the best available science, while providing any affected groundwater user the opportunity to contest not just the personal effect of a critical groundwater area designation, but to strongly contest the location and boundaries of groundwater reservoirs as well. The proposed Division 10 rules are woefully insufficient to protect groundwater users' due process rights in this

[1] These changes are so significant that OWRD should have re-initiated the rulemaking process to ensure that adoption of these rules would not violate the rulemaking provisions of the Oregon Administrative Procedures Act. As proposed, the changes made between the rule version noticed for public comment, and the Commission Draft, render the rules unlawful.

manner. Therefore, as explained herein and in Upper Klamath Landowners' prior comments, the proposed Division 10 rules should be rejected.

II. NOTICE SHOULD BE DELIVERED BY FIRST-CLASS MAIL TO TAX LOT OWNERS AND WATER RIGHT OWNERS

The Commission Draft states that notice of critical groundwater area designations and corrective controls should be mailed to affected groundwater users using county tax records to identify property owners. While Upper Klamath Landowners do not oppose use of county tax records, to ensure that affected groundwater users are properly notified OWRD should also use water right ownership information when mailing notice. Furthermore, concerning corrective controls the Commission Draft states that the initial notice of corrective controls should be sent *first class* mail to all federally-recognized tribes in Oregon, but sent *regular* mail to affected groundwater users. It is contrary to all logic and law that the parties directly affected by corrective controls—the water users—would be sent notice by *regular* mail whereas other parties, like tribes, would be sent notice by *first class* mail. The proposed Division 10 rules should be rejected for these reasons.

III. ALL GROUNDWATER USERS AFFECTED BY CORRECTIVE CONTROLS SHOULD BE MADE AUTOMATIC PARTIES TO CONTESTED CASES

In the notice draft of the Division 10 rules, the proposed rules provided that all groundwater users affected by corrective controls were automatically made parties to the contested cases stemming from the controls. In the Commission Draft, no longer are affected users automatically made parties. Rather, they—as well as any other persons—need to submit a request for party status. This is a major negative change from the notice draft to the Commission Draft. The negative affect of this change is worsened by the fact that the rules are unclear[2] whether a party to a contested case is limited to only arguing those issues which are alleged in the request for party status. Because of the unworkable, unclear, and unlawful nature of the proposed rules, Upper Klamath Landowners urge the Commission to reject the proposed Division 10 rules.

IV. REDUCING THE SIZE OF CRITICAL GROUNDWATER AREA BOUNDARIES SHOULD NOT REQUIRE A NEW CRITICAL GROUNDWATER AREA DESIGNATION PROCESS

The Commission Draft provides that the expansion, reduction, or alteration of the boundaries of a critical groundwater area may only occur through following the critical groundwater area process. While Upper Klamath Landowners agree that the expansion[3] or

[2] The Commission Draft merely provides that persons *may* include a description of how proposed corrective controls are unlawful in the request for party status. The rules do not explain what will result if persons choose not to describe the unlawful nature of the rules in the request for party status.

[3] Expanding a critical groundwater area without following the process described by Oregon's critical groundwater area statutes would violate statutory and constitutional provisions.

modification[4] of a critical groundwater area may only occur through the ORS 537.730 process, the reduction of the boundaries of a critical groundwater area should *not* require re-initiation of this process. Rather, such a reduction *which offers a reprieve to groundwater users* should be possible through a simple rulemaking process.

V. CONCLUSION

As explained herein and in Upper Klamath Landowners' previously-submitted Division 10 comments, Upper Klamath Landowners urge the Oregon Water Resources Commission to reject the proposed Division 10 rules.

DATED this 25th day of September, 2023.

Sincerely,

Dominic M. Carollo
Nolan G. Smith
Attorneys at Law
NGS/kh
Cc: client

[4] A modification of boundaries which brings new acreage within a critical groundwater area must follow the critical groundwater area designation process.

OREGON
WATER RESOURCES DEPARTMENT

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To the Commission:
I assert that the proposed rules in rule 690-010-0710 (1) would inflict undue hardship on existing exempt well users in a Critical Groundwater Area. I agree with the limitation on other classes of groundwater users described in this rule. Exempt users usually have no other workable alternative for drinking water source, so the rule as written for existing exempt users is a mandate to abandon their home. The exempt class of user is not the problem, as the class using the least volume of groundwater. ONLY potential or new exempt users should face limitations and restrictions, allowing the property owner to make a decision not to make home on the affected property in a critical groundwater area.

Sincerely,
Casey McClellan
Umatilla County
509 520 8928

The Nature Conservancy
Protecting nature. Preserving life.™

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September 25, 2023

Kelly Meinz – Water Policy Analyst

Submitted by: Zach Freed, Sustainable Water Program Director

Kelly,

Thank you for the opportunity to comment on the recent changes to the draft Division 10 Rules. The Nature Conservancy participated in the Division 10 Rule Advisory Committee and continues to support alignment of the Division 10 rule with statute to enable the implementation of Critical Groundwater Areas, which we understand to be the original intent of the rulemaking.

However, we are concerned that the recent changes to the Public Notice draft of the Division 10 rules will only create barriers to the implementation of critical groundwater areas. In particular, The Nature Conservancy recommends deleting the new section (3)(d) draft OAR 690-010-0130, which was not discussed during any RAC meetings. This new text prevents the Water Resources Department from identifying groundwater reservoirs as a part of a critical groundwater area unless they have been "adjudicated to a final determination," which is not a relevant criterion for identification of groundwater reservoirs. Groundwater reservoirs exist based on the best available science related to hydrogeologic setting, not due to administrative decisions about water rights. Whether a reservoir is fully and finally adjudicated or not is irrelevant to whether Oregon Water Resources Department can identify it.

The statutes cited in draft section OAR 690-010-0130(3)(d) are not related to ORS 537.730 – 537.742, which were the reason for the rulemaking. We recommend deleting the new draft section 0130(3)(d) because it is problematic for implementing critical groundwater areas in many parts of the state, was not identified as a need during months of RAC discussions, and raises issues that are not relevant to the identification of groundwater reservoirs for future critical groundwater areas.

Thank you for the opportunity to comment.

WaterWatch of Oregon
Protecting Natural Flows In Oregon Rivers

September 25, 2023

Oregon Water Resources Department
Attn: Kelly Meinz
725 Summer St. N.E., Suite A
Salem OR 97301-1271
Sent via email to: WRD_DL_rule-coordinator@water.oregon.gov

RE: WaterWatch of Oregon Comments on Rulemaking for OAR 690, Division 10 Rules To Designate and Limit Groundwater Use Within a Critical Groundwater Area

Dear Mr. Meinz:

Thank you for the opportunity to submit additional comments regarding the Division 10 rulemaking. WaterWatch was a member of the rules advisory committee (RAC) and has reviewed and commented on drafts throughout this process. This additional comment period is important because of the substantial changes made to the Public Notice Draft Rules that were subject to public review and comment by WaterWatch and others.

We urge deletion of certain sections that were changed or added after the Public Notice Draft Rules which may create unintended roadblocks to establishing badly needed and long overdue critical groundwater areas.

Comments

1. The "report" requirement of *Draft* OAR 690-0130(4)(c) should be deleted—or at a minimum, rewritten to make clear that this is strictly an informational report to the Commission.

We strongly urge either wholesale deletion of the "report" to the Commission described at *Draft* OAR 690-010-0130(4)(c), or in the alternative, clear language establishing that any "report" is strictly an informational report to the Commission.

There is no statutory requirement for issuing the "report" described at *Draft* OAR 690-010-0130(4)(c) prior to convening a rules advisory committee, prior to the Commission adopting a critical groundwater area rule, or at any other time.

The report requirements that have been added to *Draft* OAR 690-010-0130(4)(c) create substantive and procedural requirements that appear to serve no purpose other than hamstringing the department from convening rules advisory committees and adopting rules to establish critical groundwater areas—defeating the entire purpose of this rulemaking.

For instance, the draft rules include an evidentiary standard for this report, requiring that "report's findings and conclusions with respect to designation of a critical groundwater area shall *be supported by substantial evidence that justifies the designation*." *Draft* OAR 690-010-0130(4)(c)(C) (emphasis added). Department staff regularly prepare reports to the Commission but no evidentiary standard is prescribed for the exchange of information. The substantial evidence standard is not appropriate here. It serves no legitimate purpose, is inconsistent with achieving the goal of promulgating rules to implement the statute, and should be deleted.

Further, *Draft* OAR 690-010-0130(4)(c) would require that prior to convening a RAC or to the Commission's adoption of rules designating a critical groundwater area, "the Department shall prepare a draft report . . . *identifying and characterizing the groundwater reservoirs*," (emphasis added), subject apparently to the proposed substantial evidence standard. There is no statutory basis, nor any legitimate purpose, for requiring a report "characterizing" groundwater reservoirs in order to designate a critical groundwater area and it should be deleted.

These changes made to the Public Notice Draft Rules risk, at a minimum, creating unnecessary confusion and procedural roadblocks in an already complicated process, but also of inadvertently and incorrectly implying that the department must adjudicate any pre-1955 groundwater claims prior to establishing a critical groundwater area (which the department has correctly rejected elsewhere).[1] This legally incorrect, unintended requirement could stem from improperly conflating requirements of ORS 537.665(3) (requiring groundwater claims to be adjudicated prior to "final determinations of boundaries and depth of any ground water reservoir") with the proposed *Draft* OAR 690-010-0130(4)(c) provision for a "report" to the Commission that characterizes groundwater reservoirs subject to a substantial evidence standard.

We strongly urge that the "report" requirement of *Draft* OAR 690-010-0130(4)(c) be deleted in its entirety. If the "report" requirement is not deleted in its entirety we urge that at an absolute minimum, it be re-written as follows to clarify that this is an informational report only and to make it consistent with how the report was described during the RAC and with ORS 537.735 (additions shown in bold, deletions in strikethrough):

[1] The Department responded to commenter James Buchal as follows: "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." (Memorandum to the Water Resources Commission from Acting Director Douglas Woodcock, Agenda Item C, September 28, 2023, Water Resources Commission, Attachment 5, pages 32-33, Adobe pages 63-64)

(c) **For purposes of preparing and presenting an informational report to the Commission, ~~P~~ prior** to convening a rules advisory committee pursuant to ORS 183.333, the Department shall prepare a draft **informational** 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 **included** ~~subject to~~ **in** the proposed critical groundwater area designation and identifying **proposed** corrective control measures likely to resolve the problems that resulted in the recommendation to designate a critical groundwater area. The draft **informational** 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 **informational** report;
(B) The Department shall review the information and comments received and present ~~a final~~ **an informational** report to the Commission that includes the ~~Department's~~ findings and conclusions **that the Department is proposing to make** and includes an assessment of the information and comments received;
(C) **The informational reports shall be used solely for the purpose of public outreach, information exchange and providing preliminary information to the Commission; information provided in the report will be subject to change prior to designation of any critical groundwater area;** ~~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.~~

2. *Draft* OAR 690-010-0130(3)(d), which references ORS 537.665 (requiring adjudication of groundwater before "final determination of boundaries and depth of any groundwater reservoir") should be deleted.

First, we note that we support the clarification in the first sentence of OAR 690-010-0130(3) to that the provisions of OAR 690-010-0130(3) relate to the definition of the boundaries of a *critical groundwater area* (not groundwater reservoirs) as required by ORS 537.735(1)(a).

However, we urge deletion of the new section *Draft* OAR 690-010-0130(3)(d), which states that identification of a groundwater reservoir in a critical groundwater area "shall be considered a tentative determination unless the groundwater reservoir has been adjudicated to a final determination pursuant to ORS 537.665 – 700." We did not discuss incorporating ORS 537.665-700 into the rules during the RAC and these statutes are not included in the Proposed Rulemaking "Need for the Rule(s)," which states that "[t]he 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."

The requirement for completing groundwater adjudications in ORS 537.665(3) pertains to any "final determination of boundaries and depth of any groundwater reservoir " by the Commission.

That is not at issue in ORS 537.735 and any linkage, intended or not, in the rules should be rejected. Again, as provided in footnote 1, the department correctly rejected linking ORS 537.665 to the designation of critical groundwater areas and should not incorrectly imply any such connection in the Division 10 rules. **We urge the department to delete *Draft* OAR 690-010-0130(3)(d).**

Thank you again for the opportunity to submit these additional comments in light of the changes made to the Public Notice Draft Rules. We urge the department to make the changes requested above in order to ensure that the Division 10 rules can fulfill the intent of allowing the department to finally designate much needed and long overdue critical groundwater areas.

Sincerely,

Lisa A. Brown
Lisa Brown
Staff Attorney
WaterWatch of Oregon
lisa@waterwatch.org

Water League testimony on Critical Groundwater Area
Chapter 690 Div 10 Proposed Draft Rules
to the Water Resource Commission September 24, 2023

The following are Water League's public comments on the new provisions of the 690 Division 10 rules that were added after the close public comment period on May 26, 2023.

We believe that including 690-010-0130(3)(d) poses a serious and unacceptable risk. Bringing the water right determination process in ORS 537.665 et. seq. to these rules will slow down the CGWA process to a grinding halt.

Water right determinations will always be the fact in basins across the state since determinations are decades-long affairs. Inserting the perpetually "tentative" definition of a groundwater reservoir, ORS 537.665(1), by naming the process in the Div 10 rules, puts the question into the Div 10 process front and center so that when Corrective Control Provisions are imposed (.535 & .742), the affected water users will sue on the presumed "tentativeness" until the open-ended future. They will say that the state does not sufficiently know the hydrogeologic facts to impose Corrective Control Provisions. We hold the state can reasonably define groundwater reservoirs for the purpose of carrying out the CGWA process; however, obstructionists will do what they can to unreasonably slow down the process. We have seen this occur for decades across the state.

We know that people who have opposed the water regulations process over the past 100 years have constantly succeeded in slowing down the process, not by winning lawsuits, but by dragging out the process. While we think the OWRD may believe including the ORS 537.665 et. seq. will not pose a threat to the orderly function of the CGWA process, we disagree. We view the insertion of 690-010-0130(3)(d) as a way to mollify potentially affected water users to stave off their lawsuits upon the adoption of these 690 Division 10 rules; however, we believe they've gotten the OWRD to swallow a poison pill that is much worse down the line when the state imposes Corrective Control Provisions.

We believe the precautionary principle requires deleting 690-010-0130(3)(d) from the 690 Division 10 rules. The foreseeable lawsuits on the so-called "tentativeness" will be much more damaging to the CGWA process than any challenges immediately following the adoption of these rules without inclusion of the unrelated ORS 537.665 et. seq. rule 690-010-0130(3)(d). Not only is is unnecessary, it is unnecessarily risky.

The OWRD staff dismissed the inaccurate comments from James L. Buchal representing the Sprague River Cattle Company on pp. 62-63 of the PDF titled "11327_wrdnotice.pdf" (these pages are also noted in *Attachment 5* as pp. 31-32). The staff comment dismissing Buchal is [**emphasis added**]:

> 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.

We call into question the decision to include 690-010-0130(3)(d) into the 690 Division 10 rules given that the OWRD staff dismissed Mr. Buchal's comments. We agree that OWRD staff correctly dismissed the comments regarding the insertion of the ORS 537.665 et. seq.

Mr Buchal improperly conflated the terms in ORS 537.735(1)(a) which states that a Division 10 rule shall [**emphasis added**]: "**Define the boundaries of the critical ground water area** and shall **indicate which of the ground water reservoirs** located either in whole or in part within the area in question are included within the critical ground water area" with ORS 537.665(1) that the WRC shall "**identify and define** tentatively the location, extent, depth and other characteristics of **each ground water reservoir** in this state..."

Defining the boundaries of the CGWA is not the same as defining the groundwater reservoirs, and conflating the two is an error that the OWRD staff pointed out in their response.

Mr. Buchal overstates and misconstrues the statutory context on how ORS 537.665 -- 537.700 relates to ORS 537.730 – 537.742 to set up his conflation error described above and draw a line from the requirement in ORS 537.670(1) that "final determination of the rights to appropriate the ground water" must precede the CGWA process of defining the boundaries of a CGWA. There is no such line between first having to determine water rights before defining CGWA boundaries.

Any water use, be it inchoate, decreed, permitted, or certificated is a material and tangible water diversion, that by its very existence claimed by the water user, can be turned on, turned down, and turned off by the state to serve the greater public interest and prevent harm to the public health, safety, and welfare.

The law does not permit the state to be held back from serving the public interest simply because there is ambiguity about undetermined water right decrees; indeed, if undetermined water users insist on the material and tangible rights to use water are to be believed, then surely the veracity of their assertions must create a factual basis that the state can recognize for the governance and management of those rights to serve the public interest. Undetermined water users cannot have it both ways, claiming they exist sufficiently to turn on the water spigot, but not sufficiently to also turn down the water spigot.

We reject the notion that the state cannot impose Corrective Control Provisions in ORS 537.735 and 537.742 unless all the water users have first had their water rights determined. If the authority exists sufficiently enough for them to use the water, then it exists well-enough to turn down the volume.

The OWRD worked with the USGS to produce a comprehensive groundwater reservoir study of the Harney Basin titled: "Groundwater Resources of the Harney Basin, Southeastern Oregon," which includes extensive geologic and hydrogeologic data for the purpose of determining whether a CGWA is justified and how corrective control provisions might help fix the problems of extraordinary cones of depression. Their work is extraordinary. The scientists did not have to rely on an unrelated process in ORS 537.665 -- 537.700 to produce this report; nor does the WRC need to ensure ORS 537.665 -- 537.700 is complete before embarking on ORS 537.730 -- 537.742.

Former OWRD Director, William H. Young, who drafted HB 2192 in 1991 to reform the CGWA process, explains how the designation of CGWAs should proceed when other efforts have failed in his series titled "Water Planning: The Oregon Approach" for the University of Colorado Law School in 1991, which includes a chapter on *Groundwater Management, Policy and Principles* pp. 37-44. The statutory guidance, policy discussion, and implementing strategies were approved on June 22, 1990.

Director Young stated on page 38 [**emphasis added**]:

> "(f) **Special-area designations shall be invoked when site-specific standards and regulations are no longer sufficient to solve or prevent the problem(s)**. The invoking of special-area designations shall be accompanied by recommended monitoring, reporting, or regulating activities to prevent, correct or control existing or potential declines, overdraft, interference or contamination..."

Just prior to that on page 38, he states:

> "(e) **Special-area designations (i.e., critical groundwater management areas, serious water management areas, basin plan restriction areas)** may be warranted under conditions such as: (A) past, existing or probable excessive groundwater level declines or overdraft; (B) substantial interference between two or more wells or between groundwater and surface water uses (including public instream uses), or between groundwater appropriation and geothermal appropriation under ORS Chapter 522, and/or (C) groundwater contamination."

Director Young points out that when other "site-specific standards and regulations are no longer sufficient to solve or prevent the problem" then "Special-area designations" such as CGWAs "shall be invoked." Mr. Buchal has attempted to turn this standard on its head by saying that the CGWA statutes cannot go forward until the groundwater reservoir determinations have been made, which also happens to require that all the water right determinations be first completed. CGWAs go forward when other efforts to manage groundwater fail. Since ORS 537.665 et. seq. are statutes that manage groundwater and fail to resolve water right determinations in a timely

manner, they should not be used to hold up CGWAs. It is wrong to infect the CGWA process with the failures of the water right determination process.

Director Young also provided testimony for HB 2192 in 1991 for the legislature; by his own testimony and the concurrence of the legislators, we can see what the legislative intent of HB 2192 was.

Director Young testifies that:

> "Creation of a critical area under HB 2192 would be expedited, because the process is defined. Attention would be focussed much more quickly where it belongs---on the condition of the groundwater resource and on water use controls."

Nowhere in his testimony does Director Young refer to ORS 537.665 -- 537.700, and nowhere in the legislative intent are those statutes envisioned as involved in the CGWA statutes. Furthermore, nowhere in the existing 690 Division 10 rules that are now proposed to be replaced do ORS 537.665 -- 537.700 figure in any calculus. Director Young and the legislators in 1991 did not want to require that all the water right determinations be made before the state could impose Corrective Control Provisions as part of completing the CGWA process.

Director Young explains:

> "The imposition of critical area designation and controls is often resisted by groundwater users within the affected area. This is understandable, given that the controls reduce or totally eliminate pumping by some appropriators. That, in turn, may reduce property values and personal income. For these reasons, the decision to create a critical area is a difficult one."
>
> "However, when the statutory criteria for declaration of a critical area exist, they indicate a resource that is out of balance and that will ultimately fail without corrective action by the department. Because of the ambiguous nature of the current statutes, legal challenges to such declarations are easily mounted. Historically, the challenges have focused predominantly on questions of procedure. Questions about the technical data and interpretations are few."

Now that the Administrative Procedures Act (APA) process is about to be codified for CGWAs after an inexplicable 32-year delay that flouted the intent of the legislature to address groundwater management problems, there are efforts to confound the CGWA process on the questions of technical data and the potentially endless interpretations of that data which are the reasons why water right determinations drag on for decades.

Conclusion:

The idea of calling the location of groundwater reservoirs "tentative" in 690-010-0130(3)(d) cues lawsuits on the pretense that the locations of the groundwater reservoirs are not sufficiently known to allow ORS 535.735 and 537.742 Corrective Control Provisions to go forward. This is obstructionist because the USGS and the OWRD can reasonably identify the locations of

groundwater reservoirs to designate CGWAs and impose Corrective Control provisions regardless of whether there are still outstanding water rights that have yet to be finally determined under ORS 537.665. Furthermore, if undetermined water rights can make claims to use water based on various documents, decrees, or anecdotal assertions of past use, then so too can the state accept those working documents to turn down the volume of the spigot to serve the public interest and prevent further harm and impairment to the public health, safety, and welfare.

In 690-010-0130(4)(b) there is a change from the legal term "Consult" to "Engage" for a reason; otherwise, the OWRD staff would not have done so. What was the reason?

Does "Engage" have a specific legal meaning regarding tribal relations as does the verb "Consult?" Who, specifically called for this change, and what was their reason for the change?

See also 690-010-0150 below for more detailed notes on the matter.

690-010-0130(4)(c) is a newly added provision since the public comment period in April 2023, and in it, the statement refers to [**emphasis added**]:

> "**identifying and characterizing the groundwater reservoirs** subject to the proposed critical groundwater area designation."

This language differs from the language used in 690-010-0130(3)(d) which refers to "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."

The terms used in 690-010-0130(3)(d) cast doubt on the terms used in 690-010-0130(4)(c) because the former says that knowledge of the physical characteristics of the groundwater reservoirs will be "tentative."

ORS 537.735(1)(a) that says that a rule designating a CGWA shall:

> "Define the boundaries of the critical ground water area and shall indicate which of the ground water reservoirs located either in whole or in part within the area in question are included within the critical ground water area."

The requirement in ORS 537.735(1)(a) is sufficient for CGWAs and should not be sidelined by the unrelated statute ORS 537.665 which has a requirement to determine the water rights before the groundwater reservoirs have "been adjudicated to a final determination." As noted above in our comments, including the "tentativeness" associated with ORS 537.665 et. seq. in the 690 Division 10 rules will drag the failed water right determination process into the CGWAs unnecessarily and bog down the process indefinitely: this was not ever the legislative intent of HB 2192 in 1991.

690-010-0140(1) says: “Prior to convening a Rules Advisory Committee under ORS 183.333, the Department shall coordinate with the affected local governments.”

In general, there is nothing stopping the OWRD and local affected governments from coordinating every day of the year per the SAC; on this basis, 690-010-0140(1) is unnecessary.

That said, we are concerned that the State Agency Coordination Program (SAC) could devolve into a closed-door special interest lobbying session given the already demonstrated heightened political tensions surrounding the designation of CGWAs. The RAC should be privy to the SAC process as it occurs; surely the entirety of the SAC process and all notes will (must) be part of the RAC deliberations.

Additionally, for political subdivisions of the state to assert parity with Federally Recognized Tribes is spurious and unfounded. Comments made by the Carollo Law Group in the PDF titled “11327_wrdnotice.pdf” asserting the rights to preempt the RAC, as may Federally Recognized Tribes, are unfounded just as their language using the improper term “consult” is. The lawful term is “Coordinate.” The term *consult* implies a two-way street with greater parity than does *coordinate*, as we explain below:

The OWRD SAC requires the local affected government to comply with statewide planning goals through its comprehensive plans. With regard to CGWAs, if those comprehensive plans are not up to date with statewide planning goals, then the state either helps them come up to date or the state bypasses the out-of-date local government comprehensive plan. We believe that there is a high probability that the Harney County Comprehensive Plan, to which Carollo refers, is not consistent with statewide planning goals.

Regarding CGWAs discussed in the SAC, the state tells the local affected government precisely what to expect with the designation of the CGWA and the possible imposition of corrective control provisions; this is the extent of the “coordination.” In the SAC, CGWAs are held to a higher standard than the other ways the OWRD interacts with locally affected governments where there is more give and take on water use actions of less consequence. This higher standard is spelled out in the SAC:

On pg. iv of the SAC regarding the way the OWRD coordinates differently based on the type of program, it says [**emphasis added**]:

> “LCDC rules generally require state agencies to comply with the Goals by achieving compatibility with comprehensive plans. **Under certain circumstances, agencies may find actions in compliance directly with the Goals.** The Department's **compatibility strategies** vary by program but can be grouped into basic types as outlined in Figure 3 and described in further detail below.”

On pg. v of the SAC regarding how CGWAs compatibility strategies vary, OWRD must [**emphasis added**]:

> "Coordinate with local governments to ensure that comprehensive plans **reflect the resource constraints** in appropriate inventories."

This means the local comprehensive plans must adjust to the state data on resource constraints; there is no give and take where the local affected government knows better about the groundwater resources and the extent of the damage to the aquifer. We are concerned about the integrity of this process, especially since the RAC has been preempted in rule.

Local governments may not lobby to deemphasize scientific data the OWRD or USGS produce, and they must not be given the opportunity to do so. The preemption of the RAC as defined in rule 690-010-0140(1) does not serve the rule-making process nor the public interest by possibly "sewing up" the SAC process in advance before RAC involvement.

On pg. vii of the SAC regarding strategy "C" and CGWAs [**emphasis added**]:

> "To meet its statutory mandate, the Commission is required to adopt state water resources policy and authorized to restrict the use of water to solve urgent water supply or quality problems. In such cases, the Department will work closely with local planning officials to accommodate local plans and priorities to the maximum extent possible. However, **if conflicts arise and/or local plans lack policies or provisions to address the situation, the Commission will adopt findings that the proposed action complies with the Statewide Planning Goals directly**. Further, **the Department will attempt to resolve disparities between Department rules or orders and local plans by suggesting plan amendments that reflect resource constraints and provide resource protection through the land use planning process."**

The important point here is that the state has sovereignty over the CGWA process and its political subdivisions and it will force the affected local government to comply if need be. (The state may not do the same to Federally Recognized Tribes.) While the DLCD wishes to generally respect local sovereignty regarding land use decisions (water is statutorily defined as land), CGWAs are too important and high-risk not to be fully controlled by the state which has the resources, scientists, and data to know better than local governments on the topic of groundwater hydrology. This is the law.

ORS 536.310(10) *Purposes and policies to be considered in formulating state water resources program* says:

> "It is of paramount importance in all cooperative programs that the principle of the sovereignty of this state over all the waters within the state be protected and preserved, and such cooperation by the commission shall be designed so as to reinforce and strengthen state control."

On pg. 26 of the OWRD SAC [**emphasis added**]:

> "State law requires the Commission to maintain stable groundwater levels, and take action to prevent and control substantial interference, overdraft, and contamination of groundwater. Under Goal 5 local comprehensive plans are required to inventory and

provide programs in protect important groundwater resources. **Critical groundwater areas should be viewed not only as a regulatory tool, but also as an information source for use in local land use planning within those areas."**

The special situation with CGWAs is that the state provides the local governments the evidence-based scientific data on groundwater status, and the local governments are expected to take the information and use it in their comprehensive plans. There is no dispute resolution process as with other less consequential areas of the SAC; this is a one-way street from the state to the local government. We contend that preempting the RAC is bad policy because it strongly suggests the RAC is not involved in advising on the SAC process for purposes of protecting political subdivisions from public review. The RAC should advise on the SAC process; surely, any attempts to sequester the SAC process will only force that process into the light of day.

We note again, the testimony from OWRD Director Bill Young on HB 2192 in 1991:

> "The imposition of critical area designation and controls is often resisted by groundwater users within the affected area. This is understandable, given that the controls reduce or totally eliminate pumping by some appropriators. That, in turn, may reduce property values and personal income. For these reasons, the decision to create a critical area is a difficult one."

Local counties and cities may be prevented from approving more residential, commercial, and industrial development, and irrigators in those counties may experience lower incomes as a result of the need to protect the aquifers from destruction. While the state has never taken the CGWA process lightly, there is no reasonable justification to let political subdivisions preempt state authority as described in ORS 536.310(10); nor is there justification to artificially elevate political subdivisions to the level of sovereignty that Federally Recognized tribes experience by equating 690-010-0140(1) with 690-010-0150(1) as concerns preempting the RAC.

690-010-0150 has seen a change from the wording "Consult" to "Engage." This change must have been significant enough to have been worth making. Why did OWRD staff make the change following the April public comment period?

Since Federally Recognized Tribes are sovereign nations and are not political subdivisions of the state of Oregon, whatever the state might do, it cannot redefine the responsibility to meaningfully consult/engage with a tribe because that policy rests within federal law, to which the states must submit. This is a significant difference from how the state coordinates with its political subdivisions.

The state of Oregon has a legal responsibility to consult with tribes as written in 690-010-0150 at all times before, during, and after any other state activities, including the formation and convening of Rules Advisory Committees. To be clear, there is NO disconnect or inconsistency in consulting with these tribes prior to the RAC convening compared to the same for political subdivisions.

Claims that political subdivisions of the state deserve the same powers that tribes have by asserting the statement in 690-010-0140(1) to preempt the RAC are spurious and unlawful.

In 690-010-0190, the rules changed after the public comment period in April from automatically including any water user who would be subject to Corrective Control Orders to having to manually opt-in. The language changed from [**emphasis added**]:

> "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."
>
> And the language changed to [**emphasis added**]:
>
> "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."

The change to force an opt-in regime over the previous automatic inclusion can easily be construed as an effort to minimize the number of parties to the contested case hearings, which is too common in many other politically charged local, state, and federal actions. This is wrong and should be reversed.

These Division 10 proposed rules are unclear as to who really is involved in the Notice of Party Status. In 690-010-0180(2)(e), The Notice of Proposed Corrective Control Orders shall include, says [**emphasis added**]:

> "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."

However, in 690-010-0190(2), it says [**emphasis added**]:

> "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 people whose <u>water may be limited or otherwise restricted</u> have their Notice of Party Status filed under 690-010-0180(2)(k) thrown into the trash because they are not explicitly persons whose <u>groundwater will be limited?</u> They will not have time to also file under 690-010-0180(2)(l) Petition for Party Status because both statuses have the same 30-day deadline.

We recommend that the state err on the side of caution and change 690-010-0190(2) to align with 690-010-0180(2)(e).

In 690-010-0190(6) State Agency Party Status, the provision should be labeled (5) not (6).