

OREGON



WATER RESOURCES
DEPARTMENT

Division 10: Critical Groundwater Area (CGWA) Designation Rules



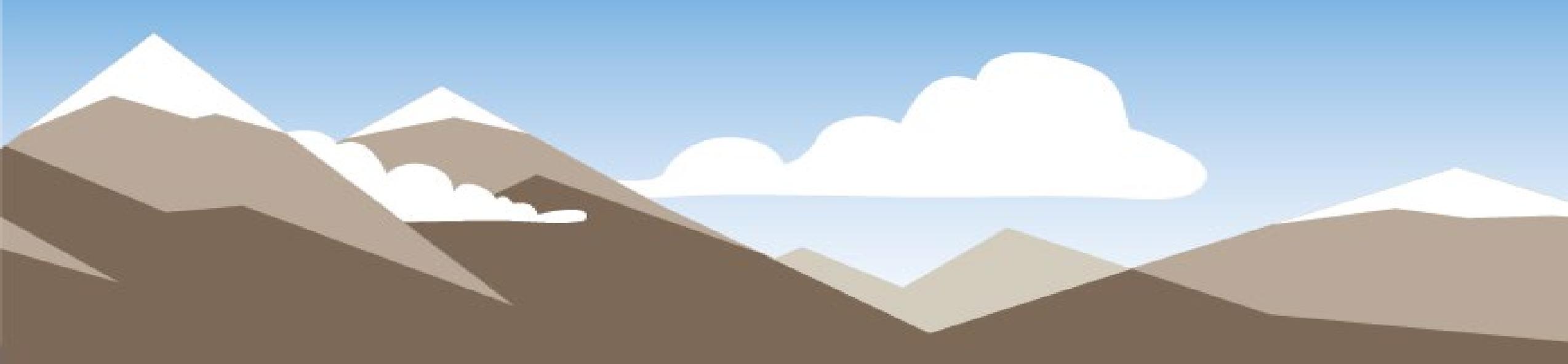
Why is Rulemaking Needed?

- Administrative rules do not match current statute
 - Statute was last updated in 1991
 - The current rules were updated in 1990
- Proposed Division 10 rules will clarify statutory terms and processes

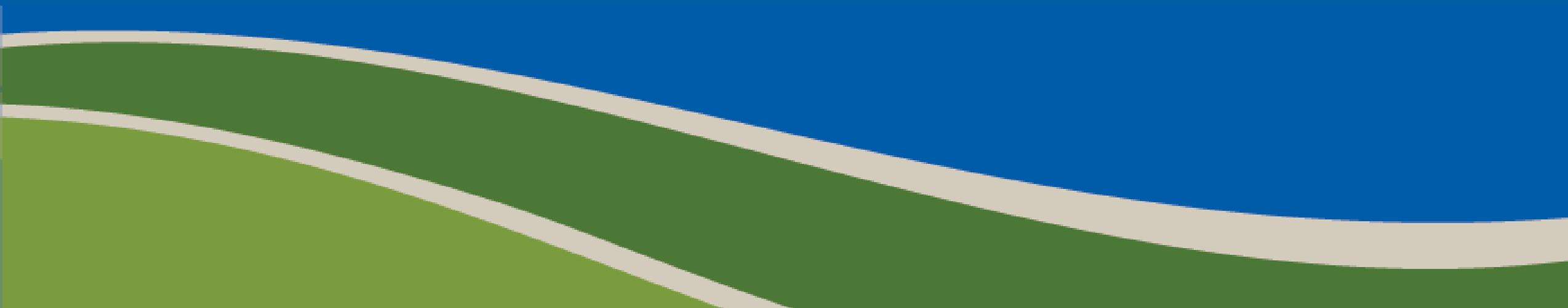
Differences Between Current and Proposed Rules?

Current Rules	Proposed Rules
CGWA designated by State Engineer through an order	CGWA designated by Commission through rule adoption
No standardized process for contested case	Contains process for Department-led contested case

- New rules provide opportunity for public input through rulemaking process
- Contested case process provides due process protections to groundwater right holders and exempt users if use is limited



Rulemaking Process



Rulemaking Timeline

**December 2022-
March 2023**
Rule
Development
(4 RAC Meetings)

May 2023
Consideration of
Comments &
Development of
WRC
Recommendation

April/May 2023
Notice in SOS
Bulletin (Public
Comment Period
& Public Hearing)

September 2023
WRC Meeting &
Decision on
Recommendation
(Potential Rule
Adoption)

RAC members included:

- 33 Members from across Oregon met four times
 - Conservation Groups
 - Agricultural Interests
 - County Planners/Special Districts
 - Federally Recognized Indian Tribes
 - Domestic Well Users
 - Non-Governmental Organizations/Interests

- GWAC was kept informed throughout rulemaking process
- Draft rules presented to GWAC for input during public comment period
- GWAC's recommendations were included in the proposed rules

53-Day Public Comment Period

**April 3,
2023 Public
Comment
Period
Began**

**April 26,
2023
Public
Hearing
(Burns)**

**May 6,
2023
Public
Hearing
(Salem)**

**April 24,
2023 Public
Hearing
(Milton –
Freewater)**

**May 4,
2023 Public
Hearing
(Klamath)**

**May 26,
2023 Public
Comment
Period Ends**

Public Comment Extension

Public comment period was extended twice:

- March 22, 2023, to March 26, 2023
- September 22, 2023, to September 25, 2023

Who did we notify?

Secretary of State
Bulletin

Gov Delivery –
Rulemaking

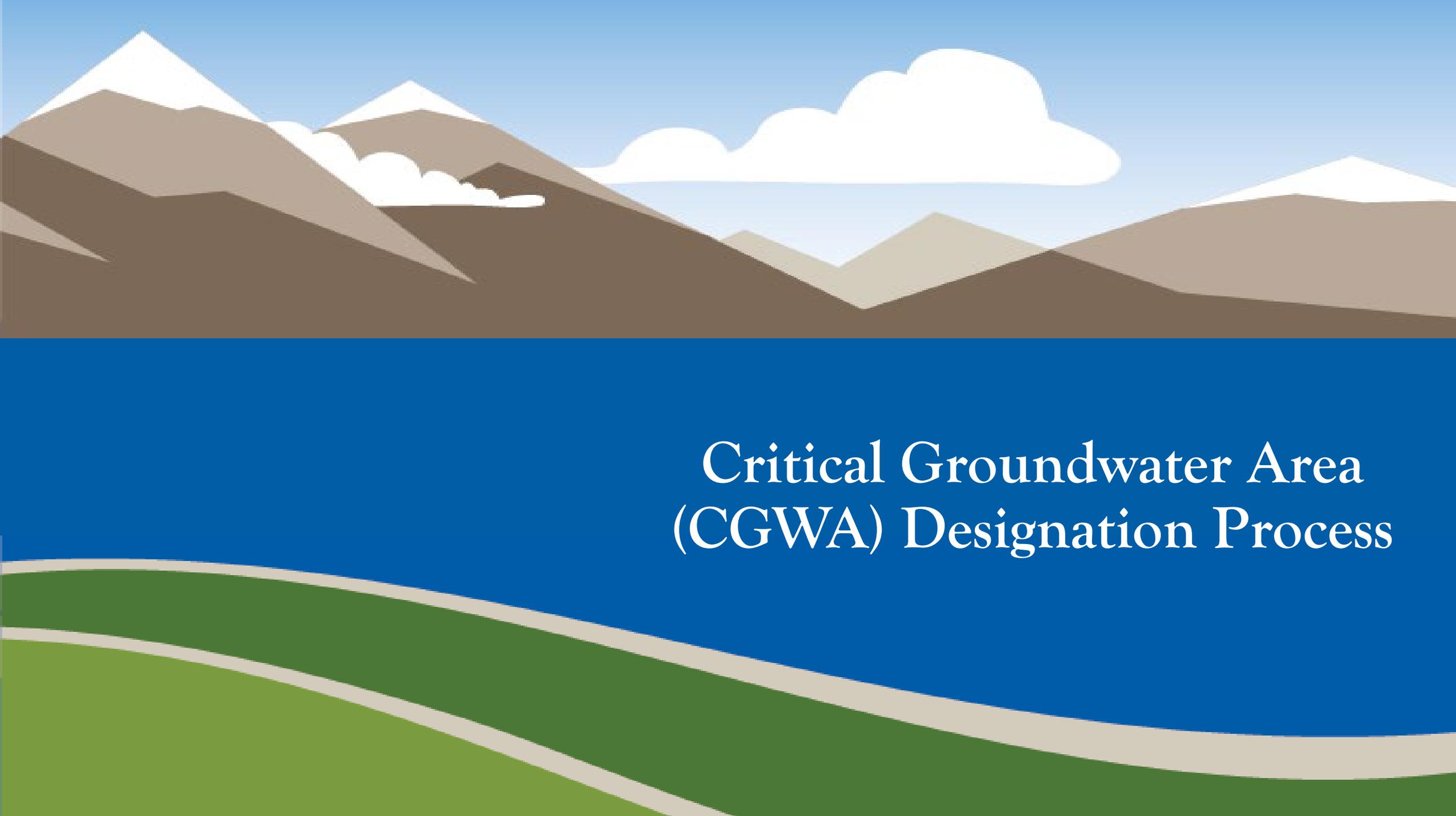
Gov Delivery –
Budget and
Legislative

Statewide Press
Release

Groundwater
Advisory
Committee

Chairs of Relevant
Legislative
Committees

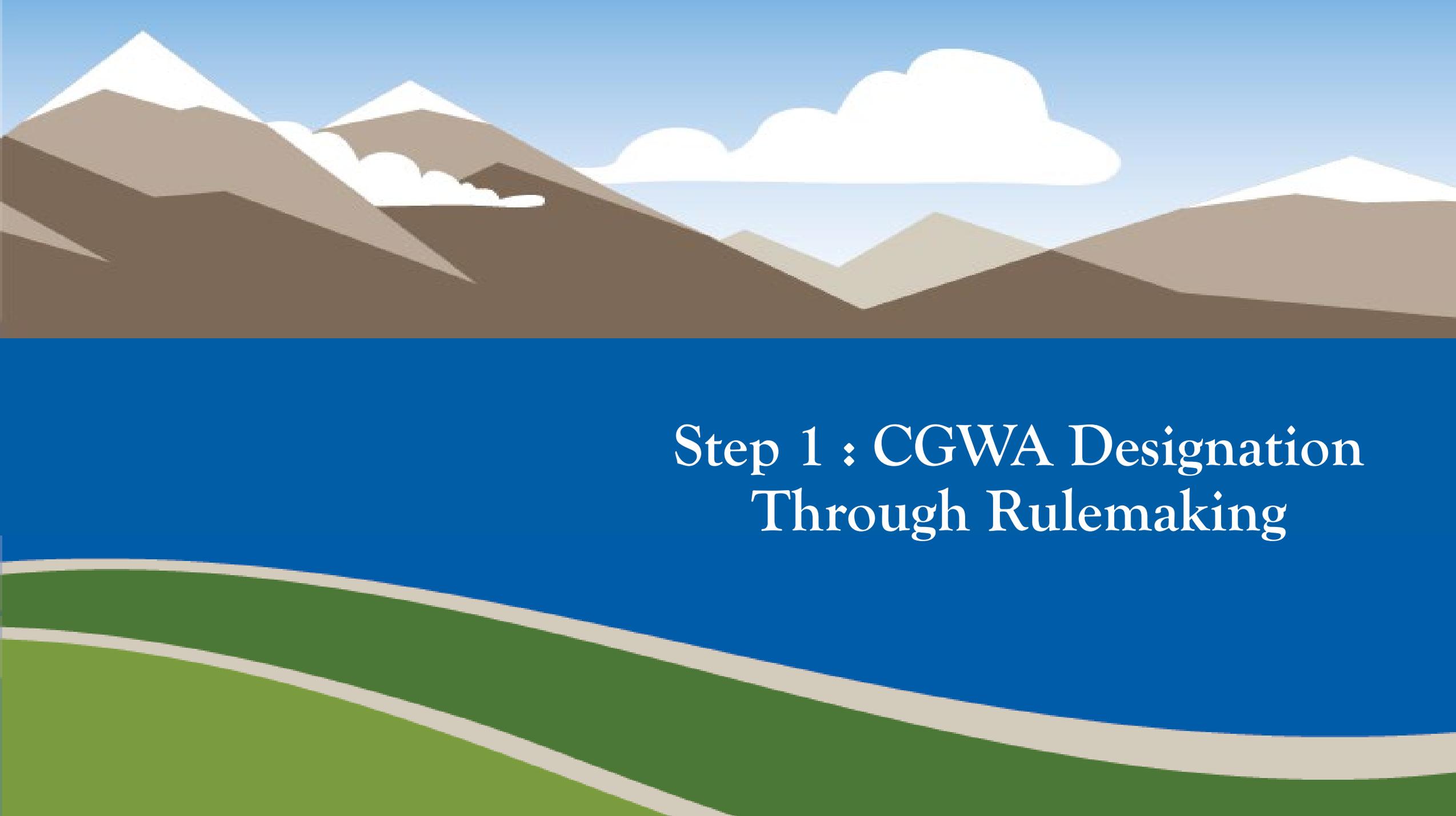
RAC Members



Critical Groundwater Area (CGWA) Designation Process

Two step approach:

1. CGWA is designated within basin program rules through rulemaking process
2. Groundwater use may be restricted through a final order after a contested case process



Step 1 : CGWA Designation Through Rulemaking

Rulemaking Process Overview

Criteria met; Prepare draft report and initiate coordination and engagement

Initiate RAC and draft rules

Rule notification, public comment, and hearings

Rule adoption

Criteria for CGWA Designation

At least one of these criteria must be met:

- Groundwater is overdrawn
- Groundwater levels show excessive declines
- Pattern of substantial interference between wells
- Pattern of substantial interference between wells and senior surface water rights
- Pattern of substantial interference between wells and production of geothermal resources
- Pollution impacting public health

Corrective Controls in Rule

Corrective control provisions authorized under ORS 537.735

1. Close critical groundwater area from further appropriation
2. Determine permissible total withdrawal (PTW)
3. Disposition pending water right applications
4. Additional requirements necessary to protect public welfare, health and safety
5. Close all or parts of CGWA for thermal characteristics
6. Determine total permissible change in thermal characteristics



Step 2: Curtail Use Through Contested Case Process

Curtailment: Initiating the Contested Case Process

Prepare and deliver Initial Notification of Corrective Control Orders



Prepare and deliver Notice of Proposed Corrective Control Orders (draft order)

Corrective Controls in Contested Case

Authorized corrective controls within the CGWA under ORS 537.742

1. Apportion the permissible total withdrawal (PTW) for groundwater right holders by priority date
2. Set preference, w/o reference to relative priorities, for residential and livestock first.
3. Reduce or adjust the PTW for groundwater users, or users with two or more wells
4. Require abatement or seal for wells responsible for polluting or impairing groundwater supply
5. Require or specify rotation of groundwater use in critical area

Notification Requirements for Initial Notification of Corrective Control Orders

First Class Mail

- Affected Local Governments
- Federally Recognized Indian Tribes
- Property owners of tax lots within the CGWA

Publication

- OWRD weekly bulletin for four weeks
- OWRD website
- Local newspaper for two weeks

Meeting

- Hold a meeting in the CGWA

Notification Requirements for Notice of Corrective Control Orders

Scope of Rulemaking

By Certified or Registered Mail

- Groundwater rights holders
- Exempt users whose groundwater use would be limited

Regular Mail

- Persons who have requested copies of the order and chose mail as preferred contact method

Email

- Persons who have requested copies of the order and chose email as preferred contact method

Publication

- OWRD Weekly Bulletin for four weeks
- OWRD Website

Curtailment: Hearing Preparation

Water users whose use will be limited file Notice of Party Status or interested parties file Petition for Party Status

WRD notifies all parties of any petitions

WRD decides on petitions for party status, WRD specifies area of participation and procedural limits for granted petitions

Director prepares list of issues and refers matter to Office of Administrative Hearings (OAH)

Curtailment: Conducting Hearing

Office of Administrative Hearings assigns
Administrative Law Judge (ALJ)



ALJ conducts contested case hearing



ALJ issues proposed order

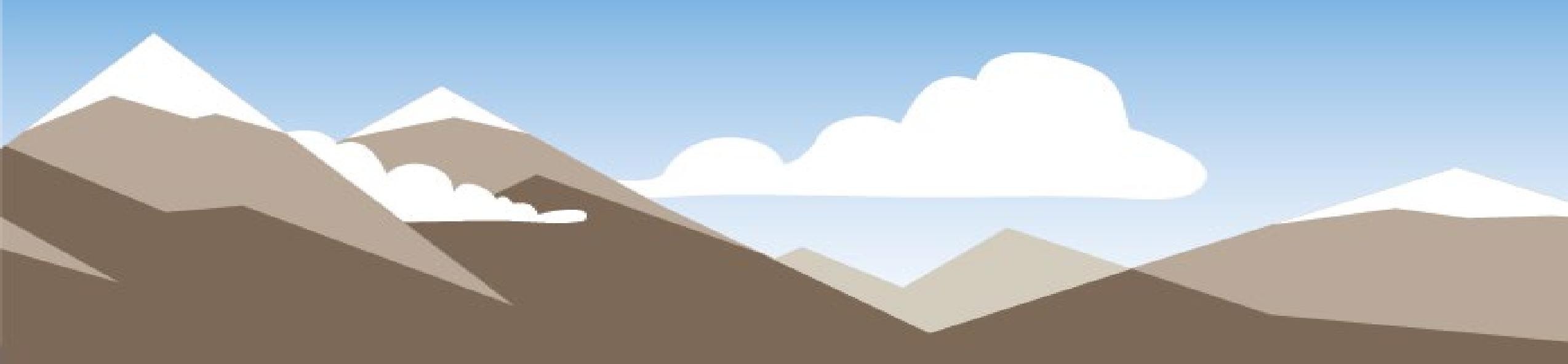
Curtailment: Issuing Final Order

Parties can file exceptions to proposed order within 60 days

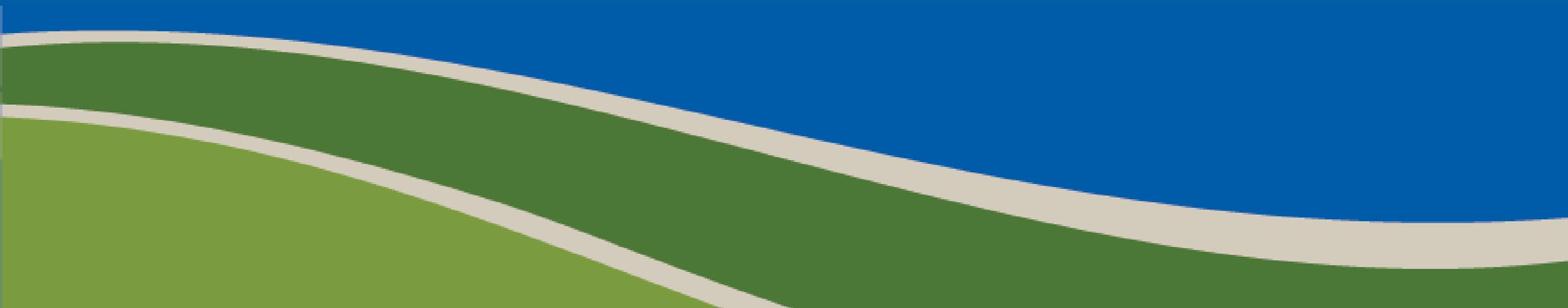
WRC considers all timely filed exceptions

WRC issues final order

WRD regulates per final order



Public Comments





Public Comment Received

- 40 – written comments
- 102 – form letter comments
- 21 – oral comments

Legislator Comments

1. Rep. E. Werner Reschke, HD 55
2. Rep. Vikki Breese-Iverson, HD 59
3. Sen. Tim Knopp, SD 27
4. Rep. Court Boice, HD 1
5. Sen. Dick Anderson, SD 5
6. Rep. Virgle Osborne, HD 2
7. Sen. Dennis Linthicum, SD 28
8. Rep. Lily Morgan, HD 3
9. Rep. Christine Goodwin, HD 4

Legislator Comments

- 10. Rep. Boomer Wright, HD 9
- 11. Rep. Shelly Boshart Davis, HD 15
- 12. Rep. Ed Diehl, R – HD 17
- 13. Rep. Rick Lewis, R – HD 18
- 14. Rep. Kevin Mannix, HD 21
- 15. Rep. Lucetta Elmer, HD 24
- 16. Rep. Tracy Cramer, HD 22
- 17. Rep. Anna Scharf, HD 23
- 18. Rep. Brian Stout, HD 31



Legislator Comments

19. Rep. Cyrus Javadi, HD 32
20. Rep. James Heib, R – HD 51
21. Rep. Jeff Helfrich, HD 52
22. Rep. Emily Mcintire, HD 56
23. Rep. Bobby Levy, HD 58

Sample of Incorporated Public Comments

- Amending the definition of "person" to be included in the contested case
- Amended definitions written in rules
- Clarified engagement with federally recognized Indian tribes
- Make the report to the Commission a more robust public process
- Define geographic area where corrective controls can be applied
- Grammar and spelling changes

Comment- Connecting Division 10 to Adjudication

Comment	Response
<p>The new language in 690-010-0130(3)(d) is concerning and should be removed.</p>	<p>The department agrees the language should be removed – recommended in alternative 2</p>

Comment- Inconsistent Language

Comment	Response
The language in 690-010-0190(2) should be aligned with the language in 690-010-0180(2)(e)	The department agrees that 690–010-0190(2) should be aligned with language in 690-010-0180(2)(e) - recommended in alternative 2

Sample of not Incorporated Public Comments

- Special districts, water agencies, irrigation districts, and elected officials, should be consulted under 690-010-0140.
- Third parties without a water right (surface and groundwater) should not be allowed to participate in the contested case
- 690-010-0210(4) should not limit discovery in contested case proceedings
- The 30-day deadline for a groundwater and exempt groundwater rights holder to file for party status is too short. Recommend 120 days

Concern- Rulemaking Process

Concern	Response
The Division 10 rulemaking process did not provide enough opportunity for public comment	The Division 10 process afforded many opportunities for the public to engage in the rulemaking process

Concern – Amending Existing Critical Groundwater Areas

Concern	Response
<p>The Division 10 rules have a lack of clarity on how these proposed rules will affect the existing Critical Ground Water Area. The rules should not apply to existing CGWA</p>	<p>Amending existing CGWAs will require the department to go through the Division 10 rulemaking process. Amending orders will require the division 10 contested case process</p>

Concern – Groundwater Rights Holders and Exempt Groundwater Rights Holders Should Be Automatic Parties

Concern

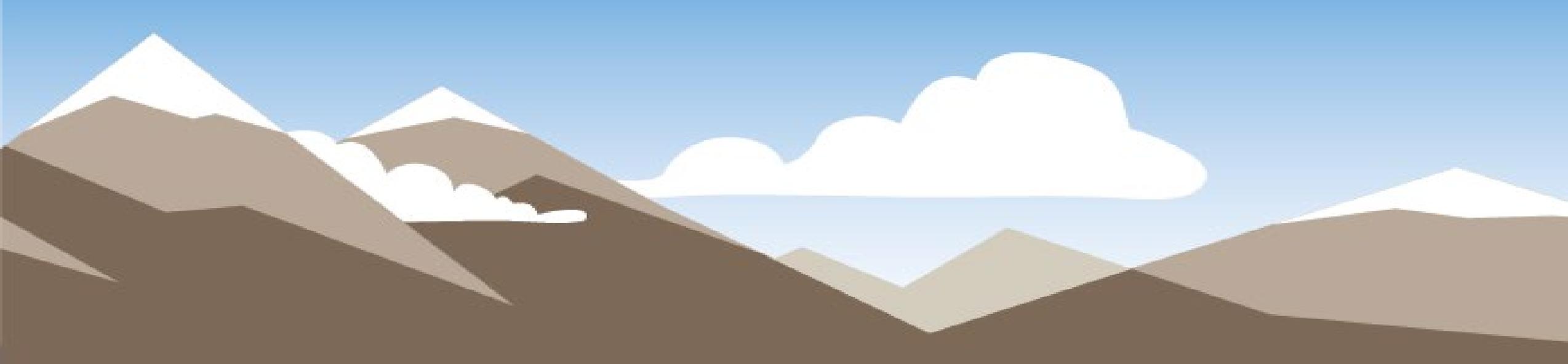
Groundwater Rights Holders and Exempt Groundwater Rights Holders Should Be Automatic Parties

Response

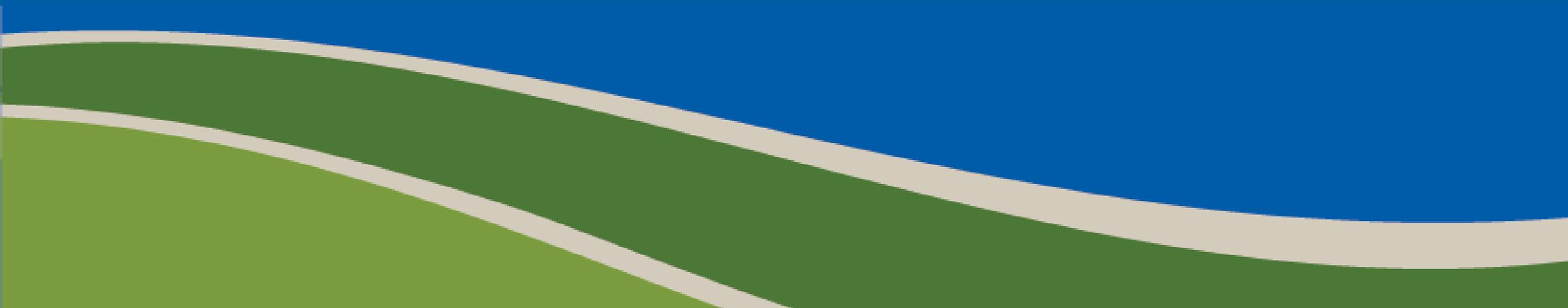
The change was made to ensure an uninterrupted contested case process.

Concern – Substantial Evidentiary Standard Draft Groundwater Report

Concern	Response
<p>The report requirement that been added to OAR 690-010-0130(4)(C) create substantive and procedural requirements that will hamper the CGWA process.</p>	<p>The department believes the report as proposed provide a transparent, consistent, and defensible process for establishing a CGWA</p>



Alternatives



Alternatives

1. Adopt the final proposed rules contained in Attachment 5
2. Adopt modified final proposed rules
3. Not adopt rules and request the Department further evaluate issue

Recommendations: The Acting Director recommends alternative 2, adopting modified final proposed rules **striking section 690-010-0130-(3)(d)**, **changing 690-010-0190(2) to:** “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,” and **changing 690-010-0190(6) to 690-010-0190(5)**

Alternative 2 Recommendations

The Department recommends removing the language in 690-010-0130(3)(d):

- 690-010-0130(3)(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.

Alternative 2 Recommendations

We recommend aligning the language in 690-010-0190(2) with the language in 690-010-0180(2)(e):

- 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

Alternative 2 Recommendations

The Department Recommends correcting the section numbering error for:

690-010-0190(6) to 690-010-0190(5)

Summary Slide

- Four RAC meetings
- Fifty-day public comment period
 - Two extensions to the public comment period
 - 40 –written comments
 - 102 – form letter comments
 - 21 – oral comments
- We recommend alternative II

OREGON



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DEPARTMENT

Thank You