WATER LEAGUE

Water League engages the public in water stewardship.

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Water League resubmits our January 8, 2025, comments to the *Proposed Guidance for Voluntary Agreements Among Groundwater Users from the Same Groundwater Reservoir*. Our comments have been revised to include new information since OWRD extended the comment period from January 8 to February 5, 2025. We acknowledge that our resubmission is after the most recent requested date; however, there have been three deadlines, none of which are related to a formal comment period that legally requires a cutoff date. The information we present is for the benefit of the overall process. As always, we appreciate the opportunity to share our thoughts.

Thank you,

Christopher Hall
Executive Director

Comments related to the *Proposed Guidance for Voluntary Agreements Among Groundwater Users from the Same Groundwater Reservoir*

and

ORS 537.745 *Voluntary agreements among groundwater users from same reservoir*

By Christopher Hall, Water League

Summary

Herein, Water League comments on Voluntary Agreements (VAs) authorized by ORS 537.745. Our comments are organized into five sections and provide extensive contextual information related to our views on the *Proposed Guidance for Voluntary Agreements Among Groundwater Users from the Same Groundwater Reservoir*, which may form the basis for rulemaking.

1. Introduction
2. Concerns About How Voluntary Agreements Have Been Envisioned, Discussed, and Promoted
3. Privileges and Immunities Called "Flexibility" and "Carrots"
4. Review of the *Proposed Guidance for Voluntary Agreements Among Groundwater Users from the Same Groundwater Reservoir*
5. Conclusion

tl;dr – The Voluntary Agreement statute under ORS 537.745 carves out a special place for irrigators to comply with the law freely, and in return for this concession, beneficiaries seek exclusive privileges and immunities that shield them from the law.

Introduction

The Oregon Water Resources Commission (WRC), through its designation of powers to the Oregon Water Resources Department (OWRD), has concluded that its implementation of water laws in the normal course of business has been insufficient to prevent the impairment, if not destruction, of the water sources in the Harney Basin. The WRC has concluded that it is past time to take an extra measure permitted by law, which is to designate a Critical Groundwater Area (CGWA) to stop the harm resulting from over-pumping groundwater reservoirs. OWRD reported to the WRC on September 13, 2024:

> For the Harney Basin, the Department is proposing to not define reasonably stable, as some areas of the basin are showing more than 50 feet of decline. Instead, the Department is framing the discussion about goals for future groundwater level trends in the Harney Basin as the target water-level trend. The Department's goal is to stabilize groundwater levels at a target

water-level trend of zero decline for the entire designated CGWA.[1]

The logic of "proposing to not define reasonably stable" is self-evident since the groundwater declines are already far beyond the lawful requirement of being reasonably stable as ORS 537.525(7) mandates. In many areas throughout the Harney Basin, there are no "reasonably stable groundwater levels."

The designation of a CGWA and the subsequent imposition of Corrective Control Orders to curtail water use require updates to OAR 690-512 *Malheur Lake Basin Program* and a Contested Case hearing. This process, referred to as *Division 512 rulemaking*, must comply with:

- ORS 537.730 to 537.742 *The CGWA Statutes* and 537.780 *Powers of Water Resources Commission; rules; limitations on authority*;
- OAR 690-010 *Appropriation and Use of Groundwater*;
- ORS 183 *Administrative Procedures Act* (APA).

The OWRD has convened a Rules Advisory Committee (RAC) to incorporate the views of the irrigators and others impacted by and concerned about over-pumping groundwater reservoirs. All meetings are open to the public. The full and final decision-making process that will result in revised rules is the responsibility of the WRC acting on the recommendations of OWRD staff. According to the APA, parties to the Contested Case may appeal the WRC order to the Oregon Court of Appeals.

The CGWA process is fraught with tension because water equates to money and irrigators use water for income.

At the December 13, 2024, WRC meeting, Mark Owens, who identified himself as a farmer and state representative of District 60, addressed the WRC during public comment following the staff presentation on the progress of the Division 512 rulemaking process. Rep. Owens is an irrigator in the Crane subarea of the Harney Basin, whose pivots and wells are located on top of some of the steepest cones of depression in the proposed CGWA. While not formally selected by irrigators in the region to be their leader on the RAC, he often fills the role of speaking for his constituents. Pointing to a CGWA map of the Harney Basin, Rep. Owens discussed OWRD draft proposals and stated in his public comment to the WRC [**emphasis added**]:

> Big red areas – [show] decline. Subareas in the 15 that the department recommends for curtailment – this area here, these two areas here. None of the rest does the department recommend curtailment in. The department recommended no curtailment in any of these areas [and] none of these areas.
>
> Are these people in these areas going to litigate the department? Can we keep those 15 subarea approaches? No doubt. Are we going to get away from litigation at all through this process? No, we are not. **I said this before, the decisions that you guys make in adopting the rules that come forward: is a majority of the community going to support you, or is the majority of the community going to leave, going to litigate you? What it comes down to.**[2]

The lawsuit threats appear unrelated to the Contested Case hearing before an Administrative Law Judge

[1] OWRD Memorandum to the WRC – Agenda item "D", September 13, 2024. [1]
[2] Representative Mark Owens, irrigator from Crane, OR, public comment on agenda item "D" before the WRC on December 13, 2024.

and to bringing the Contested Case before the Oregon Court of Appeals, as permitted in statute. Rep. Owens' suggests that irrigators are already planning to sue the OWRD and WRC far in advance of the completion of the rulemaking process and frames the WRC's forthcoming decisions as a binary choice: commissioners can either choose now to gain community support or face litigation later.

For decades the powerful irrigation lobby has pressured elected and appointed state officials, but rarely has any of the activity been documented because so much of it occurs out of public view. This paper highlights the small portion of the influence the public can see to provide insight on the prospective formation of Voluntary Agreements (VAs), which are the proposed alternative to state regulatory action that many irrigator RAC members prefer.

The OWRD selected the Harney Basin as the first CGWA designation in 35 years because the cones of depression resulting from over-pumping are precipitous. The excessively declining groundwater levels pose unreasonable risks to groundwater dependent ecosystems, to human water users in the basin, and most of all, to future humans, flora, and fauna who would be denied access to water by the unsustainable over-pumping that has been ongoing for over 30 years.[3] The political pressure that stalled revisions to the Division 10 rules for HB 2192 (1991) for three decades has now shifted to the Harney Basin Division 512 rulemaking process as officials revise the rules to stop further groundwater declines. Notably, OWRD staff manage water use under duress. The force motivating irrigators to mine every last bit of value from the groundwater reservoirs must be met with an equal force by government agencies to impose restrictions and curtailments to stop the tragic events from worsening or becoming irreversible (e.g., persistent excessive groundwater declines and subsidence, respectively).

To varying degrees, every irrigator in the Harney Basin is mining groundwater; as a result, the region is the quintessential example of *The Tragedy of the Commons*.[4] Oregon laws require that water be used for the highest economic purposes,[5] which has the unintended side-effect of incentivizing mining. Just like a gold miner working their claim, irrigators will mine water until it is gone or too expensive to extract. The Tragedy of the Commons results when people scramble to extract the value of the commons and are powerless to self-regulate. That individuals own the land where irrigation occurs is of no matter because private property ownership does not align with groundwater reservoir boundaries, which span far and wide across many artificially drawn property lines. Furthermore, the water is not

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[3] Jaeger, W. K., Antle, J., Gingerich, S. B., & Bigelow, D. (2024). Advancing sustainable groundwater management with a hydro‐economic system model: Investigations in the Harney Basin, Oregon. Water Resources Research, 60, e2023WR036972. https://doi.org/10.1029/2023WR036972 [4]. ("Prior to 1990, groundwater recharge was sufficient to maintain a net positive gain in groundwater storage despite the groundwater withdrawal.")

[4] Glennon, Robert. *Water Follies: Groundwater Pumping and the Fate of America's Fresh Waters*. Island Press, 2002. [209-224]. (Glennon makes some general comments about the Tragedy of the Commons and the problems of over-pumping groundwater – e.g., "The hidden tragedy and irremediable fact is that groundwater pumping that has already occurred will cause environmental damage in the future," but in his chapter discussing the Tragedy of the Commons, he repeats the facile claim that rational humans will protect their property because they own it. People will only protect their property to the extent they get value from it; whether they own it is secondary. Once they have extracted the value from anything (whether they have a usufructuary or possessory claim), that thing becomes waste, hence all the garbage people throw away in landfills and exhausted mining claims. Some value is more persistent than other forms of value, hence the difference between a single use item and a durable good. Given the timescales it took for groundwater to percolate (5,000 to 35,000 years) and the decades to generations required for recovery following regulatory action, groundwater use and the many wells in the Harney Basin resemble single use items. The tragedy is in burning through the public's groundwater reservoirs in the High Desert and thinking that land ownership and having vested water right certificates will somehow stop the mining through rational self-interest.)

[5] 536.310 *Purposes and policies to be considered in formulating state water resources program.* ("(2) It is in the public interest that integration and coordination of uses of water and augmentation of existing supplies for all beneficial purposes be achieved for the maximum economic development thereof for the benefit of the state as a whole.")

privately owned; it belongs to the public, 98.5% of which do not hold water rights. That a tiny minority would plunder the commons, by right of the state, is a serious affront to the constitutional order. The WRC and OWRD have sought to correct this problem by implementing the CGWA statutes.

Because the irrigators will not stop pumping until they reach the Economic Pumping Level,[6] the state must step in to impose regulations.[7] As distasteful as it sounds in a *free nation*, the state must stop the irrigators from harming groundwater reservoirs and others because the irrigators are powerless to stop the pumping themselves.[8] Oregon law requires irrigators holding certain water rights to measure the groundwater levels in their wells by March 1 of each year and to halt pumping from wells that show declines beyond a certain point. Irrigators have refused to stop pumping on their own accord as required by law (some even won't measure the groundwater levels), and when forced to do so by the state, they press officials to rescind those orders.[9]

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[6] Oregon Secretary of State, Administrative Rules, Chapter 690 Division 8 Statutory Groundwater Terms 690-008-0001(6) Definition and Policy Statements. (*"Economic Pumping Level" means the level below land surface at which the per-acre cost of pumping equals 70 percent of the net increase in annual per-acre value derived by irrigating.*" In common parlance, this means that irrigators will not stop pumping until they reach the depth at which the cost of pumping groundwater for irrigation becomes prohibitively expensive compared to the increased crop value the irrigation unlocks. The inexorably declining groundwater trends in the Harney Basin demonstrate the inevitability of the Economic Pumping Level.)

[7] OWRD, Groundwater Use and Regulation, Letter regulating off wells with decline conditions, December 30, 2024. (This recent letter (one of 17) demonstrates that, by law, the water user should have discontinued use of Wells 1-3 by 2017 and Well 4 by 2019, but they kept on pumping the wells beyond the point of the conditions set by their water right. Therefore, OWRD had to step in and issue a Final Order other than contested case to force the water user from over-pumping the groundwater reservoir. From the letter: "*The Oregon Water Resources Department (Department) conditioned the issuance of the above listed permits with decline conditions that assure groundwater use under the water rights is within the capacity of the available source and so is consistent with the protection of the public welfare, safety and health. The conditions require the holder to measure and report static water levels and to discontinue use of or reduce the rate or volume of withdrawal from wells, if annual water level measurements reveal water level declines at specific levels within specific time periods as identified in the right(s) … Rules of the Commission include OAR 690-250-0050(1) which authorizes the watermaster to take corrective action when water use is inconsistent with the terms of the water right and is therefore unlawful.*" The law requires irrigators to self-regulate as a condition of accepting water rights for which they applied. The failure to comply with the law is innate to the conflict of interest irrigators have when pumping water is pumping money. The business model simulates printing currency precisely because groundwater is a scarce commodity that irrigators mine.)

[8] OWRD, Community Meeting on Groundwater Level Permit Conditions in Burns, Harney County Community Center, February 10, 2025. (The meeting was in response to the need to comply with ORS 537.720 *Violation of terms of law or permit or certificate; action by Water Resources Commission*, which states that [**emphasis added**]: "*Whenever, after notice to* ***and opportunity to be heard by such holder****, the Water Resources Commission finds that the holder of any permit or certificate of registration issued under ORS 537.505 to 537.795 and 537.992 is willfully violating any provision of the permit or certificate of registration or any provision of ORS 537.505 to 537.795 and 537.992, the commission may cancel or suspend the permit or certificate of registration or impose conditions on the future use thereof to prevent such violation.*" Irrigators applied significant pressure and pushback against OWRD. During the February 10, 2025, community meeting to discuss the concerns publicly, an irrigator launched into a 25-minute criticism of the enforcement action, rudely mischaracterizing OWRD's intent and motives. The irrigator used invective (e.g., "*...chopping the head off of individuals cold turkey like you are,*" and "*You go chopping everybody up all at once like that and you, it's gonna devastate this town*") to blame OWRD for requiring compliance with the water right decline conditions, which are the sole legal responsibilities of the irrigators. The diatribe exemplifies the belligerent extent irrigators, caught in the grips of the Tragedy of the Commons, will go to resist voluntary efforts to self-regulate their water use, whether under ORS 537.745, or otherwise.)

[9] OWRD, Division 512 Rulemaking, Rules Advisory Committee meeting, January 22, 2025. [at 0:0:00 to 0:5:37] (Irrigator outrage at receiving the 17 "Final Order other than contested case" shut-off letters necessitated the unusual circumstance of OWRD holding a brief unrelated discussion before the RAC meeting commenced: East Region Manager, Jason Spriet, was directed to issue shut-off orders in December 2024, to 17 water right holders on wells that have exceeded their decline conditions. He explains that OWRD has received complaints from the water users who received the shutoff orders and that OWRD will reissue new orders countermanding the first set. The new orders will state that all impacted water users may continue pumping at least until 2026 when OWRD will attempt for a second time to issue shutoff orders. Given the number of wells and the varied times when those decline conditions were exceeded over the years, if the water right holders had shut off those wells, as required by law, then those voluntary shutoffs would have occurred in a phased time period as opposed to

Nevertheless, irrigators wish to be left alone and are pressing for alternative solutions to the enforcement of CGWA statutes by attempting to implement the VAs, which we consider infeasible as proposed.

The current struggle in RAC meetings between irrigators and OWRD staff has ebbed and flowed (at times the struggle has been discussed at WRC meetings).[10] Irrigators on the RAC escalate tensions because they fear regulatory restrictions on groundwater access more than the inevitable loss of groundwater due to over-pumping. (This fear drives the interest to form VAs.) Without the OWRD designation of a CGWA, irrigators would eventually extract as much value from the groundwater resources as possible because every gallon of water equals money.[11] There is no way irrigators can continue the status quo (over-pumping) and preserve their way of life because groundwater levels are unstable and irrigators are pumping themselves out of business. In this context, the only way VAs could conceivably work is if there is a bulwark of credible regulatory action.

There is a lot of cognitive dissonance and confusion because irrigators want the water sources to last forever since that water is the source of their income. To this extent, conservation through efficiencies in irrigation technology is more about extending the time left to irrigate than preserving water for non-irrigation uses (e.g., others).

Below, we discuss the serious problems associated with the VA statute and how irrigators have proposed using it to minimize the impacts on their water-pumping operations. Despite the flaws inherent in voluntary approaches to self-control, we believe there are solutions to the vexing problems currently preventing VAs from working. Officials must prevent unequal protection under the laws of the state; OWRD must write administrative rules to accompany the statute before the WRC approves VAs; and water right transfers under ORS 540.520 and 540.523 must accompany VAs.

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all at once as when the OWRD had to recently step in and enforce the law. The irrigators have known for many years that they should have already stopped pumping from those wells. Claiming to be caught by surprise by the December 2024 OWRD order to stop pumping their wells points to a tacit agreement between the OWRD and the irrigators to ignore the law. Lawmaker and Harney Basin irrigator, Representative Mark Owens, argued that OWRD exhibited "bad governance,"[at 0:4:50] by sending out the shutoff letters. We are incredulous at such an allegation and hold that it is not OWRD ordering compliance with the law that is wrong; rather, it is in all the years irrigators did not comply with the law that is wrong. That OWRD did not require compliance with the law until recently could be viewed as mismanagement. This interchange before the start of the RAC exemplifies 1) the futility of Voluntary Agreements as currently envisioned by irrigators in the Harney Basin and 2) a reasonable lack of confidence in OWRD's proposed oversight of VAs. We suggest the Oregon Department of Justice oversee compliance with VAs and enforce ORS 537.745 in coordination with OWRD.)

[10] We recommend reviewing the recordings of the Division 512 RAC meetings, with particular emphasis on the March 6, 2024 RAC. Also, the appeals and amends made to the WRC at the March 21, 2024, meeting here, here, and here highlight the ordeal.

[11] Christopher Hall, *No, We're Not There Yet: Modernizing the Conventional Wisdom*, Water League, July 17, 2024 [25]. (In 2020, alfalfa irrigators produced 4.6 tons/ acre * $205/ ton = $943/ acre-year. We use 2.5 acre-feet irrigation water use/ acre-year as our median irrigation requirement. 325,581 gal/ = 1 acre-foot. 813,953 total gallons of irrigation water used per acre. The value alfalfa unlocks = $0.00116, or roughly 1/9th of one cent per gallon. We understand the price will vary some, from one irrigator to the next; however, we hold that each irrigator could reasonably estimate the value of each gallon they pump yearly. See: Oregon's Agricultural Statistics and Directory. p.41.)

Concerns About How Voluntary Agreements Are Envisioned, Discussed, and Promoted

Oregon has increasingly acknowledged the tension between minority water users' interests to pump water for financial gain and the greater public interest in the long-term sustainable management of their water. Significant developments include 1) the creation of the water code in 1909 regulating surface water, 2) the expansion of that code to regulate groundwater in the arid region east of the Cascade Mountains in 1927, and 3) the application of that groundwater regime over the entire state in the 1955 Groundwater Act. In the 1955 Groundwater Act (HB 26),[12] legislators included ORS 537.745 *Voluntary Agreements* in an attempt to provide for a reasonable middle-ground between under-regulated water mining and the imposition of Corrective Control Orders that curtail water use under both ORS 537.742 *Contested case proceeding to limit use of ground water in critical groundwater area* and OAR 690-0010 *Appropriation and Use of Groundwater*.

ORS 537.745 states that a VA approved by the WRC "shall control in lieu of a formal order or rule of the commission under ORS 537.505 to 537.795 and 537.992." This provision permits VAs to function parallel to those statutes. But in doing so, ORS 537.745 creates two separate classes of water users: one that benefits from perks (e.g., "flexibility" and "carrots" discussed in section 3 below) that VAs might offer, and the other class that does not. This dual-class system may not be constitutional under Oregon's equal protection clause. Article 1, Section 20, states:

> Equality of privileges and immunities of citizens. No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.

ORS 537.745 states that VAs must be "consistent with the intent, purposes and requirements of" all groundwater-related sections of Chapter 537, in particular, with the CGWA statutes. This legal parity requirement creates a conundrum: the law does not permit VAs to depart from the statutes; yet somehow, VAs are supposed to be more desirable than regulatory action.

During the Div 512 RAC, irrigators have consistently pushed back against the designation of a CGWA. Their most recent push is to slow down the timeline and geographically spread out water use reductions so more irrigators who are not facing severe curtailments shoulder the burden of those who do face substantial reductions. The OWRD has acknowledged these dual time and space considerations on behalf of the RAC members. OWRD's staff report for the WRC meeting on September 13, 2024, states:

> The Department's goal for the Harney Basin is to stabilize groundwater level declines by achieving a target water-level trend of zero decline. This goal consists of three aspects: the target water-level trend, the spatial extent to meet that goal, and the timeline to achieve stabilized groundwater levels. [. . .] The flexibility the community has for achieving the target water-level trend is around defining the spatial extent of the goal and the timing to achieve stabilized groundwater levels.[13]

In response to this regulatory regime, and premised on minimizing economic losses to the irrigators, most RAC members are pressing both temporal and spatial initiatives. First, they seek a 30-year glide

[12] Oregon State Archives, HB 26 Engrossed, Section 31 [73].
[13] OWRD Memorandum to the WRC – Agenda item "D", September 13, 2024. [1-2]

path to phase in water use curtailments with a 60-year horizon to reach OWRD's target water-level trend of zero decline. Second, they have gerrymandered OWRD's map of the Greater Harney Valley Groundwater Area of Concern (GHVGAC) to encompass working wells into regions where the most stringent water use curtailments would occur to make VAs feasible.

First, we discuss the spatial layout:

Over several iterations, irrigators rearranged OWRD's proposal for 15 small subareas, which target water use curtailments over the most severe cones of depression, to eventually settle on a map with 6 large subareas, the result of which has two outcomes:

1) Irrigators who would not have experienced water use curtailments in the 15 subarea map will experience water use curtailments in a 6 subarea version.[14] In the spatial version with 15 smaller subareas, about one-third of the areas sit atop severe cones of depression; OWRD refers to these as the high-priority subareas. Most of those irrigators will experience water use curtailments. However, by grouping the 15 smaller subareas into 6 larger areas, all irrigators in each subarea must conform to pumpage restrictions necessary to stabilize the highest priority areas sitting atop the most severe cones of depression. Irrigators with more sustainable levels of water face stricter controls to support the areas within their enlarged subarea that are experiencing more severe water level declines. There is no better depiction of *misery loves company*.

Looking at this scenario through the lens of VAs: if the irrigators over the cones of depression can benefit from VAs to the effect that they keep pumping those cones deeper by moving around seniority and Places of Use (POU), then surrounding neighbors whose groundwater levels are not so severe will be forced to make up the difference to the extent they are hydraulically connected to those deep cones of depression. This will be considered unfair, especially by those left out of VAs.

We note that this hydrologic reality simulates a water right transfer: by lumping smaller subareas together to form larger ones, those subareas that were distinct in the OWRD 15 subarea version are now forced to give up water to their neighboring subareas that sit atop steep cones of depression in order for the larger lumped-together region to comply with Permissible Total Withdrawals (PTW) that enable achievement of OWRD's target water-level trend of zero decline in groundwater levels.

2) Irrigators in subareas with the most severe groundwater declines can only hope to enter VAs if the geographic region they are in is large enough to encompass irrigators with better prospects. For VAs to work, there has to be a broader field upon which to negotiate – literally, a bigger geographic area from which to draw all comers to the negotiating table. This is the primary factor in pressing for the larger 6 subarea proposal. Under the 15 subarea proposal, the irrigators responsible for the steepest cones of depression have no one to negotiate with but themselves, which is like trying to negotiate a financial deal with no funds. If, however, a 6 subarea geographic map shows that further-flung neighbors must give up water to these larger subareas to reach OWRD's target water-level trend of zero decline in groundwater levels, then all of a sudden, the worst off can force others to the negotiating table.

It is reasonable to conclude that the equity concerns noted above in #1 are a side-effect of irrigators in the worst subareas wanting to gerrymander large enough areas to form VAs. To be clear, the winners under this scenario are currently the folks who have the most to lose and have already lost much due to over-pumping the groundwater reservoirs: they wish to externalize their potential losses on their

[14] Darrick E. Boschmann, Response to RAC request: "sub-basin" PTW for the Harney Basin CGWA, 02/26/2024. [7-8]

neighbors to create large enough areas to form VAs that offer them benefits others may not enjoy.

There is no debate that OWRD's target water-level trend of zero decline in groundwater levels can be achieved under the 6 or 15 subarea model scenarios (the main factor is the timeline given to arrive at the target).[15] However, what is yet to be determined is who will give up how much water, which is a political decision based on the private sector deal-making around the VAs and the political pressure put on state officials.

To reiterate, the 6 and 15 subarea modeling outcomes are close in aggregate but the results in detail are disparate: some irrigators who would not have to experience water use curtailments under the 15 subarea scheme will see water use reductions under the 6 subarea plan. The purpose of the 6 subarea plan is to protect the irrigators with the worst prospects so they can hope to evade regulatory actions by shielding themselves in VAs. That such a scheme comes at the expense of other irrigators begs the question of whether it is constitutional.

OWRD explains in the conclusion to the "Summary of Model Results Presented at RAC 11":

> What size of subareas should be used to manage the basin? Considerations for this question include how subarea size affects the ability to form voluntary agreements and water right transfers and how important it is to strictly follow prior appropriation.[16]

When asked by this author, during a Harney Basin CGWA Discussion Group on October 7, 2024, why irrigator RAC members would prefer fewer subareas that are larger than the OWRD recommendation, two moderators and one RAC member offered their thoughts [**emphasis added**]:

> Bobby Cochran, moderator: "...the subareas can be defined both hydrologically and geomorphologically, **and also by management**.
>
> "...running the USGS model, that **we can play with different variables and inputs to just kind of see what that might mean for overall stabilization and groundwater management implication**.
>
> Harmony Burright, moderator: "...are we pursuing targeted reductions in these areas of decline to see changes in water levels more rapidly in those areas, **or, are we really trying to achieve a kind of a new equilibrium in a larger subarea**?"
>
> "...what are the main kind of recharge areas – how are each of these subareas primarily recharged...and...**how people associate themselves with those various recharge areas.**
>
> "...**looking at potential voluntary agreements, how are people likely to organize themselves around kind of a shared vision and outcomes for the subarea.**"
>
> Rep. Mark Owens, RAC member: "...when the department put out their 15 subareas, it looked like, **in our opinion, that some subareas might be being restricted too much, while some**

[15] OWRD, RAC 11, Optimization of Management Scenarios, November 13, 2024. [Slide #77] (On this slide, annotations accompanying the graph include: "Considering a larger percent of wells increases curtailment. Using more subareas can reduce overall curtailment." The difference in this one optimization run shows how close the 6 and 15 subarea schemes compare in aggregate.)
[16] OWRD, Summary of Model Results Presented at RAC 11, November 13, 2024. [16]

> **might not be being restricted**...and [we're] wondering if a 30% or 35% reduction in that whole area would reach stabilization faster or more uniformly than the 15 subarea approach...**maybe a more equal distribution of reduction could meet a goal.**"[17]

By promoting the opinion that some areas are being restricted too much while others are not restricted enough, the idea of a "more equal distribution of reduction," appears to support a shift of the burden from areas with steep cones of depression to areas with slower declines. (This ideology aligns with redistribution schemes typical of *Socialism*.)

This Discussion Group was held six weeks before OWRD released the model results on November 23, 2024, showing how similar the PTWs are for both the 15 subarea and 6 subarea maps, when the phase-in period and timeline to the target water-level trend of zero decline are controlled for. Therefore, the speculation that the 6 subarea approach would reduce groundwater levels faster has been resolved as a "no" and the only reason to further push for that scheme is to assist irrigators sitting atop severe cones of depression to externalize their losses onto their neighbors who are not so bad off.

A concise explanation for drawing larger subareas came from OWRD staff during the December 13, 2024, WRC meeting during agenda item "D" Harney Basin Groundwater Update, as articulated by Tim Seymour, staff hydrologist [**emphasis added**]:

> "And, with more subareas, there's potentially less flexibility for Voluntary Agreements, or, I guess you could say it a different way, **there's less potential participants in a voluntary agreement…for limiting the number of Voluntary Agreements to within a subarea.**"[18]

A constitutional crisis is likely to occur under the proposed regime required to make VAs functional for the most at-risk irrigators whose pumps are located on top of the most severe cones of depression. Putting ORS 537.735(1)(a) and OAR 690-010-0130(3) to work for a few irrigators by harming other irrigators is a *de facto* use of the law to benefit some at the expense of others. This is not a justified use of OAR 690-010-0130(3), which states [**emphasis added**]:

> 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 subareas wholly contained within the designated critical groundwater area must be defined to allow for implementation of corrective control provisions, these subarea boundaries will also be reasonably inferred or ascertained as in 690-010-0130 (3)(a) or (3)(b).

The rule permits defining subareas to implement *corrective control provisions*, which are regulatory actions, not for implementing *VAs under ORS 537.745*. **This distinction is important.** There is much

[17] Oregon Consensus, Harney Groundwater Discussion Group, October 7, 2024. [at 7:25 to 11:40]
[18] Tim Seymour, OWRD Hydrologist presentation to the WRC – Agenda item "D", December 13, 2024.

ado about gerrymandering the Harney Basin CGWA subarea maps to make VAs work because OWRD has been clear that the geographic limits of VAs will be contained within those subareas, however they are configured. ORS 537.745 only permits "voluntary agreements among groundwater users from the same groundwater reservoir;" therefore, the gerrymandering of the Harney Basin subareas is effectively reverse engineering the presence of groundwater reservoirs as a legal fiction under 0130(3)(b) and (c) rules. This machination is not how the CGWA statutes or rules "envision" water management of CGWAs, which are the most sensitive and at-risk hydrologic regions in the state. We are incredulous that irrigators pumping from the most severely impaired groundwater reservoirs would use 0130(3)(b) and (c) to aggrandize themselves by harming their neighbors they would administratively map-in.

The OWRD hydrologists explain that:

> Grouping together both high priority subareas and lower priority subareas for the "sub-basin" approach and distributing pumpage reductions across these larger areas will require significantly more pumpage reductions in the lower priority subareas to achieve stable groundwater levels in the high priority subareas. The PTW for the entire "sub-basin" will be constrained by the pumpage reductions needed to achieve stable groundwater levels in those area[s] with the most significant declines.[19]

To reiterate, the decision to select the 6 subarea map over the more targeted 15 subarea map would be a *de facto* regime of involuntary water right transfers. Choosing to curtail water in low-priority subareas that do not experience severe declines in groundwater levels as their neighbors in high-priority subareas experience, the WRC would be effectively transferring water from the more stable low-priority subareas to the less stable high-priority subareas. The material results would be akin to forced water right transfers from water right certificates held by irrigators in low-priority subareas to water right certificates held by irrigators in high-priority subareas. The impetus for the 6 subarea map is to serve proponents' formation of VAs and externalize their water use reductions onto others. That they would use OAR 690-010-0130(3)(b) and (c) to achieve their goals depicts a clear and unambiguous use of the law to grant a class of citizens privileges and immunities, which, upon the same terms, do not equally apply to all citizen irrigators.

Second, we discuss the temporal elements and OWRD's target water-level trend of zero decline:

OWRD has created several computer models (as previously noted) that show the results of immediate and phased-in multigenerational timelines with 30-year phase-ins and 60-year targets to reach water-level trends of zero decline. The timelines are so long, they compound upon and worsen the effects of the 30-year freeze following the passage of HB 2192 in 1991, which revised the CGWA statutes. That bill had near unanimous legislative support to streamline the CGWA under the Administrative Procedures Act (APA), with hopes of *eliminating the stalling tactics* inherent to the struggle between the powerful irrigation industry and state regulators managing the public water resource. When OWRD Director, Bill Young, and legislators passed HB 2192, the urgency was palpable. Had they known 30 years would pass before the necessary Division 10 administrative rules would be written in 2023, they'd likely have been outraged.[20]

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[19] Boschmann, Response to RAC request. [6]

[20] Bill Young, OWRD Director, Testimony Before the Joint Committee on Water Policy, *HB 2192: Critical Groundwater Areas*, January 29, 1991. [1-2] (The bill passed without opposition in the House and 26-2-2 in the Senate [12, 15]. The stalled 30-year period between 1992, when Division 10 rules should have been written, until 2022, when they began in earnest, has been officially declared "the result of a lack of staff." If the claim that staff were not available for 30 years was true, then the executive leadership decisions not to prioritize the administrative rulemaking for Division 10 rules reflects the

The model results show that the most important factor leading to stable groundwater levels is the time taken to implement water use curtailments and the volume of water curtailed. Since the spatial configuration to make larger subareas aids prospective parties to VAs, the most indispensable element to control *among all irrigator RAC members* is the time and volume of water use reductions. To this extent, VA proponents want parity with irrigators who do not enter VAs as a matter of equity. So, if some irrigators enter VAs before other irrigators finish their appeals court challenges to the contested case hearings, VA parties don't want to start water use reductions until all others do.

But proponents argue on behalf of VAs during RAC meetings by saying that they can begin slowing or stopping groundwater declines immediately. How does this eagerness square with their desire to work within the 30-year phase-in and 60-year horizon once regulatory orders kick in for other irrigators who slogged through appeals court challenges to push back against regulatory action? It doesn't; rather, it resembles the stall tactics used by proponents in California basins. For some perspective on this issue, we refer to the 2024 policy paper, *Five Guiding Principles for Effective Voluntary Agreements*, which addresses the problems associated with irrigators using VAs for the express purpose of stalling the effects of regulatory action:

> One of the oft-cited benefits of VAs is that they can achieve desired outcomes more quickly than regulatory requirements alone. However, the actual pace of VA development in the Bay-Delta watershed—where, as for many other watersheds, pace matters acutely—has not lived up to this promise. When ecosystems are buckling under severe hydrograph modification, climate change, and a barrage of other stressors, delays in establishing and implementing adequate flow requirements risk permanent ecosystem harm, including extinction. In effect, however well-intended, the protracted VA negotiations and related State Water Board processes have functioned as long-term waivers of the increased regulatory protections the Board and others have long agreed are necessary.[21]

The authors discuss at length how VAs function as diversions away from regulatory action. The extent of the subterfuge in California, as it relates to stalling action in the Bay-Delta watershed, is near universal. Notably, VA proponents wish to incorporate adaptive management processes that could require elaborate beta-testing scenarios, which are sequential and time-consuming. Indeed, prolonged measures of some adaptive management schemes could be labyrinthian.

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pressure over several administrations at OWRD following Bill Young, who had pressed hard for HB 2192. His immediate successor, Martha Pagel took no action over eight years. Notably, The Capital Press reported on the OWRD Director: "*Nicknamed the "water queen," Pagel was considered a highly capable administrator of the agency that she led from 1992 to 2000 and a ferocious advocate for irrigators as a private lawyer.*" Pagel was lauded as "*a skilled 'champion' for agricultural water users,*" and "*'She was on the side of the farmers, on the side of irrigators…'" according to state Sen. Betsy Johnson, D-Scappoose*." The article continues: "*In recent years, Pagel successfully argued for pending water rights applications to remain viable in Oregon's Harney Basin even as new drilling was otherwise being shut down by regulators, Howard said. She also helped fight off a proposal in the Legislature to require more extensive water measuring by irrigators by explaining why the timing was wrong for such a policy, Howard said.*" Paul Cleary, Pagel's immediate successor, did not take action, nor did Phil Ward, who was Executive Vice President of the Oregon Farm Bureau and Director of the ODA. OWRD Directors spun through the revolving door repeatedly, going from the industry they were to regulate to serving in those industries. Questions about why 30 years passed from 1992 to 2022 and no Division 10 rules were written to enable implementation of the CGWA statutes must acknowledge these political facts in order to understand the political pressure pushing back against forthcoming regulatory action under the Division 512 rulemaking process in the Harney Basin and the desire to seek shelter inside the Voluntary Agreements statute.

[21] Felicia Marcus, Nell Green Nylen, Dave Owen, Michael Kiparsky, *Five Guiding Principles for Effective Voluntary Agreements: A Case Study on VAs for Water and Habitat in California's Bay-Delta Watershed*, The Center for Law, Energy & the Environment, UC Berkeley Law, January 2024. [25]

Privileges and Immunities Called "Flexibility" and "Carrots"

The more a VA departs from the regulatory arm of the law, the more likely irrigators will enjoy and comply with the VA provisions. With this axiom in mind, and the contradictory requirement that VAs must be "consistent with the intent, purposes and requirements of" the groundwater sections of Chapter 537, we now review the terms *flexibility* and *carrots*. VA proponents and OWRD staff use these two terms to refer to the benefits and incentives, respectively, that VAs can offer irrigators.

The more benefits parties to VAs enjoy, which separate their experience from irrigators who are left out of VAs, the more unconstitutional the implementation of ORS 537.745 becomes. It is expressly the provision in ORS 537.745 that VAs must be "consistent with the intent, purposes and requirements of" the groundwater sections of Chapter 537 that both prevents the statute from running afoul of the equal protection clause in the Oregon Constitution and makes the proposed benefits of VAs difficult to comprehend within a legal framework.

Similar to California, Oregon incentivizes VAs through the threat of regulatory action.[22] This sentiment is the basis for all diplomacy. Agreements must be backed by the use of force, whether by the law, regulation, order, or legal precedent. Every VA is, by definition, an alternative to regulatory action to avoid, by degrees, the concrete implementation and enforcement of the law and administrative rules of the state. Ostensibly, every VA is an effort by those, whose actions would be regulated, to find an easier and softer way to mimic the effects of the law.

The authors of *Five Guiding Principles* state that:

> Public discourse often misleadingly describes a false choice between regulations or VAs. It is more accurate to say that, to enable VAs, there must be regulatory requirements that allow for the possibility of alternative implementation pathways.[23]

Such sentiment is welcome but must be tempered by fairness to the extent the means (e.g., "alternative implementation pathways") create a premiere class of citizen irrigators who reduce their water use not only because they have to as the regulated irrigators must, but because they also receive exclusive benefits that unfairly privilege them while leaving the regulated irrigators at a disadvantage, economic or otherwise.

Presumably, for VAs to work, the voluntary actions must parallel regulatory actions in effect; while the means may vary, the ends must be the same. There is a problem, however, when the means in fine grain detail are unfair among the population of a class, such as regulated irrigators not party to VAs. The aggregate outcomes achieved through a VA may equal the same outcomes achieved by irrigators exposed to regulatory action, but at what cost in terms of equity under the law? Are there benefits ("flexibilities" and "carrots") that some irrigators enjoy, which others cannot access because they are either excluded from VAs as if left out of cliques, or excluded for other reasons despite their wish to join?

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[22] Marcus et al., *Five Guiding Principles*. [28] (The authors note that "VAs cannot substitute for regulatory requirements. On the contrary, negotiation of successful, durable VAs depends directly on the existence of a strong regulatory foundation to drive agreement and assure implementation.")
[23] Marcus et al., *Five Guiding Principles*. [35]

VA proponents want the OWRD to allow "flexibility" that others cannot enjoy outside VAs, and to provide them with "carrots" that are sweet enough to incentivize the formation of VAs.[24] If all irrigators could enjoy the same benefits whether or not they were parties to VAs, then the justification for VAs would be moot. Therefore, the presence of VAs are *prima facie* evidence of a double standard or two-tier class system. The idea that any irrigator can form a VA or join one to enjoy the benefits is baseless; otherwise, the WRC would institute the "flexibilities" and "carrots" for all irrigators in the GHVGAC as a matter of policy.

On the matter of flexibility, there are three desires:

1) A desire for adaptive management, which in the case of excessively declining groundwater levels, generally means starting from a ramp-up in reduction of pumping, to annually checking results against the trajectory when the USGS/ OWRD modeling scenarios project reaching OWRD's target water-level trend of zero decline, and modifying pumping up or down as needed to stay on track. Factors related to pumping reductions include: 1) monitoring meters on wells and monitoring groundwater levels, 2) evaluating effectiveness, 3) adjusting the timeline for reaching the Total Voluntary Reductions (TVR), which requires both "reducing the Agreed Water Use Limit each year until the PTW or TVR is met,"[25] and 4) modifying the TVR as needed to target OWRD's goal of a water-level trend of zero decline.

   Without strict OWRD oversight and guardrails to confine adaptive management activities, these objectives could go from a straight-line trajectory intended to achieve the desired outcomes to a meandering journey. VA proponents desire control over adaptive management to the greatest extent possible to test various alternatives to simulate regulatory orders without experiencing the same level of pain as those directly exposed to such orders.

   There are two species of adaptive management: one is guided by administrative rules and OWRD staff; the other is guided by the terms of VA contracts. As of this writing, there is a debate as to which activities that comprise adaptive management go into which bucket: the OWRD rule bucket and the VA bucket.[26] While this is a legitimate exercise, it can become corrupted by inappropriately putting some activities into the wrong bucket. For OWRD, adaptive management will apply to all irrigators (whether or not they are in VAs) within a review of Corrective Control Orders every 3 years and a review of the CGWA designation every 10 years.

   With the proposal to phase in water use reductions over 30 years and a 60-year horizon for

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[24] Oregon Consensus and OWRD, Harney Groundwater: Voluntary Agreement SubGroup, October 1, 2024. (See the entire set of negotiations in this informal 2-hour discussion to set the standards for Voluntary Agreements. This meeting was publicly announced after it was held. The incentive to join a VA must be inherent to the benefits of acting voluntarily (whatever they are that do not create a constitutional crisis). Attempting to incentivize VAs in lieu of the threat of regulatory action is nonsensical, unless the state allows irrigators to turn the concept of "incentive" on its head, and concludes that submitting to the threats of lawsuits by irrigators who would draw out the regulatory process interminably is an incentive to approve VAs. In that case, the state has ceded power to the persons they would regulate, setting up an entirely higher level of preferential treatment (the "coercion carrot") for parties to VAs.)

[25] OWRD, *Proposed Guidance for Voluntary Agreements Among Groundwater Users from the Same Groundwater Reservoir*, October 25, 2024. [3]

[26] Oregon Consensus & The High Desert Partnership, Examples of Adaptive Management in Oregon and Beyond, December 12, 2024. [3] (This document is ostensibly an advisory draft; it appears, in part, to also be a countervailing force to the OWRD document "*Proposed Guidance for Voluntary Agreements Among Groundwater Users from the Same Groundwater Reservoir*.)

achieving the OWRD's target water-level trend of zero decline, in the hands of VAs, adaptive management could draw out compliance well into the 22nd century. The premise of adaptive management, related to VA "flexibility," is that reaching OWRD's target water-level trend of zero decline is highly complex and will require much "learning while doing" (a euphemism proponents embrace to replace the distasteful but more accurate term "trial and error").[27]

For irrigators not party to VAs, OWRD will simply regulate off juniors until PTWs result in a target water-level trend of zero decline, and then they'll probably hold that pattern indefinitely.

2) A desire to transfer the seniority of water right certificates from one Point of Appropriation (POA) to other junior POAs, and to move irrigation water from one Place of Use (POU) to other POUs – all within the geographic boundaries set by the terms and conditions of VAs within the same reservoir. ORS 537.745 can control in lieu of WRC orders related to the groundwater sections of Chapter 537, but not over the rest of the chapter or other chapters; therefore, ORS 540.520 and 540.523, which govern water use transfers, block the presumption by VA proponents that they can move their water right certificates around among various POAs and POUs under ORS 537.745.

   No one else in Oregon, including irrigators left out of VAs, can evade the water right transfer laws. The proposal for flexibility to avoid ORS 540.520 and 540.523 is factually and legally impossible. Arguments by VA proponents that water needs to be used on more productive soils is a widespread problem across eastern Oregon and is resolved through the water rights transfer process. The idea that irrigators who have caused some of the worst damage to groundwater reservoirs and soil salinization would be rewarded with not having to comply with the water right transfer laws would create widespread resentment across the state.

   The simple remedy is for every party to a VA to apply for water right transfers as needed. The idea of hot-swapping seniority, POAs, and POUs on very short time scales runs counter to the most essential principle that propelled the establishment of Oregon's water code in 1909 and the subsequent expansion of it by the 1955 Groundwater Act: taming the water use chaos through staid and controlled regulation to create more certainty and predictability, both spatially and temporally. An important consideration is that water right transfers shall not cause injury to others. The OWRD maintains security by conducting hydrologic studies that demonstrate over long periods of time, and at specific locations, proposed water uses will not harm others. Proponents' use of VAs to move around seniority, POAs, and POUs annually is anathema to the rule of law and order necessary to reasonably protect the present and future public health, safety, and welfare, and the groundwater dependent ecosystems. As such, the proposal is inconsistent with the CGWA principles, which we argue is the precise intent of VAs: to avoid the WRC's regulatory actions to the extent possible.

   In a CGWA, the logic of moving senior water diversions around to various POUs is not unlike trying to develop land around the rims of steep eroding canyons. If proponents of VAs define subareas of VAs under OAR 690-010-0130(3) to benefit some irrigators party to a VA, and it has the effect of harming others,[28] there is a high chance that any water right transfer in the geographic area of the VA will cause an injury. Moving water diversions among POAs and POUs without going through the water right transfer process compounds the potential for injury.

[27] Oregon Consensus, Examples of Adaptive Management. [1-2]
[28] Boschmann, Response to RAC request. [6-8]

The related concepts about comparing VAs to rotating ditch agreements and irrigation districts[29] are unjustified and therefore fail to work around the water right transfer statutes. VAs would comprise two or more water rights, each associated with POAs and appurtenant POUs; whereas, ditch rotation agreements usually distribute water to various landowners whose properties are overlaid by one POU associated with a water right certificate. The parts of a VA cannot become subsumed into or become a whole; legally, they must remain as parts distinguished by their distinct water rights and associated POAs and POUs. We acknowledge that OWRD proposes Total Voluntary Reductions (TVR) that represent the collective sum of water use conservation required by each VA, subtracted from the full duty of all the water rights that parties bring to VAs. However, this summation does not subsume the various parts into a whole, single water right. The analogy to a rotating ditch agreement erroneously conflates numerous discrete components with a VA that cannot legally merge those components.

Nor will ORS 540.150 *Rotation in water use; notice* suffice to move water around various POUs in conjunction with ORS 537.745. In circumstances where two or more water right certificates share use of the same water source, rotation agreements can provide an alternative to prior appropriation where one of the water right holders is senior, but nonetheless, they agree to share the water source with other junior water right holders.[30]

Ditch and other types of rotation agreements do not transfer seniority to different POAs or POUs, nor do they mix water from various sources for distribution to various POUs as VA proponents propose. Instead, rotation agreements manage timing and sharing of water within the constraints of existing rights. VA proponents misconstrue ditch and other types of rotation agreements, particularly regarding how water rights are geographically and legally bound.

In the case of rotating two or more water rights, ORS 540.150 is a voluntary version of ORS 537.742(2)(f), which is the regulatory action OWRD uses in CGWAs: "A provision requiring and specifying a system of rotation of use of groundwater in the critical area." Quite to the contrary, VA proponents envision mixing and matching various water rights and POAs to irrigate various unauthorized POUs. Additionally, some rights would be in use, some not, and some might attempt to pump their wells at rates higher than the water rights permit.[31]

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[29] Oregon Consensus, Voluntary Agreement SubGroup. (Discussions in this meeting, about how VAs are like rotating ditch agreements and irrigation districts, have the unintended effect of highlighting how VAs are not like rotating ditch agreements and irrigation districts.)

[30] United States, Brief on the Merits as Amicus Curiae in Support of Appellants Oregon Water Resources Department and Klamath Tribes, Case No. CA A167380, Oregon Court of Appeals, filed December 7, 2018, by Billy J. Williams, Kelly Zusman, Jeffrey Bossert Clark, and Eric Grant. [28-29] (The US Attorneys' argument about why the Hyde Agreement is not a rotation agreement under ORS 540.150 is elegant and concise. Citing two sources: "*In a rotation agreement, different water users, each of whom draws their supply from the same source, agree to 'take a turn at using the full quantity of water available in the source to irrigate his or her lands*,' … '*Under rotation one user may take all the available water, regardless of senior priorities for a limited period of time, and the next user may do the same.' Oregon law confirms the obvious proposition that a rotation agreement is an agreement to "rotate" the use of water … Even under the Hydes' erroneous interpretation of the Hyde Agreement, the parties did not agree to each take a turn using their full shares of the river's water. Instead, the Hydes argue that the parties agreed to split the water of the Upper Williamson River between the Hydes' appropriative use and the Tribes' non-consumptive, in-stream water rights in the Klamath Marsh. But that is not "rotation" because the parties are not taking turns or "rotating" their use of the water.*"

[31] Representative Mark Owens, Draft Voluntary Agreement Guidance Document, email to OWRD, August 6, 2024. [3] (See admission that irrigators have been exceeding the rate limits set by their water rights and how they want to keep doing so under the pretense that pairing ORS 537.735(3)(d) with ORS 537.745 allows them to exceed water right rates despite the fact that VAs must be "consistent with the intent, purposes and requirements of ORS 537.505 to 537.795 and 537.992.")

As for irrigation districts, they hold water rights on behalf of their members, who put water authorized by those water rights to beneficial use. Irrigation districts hold a set number of water rights associated with specific PODs, POAs, and POUs, and any movement of these real assets requires a water right transfer for which only the water right holder can apply.[32] VAs cannot operate as irrigation districts unless the irrigators who would be parties to VAs set up an irrigation district. Even then, the law prohibits moving around seniority, POAs, and POUs within an irrigation district without a water right transfer.

3) A desire for a flexible contract that can increase or decrease the number of parties to a VA, change the geographic boundaries of the VA, move the goalposts for compliance with VA provisions under the pretense of adaptive management, and change other terms of the VA in a ministerial way without having to go back before the WRC and seek approval for the revised contract. As Chad Karges noted during the Harney Basin VA Subgroup Meeting, they would like: "Resolution at the lowest level possible," and Rep. Mark Owens suggested, tongue-in-cheek: "Complete discretion by the groundwater users."[33]

On the matter of "carrots," there are:

1) A desire to receive a waiver on the Contested Case process, which would protect parties to VAs from being legally held to the same standards as irrigators who are left out of VAs. Contested Case proceedings are long and drawn out; they are quasi-judicial hearings that fulfill the constitutional requirement of due diligence when enacting water use curtailments on a water right. They include evidence, discovery, witness statements, and a legal process that concludes in a ruling by an Administrative Law Judge (ALJ). Then the WRC reviews the ALJ ruling and issues an order. Following the orders, which could include substantial reductions in pumping along the doctrine of prior appropriation, there could be cases brought before the Oregon Court of Appeals. That appeals process could take two to five years. If VA parties were exempt from the Contested Case process, they could not be regulated off in the event their VA fails or parties leave the VA. The WRC would have to start up a new Contested Case every time a VA fails or a party resigns from a VA. Given the rigmarole of the legal process, untold years could pass while a VA stalls through "adaptive management," fails to substantially comply with its obligations, and the WRC orders the termination of the VA before parties undergo a Corrective Control Order curtailing their water use similar to their neighbors who never entered VAs.

   Any VAs approved by the WRC should require all VA parties participate in a Contested Case hearing under ORS 537.742 and ORS 183 to ensure regulatory action buttresses substantial compliance with all VA provisions. The "learning while doing" (trial and error) activities under the pretense of adaptive management should have strict timeline limits set forth from the outset to ensure that the effects promised by the VAs will strictly align with the effects of regulatory actions imposed upon irrigators who are not parties to VAs. If parties to VAs are to be believed – that they will meet the same standards as the statutes to ensure the effects of their actions track with the effects of regulatory action – then they should have nothing to fear by being parties to the forthcoming Contested Cases. To the point: there could be irrigators who go through the Contested Case hearings as parties and then later on join a VA.

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[32] *Fort Vannoy Irrigation v. Water Resources Comm.*, Sup. Ct. of Ore., filed July 10, 2008. (This case settles the question of who controls water rights and water use in irrigation districts, and discusses the roles and responsibilities of the water right users and water right holders, particularly with regard to water right transfers.)

[33] Oregon Consensus, Voluntary Agreement SubGroup. [at 2:04:50]

2) A desire to operate relatively risk-free means, in part, avoiding groundwater statutes in Chapter 537 that irrigators would otherwise have to comply with. ORS 537.745 states that VAs "shall control in lieu of a formal order or rule of the commission." A very liberal misconstruction of that clause could attempt to protect VA parties from other groundwater sections of Chapter 537 under the pretense that the VA has primacy. The extent of the misconstruction would be the degree to which it departs from the other requirement that VAs are "consistent with the intent, purposes and requirements of" the groundwater sections of Chapter 537. The law cannot equally apply to all irrigators if a portion of it applies only to one class and has the effect of reducing business risk on their behalf.

   Irrigators have also expressed a desire to be free from several types of risk associated with more rigid regulatory frameworks that others left out of VAs could be exposed to. For example, VA proponents are concerned about the potential for future regulatory changes that could impose stricter water use limitations in their subareas and they want their VAs to shield them from adaptive management by the state. VA proponents also want to be shielded from lawsuits by disgruntled neighbors who are left out of VAs and believe they have been harmed by the irrigators who are party to VAs. They also want to avoid the risk of being locked into annual/ seasonal water use limits that would have been set by the WRC as the annual Agreed Water Use Limit that increases until it equals the Total Voluntary Reduction (TVR). And proponents of VAs want to be shielded from lawsuits by those who have standing related to domestic well failures and harm to groundwater dependent ecosystems. It appears that VA proponents want the WRC to grant them fiefdoms.

3) A desire to be bought out by the state on the pretense that the state is responsible for the over-pumping because the agency staff over-appropriated the Harney Basin by permitting too many groundwater right applications. This desire, which came up during the Harney Groundwater Voluntary Agreement SubGroup,[34] is unrelated to VAs and is common to all irrigators who 1) fear having their junior water rights on productive wells being regulated off in the CGWA, or 2) want recompense for their water rights associated with non-productive wells that aren't capable of generating income. One of the attorneys, Dominic Carollo, raised the "carrot" of buying back defunct water rights during the discussion on VAs because he is skeptical that VAs are feasible and that the only viable alternative is paying irrigators to cancel or pause their water rights.

   Advocating for buyback proposals (e.g., eminent domain lite) is unrelated to VAs, but we refer to the proposals because they were raised during VA discussions.

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[34] Oregon Consensus, Voluntary Agreement SubGroup. [at 1:59:14 to 2:01:37] (The claim that Oregon is responsible for over-appropriating the Harney Basin and is therefore legally responsible for the welfare of the groundwater right certificates it issued is spurious because of extraordinary and prolonged political pressure by the irrigation lobby and their patrons who forced through water right applications that never should have been permitted. (See Emily Cureton Cook, "Race to the Bottom: How Big Business Took Over Oregon's First Protected Aquifer," OPB, March 16, 2022. This three-part series reports on the political and private sector negligence that has led to the impairment of the public's groundwater sources.) Far from the OWRD acting as if it were a socialist state government agency running the irrigation industry as a public sector concern, OWRD staff were under intense pressure for decades to approve water right applications when there was not sufficient water available or the water availability was unknown. We reference the tenure of Maragret Pagel, Phil Ward, and other state officials cum lobbyists/ lawyers who passed through the revolving door between the public and private sectors as examples of the culture that led to over-pumping the water sources that belong to the public. Notably, Representative Owens has managed to straddle the revolving door and work in the public and private sector simultaneously to benefit his and his constituents' interests, the awkwardness of which is constantly apparent.)

Review of the Proposed Guidance for Voluntary Agreements Among Groundwater Users from the Same Groundwater Reservoir

Generally speaking, OWRD's *Proposed Guidance for Voluntary Agreements Among Groundwater Users from the Same Groundwater Reservoir*, which we review and comment on below, is a good starting point for rulemaking related to ORS 537.745.[35] We also incorporate the entire set of comments in this paper as information to consider when contemplating rulemaking for ORS 537.745.

Notwithstanding our serious concerns about the statutory construction and the interpretations of ORS 537.745, including the ways proponents of VAs have envisioned applying the statute, we provide the following comments on OWRD's *Proposed Guidance for Voluntary Agreements Among Groundwater Users from the Same Groundwater Reservoir*.

We strongly agree with and support the *Proposed Guidance for Voluntary Agreements Among Groundwater Users from the Same Groundwater Reservoir* as a rough draft for writing administrative rules for ORS 537.745. ***Any sections of that document we are silent on means that we have no questions or comments and support the draft language.***

Our comments follow the title of each topic in the OWRD document:

Background:

We refer to our critique herein – of ORS 537.745 and the numerous proposals articulated by proponents of VAs – as the scope of information the WRC and OWRD should consider as background when contemplating the approval, management, and termination of VAs.

General Applicability:

ORS 537.745 explicitly states that VAs must be "consistent with the intent, purposes and requirements of ORS 537.505 to 537.795 and 537.992, and in particular ORS 537.525, 537.730 to 537.740 and 537.780…" These statutes are the groundwater sections of Chapter 537. However, OWRD has interpreted the consistency to be with the Groundwater Act of 1955, the provisions of which were articulated in HB 26 in 1955. Since then, there have been many amendments to the groundwater section of Chapter 537, and we recommend reframing the General Applicability to ensure ongoing consistency with the evolving statutory framework governing groundwater within Chapter 537.

We also suggest acknowledging that VAs must be consistent with the entire water code, including all chapters from 536 to 558, and that ORS 537.745 cannot conflict with other statutes and the Oregon Constitution, as would some of the proposed provisions of VAs.

Authority

The WRC can delegate its authority to issue an order terminating VAs, as acknowledged at the end of the *Proposed Guidance* document; however, no mention of such authority is stated in this section.

While we strongly believe the WRC should hold informational hearings on VA approvals and termination orders, and make the first generation of approvals and any termination orders, we

[35] OWRD, *Proposed Guidance for Voluntary Agreements*.

acknowledge the authority of the OWRD staff to process such acts on behalf of the WRC.

The politics, liabilities, and gravity of approving VAs for the first time – under an elusive and troubled statute that has never been implemented since 1955 – requires the WRC leadership. We also recognize that administrative rules must be written to accompany ORS 537.745, which will involve the WRC to an extent that will enable the commission to be competent in actual business approving and terminating VAs.

Groundwater Users:

Under the Minimum Participation Level, the requirement is that a VA must account for at least 30% of the PTW of the subarea the VA is located in. But what happens if irrigators drop out and the VA lacks a minimum participation level? Is there a grace period for the remaining irrigators to seek new members before the OWRD finds the VA is not in substantial compliance with the WRC approval? Is there a subarea census that can be updated annually that contains the information that is required under the heading "Reporting and Monitoring" and reasonable projections be made about the "bench depth" that all VAs have regarding the potential to lose and gain new parties? OWRD could estimate the viability of VAs and the length of any grace period by understanding the scope of potential irrigators capable of joining VAs when VAs fall below the Minimum Participation Level.

The Agreed Water Use Limit should be referred to in the second paragraph of the Minimum Participation Level to clear up the ambiguity about what is "subject to the agreement;" otherwise, state what is meant by that conditional statement.

Groundwater Rights:

The statement referring to "valid water rights that can prove beneficial use within 5 years prior to the time the agreement is approved" needs to address the ways irrigators will prove use that is evidentiary based. Perhaps this could include metering where available, OpenET imagery, sworn statements of fact under the threat of perjury, and photographic and video evidence.

All unauthorized and non-conforming wells drilled without start cards and/ or lacking well log numbers, and all wells used in violation of the terms of a water right must be prohibited from participating in VAs and be subject to well abandonment unless OWRD receives water right transfer applications within 60 days of discovery by OWRD or disclosure by the irrigator. Well abandonment should begin after 60 days in the event of no action to remedy the unlawful appropriation.

That unauthorized water uses could be overlooked in a CGWA would be an extraordinary breach of the public trust, undermining the integrity of Oregon's water laws and the equitable distribution of this critical resource. Such permissiveness would erode confidence in the state's ability to manage water resources sustainably and equitably. The admission of the scope of the problem requires immediate remediation regardless of whether unauthorized or non-compliant wells are associated with VAs.[36]

[36] Oregon Consensus, Voluntary Agreement SubGroup. [at 0:43:32 to 0:45:53] (OWRD staff hydrologist, Tim Seymour, reading from a document compiled by Harney Basin VA group: "We anticipate that there will be a number of wells that are not specifically in their authorized locations, and we need a process to allow water users to fix this without penalty and without delays." Representative Mark Owens, irrigator from Crane also noted: "So you're going to see you're going to see a fair subset of wells that may or may not be in a specific location, maybe not authorized under permit…I mean, a lot of it's gone on for the last multiple decades. Well goes dry, a well goes out. You get a well driller, maybe the welder didn't do a start card. He drills a well close to the same location...We start pumping from it. I don't think, honestly, the farmers

The next statement that "The maximum volume of water available to the parties within a voluntary agreement is the sum of the total duty allocated to all valid rights participating in the agreement" should continue with "notwithstanding the limits imposed by the subarea PTW and/ or the VA TVR."

Groundwater Reservoir:

This section states that:

> An approved agreement must define the groundwater reservoir, or portion thereof, the agreement is intended to cover. For a designated CGWA, the groundwater reservoir may be defined as the entire CGWA, one or more subareas within the CGWA, or a portion thereof.

Given the extraordinary work by the OWRD and USGS to study and map the GHVGAC (and to paraphrase ORS 537.665), the WRC, 'by its own motion, has already identified and defined the location, extent, depth, and other characteristics of the groundwater reservoir' and 15 subareas that are hydrologically distinct.

But the gerrymandered 6 subarea map made up by irrigators with an interest in increasing the geographic areas to facilitate VAs are not groundwater reservoir boundaries; rather, they are administrative boundaries established under OAR 690-010-0130(3)(b) and (c). Because the irrigators drew up the 6 subarea map for their private contractual purposes, there is no set of groundwater reservoirs yet defined they can use for VAs. To be clear, the CGWA map lines are not the lines of groundwater reservoirs, though they could be if the WRC made a final determination of the boundaries and depth of the GHVGAC groundwater reservoir(s). Any proper map suitable for VAs may need to coordinate with ORS 537.665 if VAs are to withstand critiques about whether parties to VAs are indeed from the same groundwater reservoir. Such tensions could flare up between juniors in VAs adjacent to seniors not in VAs. Knowing that the WRC formally stood behind the data regarding hydraulic connections through a *Final Determination* under ORS 537.665(3) would streamline the resolution of these concerns.

While the entire GHVGAC is hydraulically connected by degrees, OWRD designates some areas as high-priority and others as low-priority because there are distinct hydrogeologic units that demonstrate unique features, including the propensity for some to be easily overdrawn much more than others. For this reason, we acknowledge the need for VAs to be sufficiently proximate so that they pump "each other's water" in a seasonal/ annual timescale (the groundwater flows along a hydraulic gradient among VA parties within the length of a season). If VA parties were spread out beyond the one-year reach of the groundwater flows, then the logic of how *a TVR is to a VA as a water use curtailment is to a single irrigator* falls apart. The logic of a VA is that all the irrigators sort out how they will collaborate on reducing annual groundwater pumping to reach the TVR, and somehow that is attractive enough for them to form a VA that does not run afoul of state laws and the state constitution.

The purpose of proximity is to ensure that irrigators are horsetrading water (under ORS 540.520/ .523) of the same relative level of *scarcity* because CGWA statutes (that the VAs must be consistent with) seek to establish a target water-level trend of zero decline, and that is not possible if irrigators were to cap and trade water credits from relatively distant, distinct, or compartmentalized groundwater reservoirs. We acknowledge that the entire GHVGAC could be regulated as one hydrologic unit as

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understand to what extent that that might be scrutinized, to what extent it might show up.")

shown in the "Model E scenario,"[37] but that requires a 59% reduction across the board and any proposed VA would have to consist of at least 30% of all irrigators in the GHVGAC, which is inconceivable.

This section also states: "(1) An approved agreement must be accompanied by a map depicting all places of use and points of appropriation for the water rights included in the agreement." We take this moment to concur with OWRD that no version of state-run water use management could allow unauthorized or non-conforming large-scale wells to be associated with water rights in a CGWA region that is under immense stress resulting from excessively declining groundwater levels and the scrutiny of hydrologists, political pressure, rulemaking, and the public eye. While the OWRD may have overlooked the misappropriation of water in the past as described in the Oregon Consensus Voluntary Agreement SubGroup discussion, the tolerance for such lax oversight is over. The POAs must be lawfully associated with the water right certificates and POUs must be preexisting locations defined and authorized by non-canceled water right certificates used at least once in the prior 5 years dated to the submission of the VA to the WRC for approval. (Incidentally, we support extending the period of permissible non-use to 15 years.)

Groundwater Use:

This section states that: "If a voluntary agreement is within a critical groundwater area or subarea where a permissible total withdrawal has been set by rule, the Department must use the PTW as the primary criterion for evaluation when considering whether to approve the voluntary agreement." This may be fine to determine whether the VA meets the Minimum Participation Level; otherwise, there should be an acknowledgment to the effect "...except where the department has set a TVR."

This section states: "Target for Voluntary Reduction" or "TVR" means the total amount of groundwater that the Department determines should be withdrawn from an area on an annual basis." The phrase "from an area" is ambiguous and should say "from within the geographic boundaries of a voluntary agreement approved by the WRC under ORS 535.745."

The concept of a TVR should be elaborated on to remove any question about what it is and how it works: the TVR is the total (collective?) amount of water irrigators party to a VA must not pump in order to comply with the PTW of any given CGWA or subarea therein.

In the case the WRC was to consider approval of a VA before a PTW or TVR has been set, then all WRC approvals of VAs must have a contingency clause that requires all VAs approved before the OWRD sets PTWs to immediately conform to the limits of PTWs once they are set.

Under the section on Agreed Water Use Limit is this statement: "The schedule for water use reductions must be specified in the voluntary agreement and should demonstrate a commitment to achieving stable water levels within a reasonable timeframe." This is weak language – "should demonstrate a commitment to achieving..." This allows irrigators party to a VA the flexibility to not conform to TVRs that must comply with PTWs; meanwhile, all the irrigators left out of VAs are forced to comply with state Corrective Control Orders and do not experience the so-called "flexibility" parties to VAs enjoy. This double standard is inequitable, where in one section of chapter 537, some irrigators can enjoy flexibility (ORS 537.745), and in others, they cannot (ORS 537.742).

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[37] OWRD, Summary of Model Results Presented at RAC 11, November 13, 2024. (See the entire document for how "Model Scenario E" functions.)

The section on Rate and Duty states: "Notwithstanding this provision, the Director may determine, pursuant to ORS 537.735(3)(d), that a higher rate would result in more efficient water use." ORS 537.735(3)(d) states:

> 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.

Despite the broad scope of this paragraph, we question whether ORS 537.735(3)(d) can authorize water use rates beyond the terms of certificated water rights, especially considering the limits on water right transfers not to expand the rate. OWRD believes it is theoretically possible.[38] Rate limits are longstanding controls to protect the water resources of the state; to relax them in areas where substantial harm looms resulting from excessively declining groundwater levels is not only an unjustified privilege and immunity from the law, but a profound inconsistency with CGWA principles reining in harmful water uses.

This statement for increasing the rate on a water right comes from a request emailed by Representative Mark Owens, wherein he states:

> Many of the water rights in the Div 512 rulemaking area fall below the rate required to irrigate crops in the Harney Basin. Limiting all water use to 1/80th cfs (may not exceed the rate and duty of "any water right") will be highly detrimental to water right holders and voluntary agreement participants. If individuals are part of a voluntary agreement, it does not make sense that they would generally be subject to WRD regulation based on water right calls. ORS 537.735(3)(d) can apply whether there is a senior water right call, or not. The flexibility in rate is critical to formulate voluntary agreements that are reducing water withdrawals so as to achieve a stable groundwater level within an acceptable timeframe and at an acceptable level, while making economic sense to the participants and signatories to the agreement.[39]

We understand from this statement that 1) irrigators are currently using water at rates higher than their water right certificates authorize; 2) that irrigators have not been sufficiently regulated by OWRD on

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[38] OWRD, Response to email from Mark Owens to Kelly Meinz (August 6, 2024) regarding OWRD's Draft Voluntary Agreement Guidance Document, September 27, 2024. [6]

[39] Representative Mark Owens, Draft Voluntary Agreement Guidance Document, August 6, 2024. [3] (This email is a response to a July 8, 2024, meeting that was withheld from public view so VA proponents could work among themselves to settle the prospective guidelines for how VAs would function to their specifications. These guidelines will likely be the basis for administrative rules, and to that extent, they were at the time, a form of private rulemaking that is now open to the public. Rep. Owens began his email stating: "*We would kindly ask that WRD refrain from disseminating the draft proposed guidance to the RAC in its current form, pending further discussion with the small work group that met on July 8, 2024, and pending revisions reflecting further discussions and input. As explained in more detail below, there are a number of areas where we think further work is likely needed to find alignment and agreement on an approach to voluntary agreements in the area of the Div 512 rules/Harney Basin.*" We view this request for privacy as an example of how business as usual has worked in the past decades whereby the largest water users call the shots and influence statutes, administrative rules, guidelines, and the day-to-day management of the public's water resources. Such policymaking has had the effect of privileging special interests who have a usufructuary right to the water that belongs to the public over others, and in this case, not just over the greater public interest, but more specifically over those who may be left out of VAs. We include this detail to show in fine grain resolution the mechanics by which special interests (VA proponents) seek to influence laws to privilege themselves above and/ or immunize themselves from the public interest, which may hold different views. We also recognize that not all the VA proponents' ideas necessarily conflict with the public interest; some are worthy and ought to be considered.)

this matter; and 3) since parties to VAs will necessarily come under the close management of OWRD, parties to VAs request a pass on the enforcement of the law that requires water right holders to comply within the rate limits of their water right certificates. This is what VA proponents mean when they request flexibility: they want ORS 537.745 to extend privileges and immunities others cannot access. Given, however, that the Harney Basin is suffering from excessively declining groundwater levels, the fact that OWRD has not and would not enforce the rates on water right certificates is extraordinary. With the imposition of a CGWA impending, there is reason to believe OWRD will require all irrigators to stop misappropriating water by exceeding the authorized rates of their water right certificates. That VA proponents would anticipate this enforcement and seek "flexibility" on the matter demonstrates yet another example of how those left out of VAs will not enjoy the same perks, including perks that are unlawful, such as exceeding rate limits set by water right certificates.

The section on Rate and Duty states: "'Overuse' means use above the volume or rate of the approved voluntary agreement." The section should state: "'Overuse' means use above the collective duty or rate of the approved voluntary agreement, or the use above the duty or rate of any one water right."

There is also this statement: "Overuse is a basis for a finding that the parties are not substantially complying with the agreement." We suggest that OWRD clearly define the term "substantial compliance" in rule as it relates to compliance with VAs. While the term is generally understood in a regulatory context, VAs must be held to a percentage, such as 95% of the Agreed Water Use Limit, TVR, and PTW. Otherwise, there will be endless stalling over what is meant by substantial compliance by lawsuits that have already been threatened.

The statement "At no time will under use result in an increase to the agreed water use limit," should include a direct statement that "no parties to VAs may carryover under use from a previous year to any year thereafter."

Duration:

The statement "The agreement will include the period of time over which groundwater use will be reduced" should replace the word "over" with "during."

Regarding the duration of water use, OWRD could track the annual water use for a VA on a graph that shows the actual duty of water used on the Y-axis and each year on the X-axis, with the Y-axis ranging from zero to the maximum duty the TVR permits, and the X-axis ranging from the year the WRC approves the VA to the year when OWRD has set compliance with the target water-level trend of zero decline. This simple graphing would enable OWRD to reasonably project whether VAs are on a timeline to reach their targets and will give OWRD and VA parties sufficient notice of whether course correction is required to stay on target. The OWRD should project (plot) the graph in advance as to what the trajectory would look like so that it can compare every year just how close VAs are "Substantially Complying" with their TVRs. The USGS/ OWRD modeling software would set the end point where the TVR rate results in OWRD's target water-level trend of zero decline.

Under section (1) of Duration, the statement "...voluntary water use reductions to match the PTW should be implemented within a reasonable timeframe" must be consistent with what is expected of irrigators who are not party to VAs and are subject to regulatory action. Otherwise, preferring or privileging water users because they entered VAs creates a double standard, two-tier class system under the law. This double standard is the quintessential definition of unequal protection under the laws. Whatever time frame OWRD imposes upon irrigators not party to VAs (in any given CGWA or

subarea) must be the same time frame imposed upon parties to VAs, or vice-versa.

Section (2) of Duration states: "If a voluntary agreement is within a critical groundwater area or subarea where a target for voluntary reduction has been set, voluntary water use reductions to match the TVR should be implemented within a reasonable timeframe." The term "reasonable timeframe" is a poor and ambiguous euphemism for "Substantial Compliance," which should be used and the graph mentioned above should replace the ambiguity. Also, the statement is awkward and redundant.

Section (3) states: "If a voluntary agreement is within an area or subarea the Department has set a target for voluntary reduction, the period of time for voluntary reduction to match the TVR cannot exceed the duration of the agreement." The statement should be: "If a voluntary agreement is within an area or subarea the Department has set a target for voluntary reduction, the period of time for *the Agreed Water Use Limit* to match the TVR cannot exceed the duration of the agreement."

Reporting and Monitoring:

Under the Annual Statement of Use, section (1) "a map depicting lands subject to irrigation" should show the precise POUs surveyed by a CWRE. A CWRE could initially map out all the existing POUs and grid the map for easy modifications in the future, where each grid square is one square acre.

Section (3) requires: "contact information, including telephone and email address, for owners of every well to be pumped during the irrigation season." This section should also require the same for owners of the POUs to be wetted by irrigation use; they may not be using their wells but they may be contributing their lands. (We take this opportunity to reiterate that all VAs must incorporate water right transfers under ORS 540.520 and 540.523.)

Under Monitoring, Section (2) states: "...that Department staff may, with reasonable notice, enter the property of a party for the purposes of water level measurement, collecting flow meter readings, and ensuring that the flow meters are properly functioning." We suggest that ascertaining the location of irrigation use on POUs and the duty of water on POUs not to exceed the certificated CFS/ AF is also a reason to enter the property.

Section (3) states: "...the watermaster must visit each participating landowner's property to verify wells authorized for use under the voluntary agreement and the existence and functioning of totalizing flow meters." We suggest detailing what the term *verify* means by adding "to verify that wells authorized for use under the VA have well logs, are associated with start cards, and are authorized for use by water right permits or non-canceled water right certificates."

Agreement Modification Prior to Commission Approval:

No additional comments at this time – refer to the entirety of this paper for details related to the approval of VAs.

Agreement Amendment After Commission Approval:

(Note: we reiterate that there must be strict limitations to the "flexibilities" and "carrots" that parties to VAs enjoy that privilege or grant immunity to them over irrigators unable or uninvited to join VAs. Proponents have been vocal about wanting near free rein to act as if VAs were sovereign entities. Their ambition is directly proportional to their resistance to the Division 512 rulemaking effort leading to a

CGWA designation and regulatory action to curtail water use. We suggest the WRC be present and active in the VA approval process and that OWRD manage VAs carefully because VAs are statutory instruments with their legitimacy and fairness dependent on equitable access and administration.)

The statement: "The Commission also may delegate this authority to the Department" is acknowledged. However, while OWRD can manage ministerial amendments to VAs, the WRC should oversee more substantial amendments, especially when attempting to implement ORS 537.745 for the first time since 1955. What are the minor amendments that can be managed ministerially, and what are those that should go before the WRC for approval?

We suggest that the following amendments must go before the WRC and should not be processed by OWRD staff in a ministerial fashion:

1) Changes in parties to the VA, both incoming and outgoing;
2) Changes in POAs and POUs (which will require coordination with ORS 540.520/ .523);
3) Water Right Transfers into or outside of the VA geographic boundaries (intra-VA Water Right Transfers between VA parties can be an OWRD ministerial action);
4) Changes in the Agreed Water Use Limit and the TVR;
5) Changes in the timeline to reach the TVR or water volumes that relate to phasing in or out of water use reductions and the timeline to reach the zero rate of decline in groundwater levels;
6) Any changes in adaptive management that could cause injury or harm to domestic wells, groundwater dependent ecosystems, and other irrigators subject to regulation in the Harney Basin CGWA.

OWRD staff will be put under immense pressure by parties to VAs to process changes ministerially, and we believe the WRC must oversee all the amendment types listed above to prevent the abuse on behalf of the public interest. Pressure on OWRD staff by those they regulate must come to an end, especially when such pressure goes unseen out of the public eye.

Under Additional Parties, two statements need to be better understood:

> (1) A prospective party must notify the Department and the existing parties to the agreement of their intent to join the agreement by December 31 prior to the year in which they wish to join.
>
> (3) All existing parties to the agreement and the Commission (or Department if authority has been delegated) must consent to the addition of any new party.

Who decides who is in VAs and who is left out of VAs? What if three irrigators get together and want to form a VA and a fourth wants to join – can the three irrigators refuse to admit the fourth? And can they gang up on each other and sue each other and push each other out? How is the formation of VAs (who is privileged to enter, who is left out, and the criteria for being selected or rejected) to be determined? Since VAs are instruments of the law, which is a specific legal framework that has been envisioned by proponents to grant parties to VAs certain privileges ("flexibilities" and "carrots"), the decision about who gets to benefit and who does not quickly reaches a constitutional question of fairness and equal application and protection of the law to all.

Given that VA proponents seek significant advantages, how VAs derive their authority to form, change membership, and dissolve raises legal and ethical questions regarding equality and fairness. We wonder if VAs are like public or mutual benefit corporations or political subdivisions of the state that require

bylaws or charters, and trustees. Would parties to VAs be the trustees of the VAs?

We believe that if the opportunity to participate in a VA, in any given CGWA or subarea, is not equally available to all eligible water users without prejudice, or if the criteria for participation are not transparently applied, VA governance (or the lack thereof) could potentially lead to claims of discriminatory practices. These are significant factors to consider regarding the statutory construction of ORS 537.745 and proposed administrative rules. We also wonder if and who can challenge the membership of VAs – who has standing to challenge the vagaries of membership.

Under Party Termination, will the WRC and OWRD be held liable for how VAs manage terminations and resignations of its members since the WRC and OWRD approved the VAs? We believe the process of membership management must be very carefully considered since VAs are an instrument of the law that has been envisioned to dole out privileges and immunities only some can enjoy.

The statement "Any party terminating their involvement in the agreement will become subject to any existing groundwater control measures pertaining to the geographic location of their water right" underscores the seriousness of terminations and disgruntled resignations from VAs because the consequences are the loss of privileges and exposure to the cold hard hand of the regulatory state. Who will take responsibility for those kicked out of the Garden of Eden?

We also note that all parties to VAs will have to also be parties to Contested Case hearings from the start if they are to be subjected to the regulatory actions of the state after removal from VAs.

Two side notes: 1) any prospective VA parties who went through a Contested Case hearing but do not wish to go through appeals court challenges to implement their VAs, will be casting doubt on the legitimacy of the complaints other irrigators have who wish to proceed with their appeals court challenges; and 2) the discrepancy between the experience irrigators have in their VAs and irrigators subject to regulatory action will come into stark relief on the basis that VA parties may not wish to go through the appeals court challenges, demonstrating the extent to which the VA class of irrigators enjoys benefits under the law that regulated irrigators do not.

The section titled Water Right Transactions is a poor euphemism for Water Right Transfers under ORS 540.520 and 540.523, and is unjustified. The following language from this paragraph is unambiguously the language of water right transfers:

> …if any water right subject to the agreement is modified by a water right transaction in a way that changes the amount of water available to the agreement or changes the places of use subject to the agreement. Such transactions include, but are not limited to, changes to the place of use, changes to the points of appropriation, or splitting of a right.

We are incredulous at the term "water right subject to the agreement" because the legal term is water right subject to transfer. ORS 537.745 has no authority over statutes other than ORS 537.505 to 537.795 and 537.992. While VAs must be "consistent with the intent, purposes and requirements of ORS 537.505 to 537.795 and 537.992," there is no law that says VAs may run afoul of all the other laws of the state of Oregon, including other chapters in the water code. Our position here aligns with our repeated statements that ORS 537.745 does not permit the WRC to approve VAs that run afoul of the Oregon Constitution. All VAs must apply for water right transfers.

Agreement Approval:

See our earlier comments on the WRC delegation of its authority to the OWRD.

Agreement Termination:

Section (b) states: "Changed conditions have made the continuance of the agreement a detriment to the public welfare, safety and health or contrary to the intent, purposes and requirements of the Ground Water Act of 1955." The Ground Water Act of 1955 has been amended many times over 70 years, so it may be best to say the "Water Code" to encapsulate all the laws of the state that pertain to water governance and management regardless of the time period. If VAs were a detriment to the public health, safety, and welfare for any reason, they could be terminated for breaching any law, including the Oregon Constitution.

There may also be a reason for the WRC to terminate a VA if the parties are suing each other in tort actions that are prolonged and are not resolved in a timely manner. The governance of VAs must be held at a high level in the way public and mutual benefit corporations function with bylaws and trustees to ensure that VAs, instruments of the law authorized by ORS 537.745, are maintained in an orderly, lawful, and constitutional fashion. Administrative rules for ORS 537.745 must include how VA governance shall function.

Conclusion

Privatizing public sector duties has been fraught with many failures over the past 70 years because some public sector activities are not well-suited to the private sector. VAs are an attempt to privatize the regulatory functions of the state, and we believe such privatization will unreasonably perpetuate the harms resulting from over-pumping the groundwater reservoirs. The VAs under ORS 537.745 are not feasible as proposed because they conflict with the water right transfer statutes and create a constitutional crisis resulting from numerous factors related to privileges and immunities. The VA's most effective result may be stalling water use reductions while the WRC imposes water use curtailments on other irrigators. Such an effect runs counter to the legislative intent of HB 2192, which sought to remove stalling tactics by affected water users and their lobbyists by bringing the CGWA statutes in line with the Administrative Procedures Act (APA).

The OWRD must manage the water in the basin (every basin) to ensure that we do not return to the *Wild West*. It's problematic enough that too many of Oregon's water use policies still contain vestiges of the dysfunctional past, not for the private sector to potentially game the public sector and worsen those effects in the 21st century.

If there are any credible scenarios, at a minimum:

- VAs must be state-enforced binding legal contracts so all parties have shared expectations and legal responsibilities to each other and the state.
- The WRC must impose strict penalties for breaking the contracts or stalling their provisions, which would parallel VA parties suing each other for breach of contract (tort).
- Access to VAs would have to be open to all irrigators in the Harney Basin (no one could be denied entry), and protections would have to be in place to ensure those who experience regulatory action do so because they believe they are as well off as if they were to join VAs.

- VAs can never be used as schemes to avoid unequivocal and timely compliance with OWRD's target water-level trend of zero decline, which is already 30 years past due.

VA proponents will argue that VAs are inherently fair because they are voluntary; because participation is not compulsory, any resulting disparities in access or benefits do not raise concerns of fairness or constitutional rights. That argument is facile because it leaves out important details related to privileges and immunities in both the formation of VAs and the disparity of experiences and outcomes VA parties seek.

If the benefits of VAs were genuinely equitable and universally beneficial, there is a compelling reason for the WRC to extend these benefits across the board, rather than restrict them to self-selected groups. If, however, doing so stalled or preempted the goal of stabilizing groundwater levels in the CGWA, then it follows that extending the perks of VAs is an exclusive benefit only a few can enjoy. The idea that the Harney Basin hydrology might only be able to tolerate a certain limited amount of VAs would demonstrate that there necessarily must be an excluded class of irrigator citizens if VAs were ever implemented. Perhaps this is one reason why ORS 537.745 has never been implemented since legislators passed the law as part of the 1955 Groundwater Act.

We also note that conflating the voluntary nature of the agreements with freedom, which is both the public relations message and the main benefit VA proponents seek (e.g., freedom from the imposition of Corrective Control Orders, freedom to hot-swap water sources and locations, freedom to exceed the rates of water rights, etc.), has the effect of misrepresenting the potentially egregious negative impacts. We sense the inadvertent and inescapable possibility that proponents cannot avoid voluntary-washing their ambitions to obscure how the envisioned privileges and immunities may benefit them at the expense of others: "It's voluntary; what's not to like?"

We explained how gerrymandering the CGWA subareas only serves proponents of VAs; worse, the process forces irrigators in low-priority areas to give up their water to irrigators in high-priority areas, which when reverse-engineered by OAR 690-010-0130(3)(b) and (c), simulates a state-mandated water right transfer that redefines the term *water right subject to transfer* in ways no one could have ever envisioned.

Voluntary Agreements under ORS 537.745 incentivize lawful behavior by offering exclusive benefits to participants, effectively rewarding them for voluntarily complying with laws that are intended to apply equally to all. This arrangement contradicts the principle of equal application of the law, creating a privileged class that operates under different rules.