

including assertions that the transfer was not consistent with law and would injure existing water rights.

3. The portion of the right proposed to be transferred is as follows:

Certificate: 76684 in the name of Tumalo Irrigation District (confirmed under T-8557; originally perfected under Permit R-2743)
Use: A primary reservoir right for storage of water for Multiple Purpose Uses
Priority Date: December 8, 1961
Quantity: 108 acre-feet
Source: Tumalo Creek, a tributary of the Deschutes River.

Authorized Point of Diversion for the off-channel reservoir is located:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
17 S	11 E	WM	23	SE NE	2080 FEET SOUTH AND 1310 FEET WEST FROM THE NE CORNER OF SECTION 23

The reservoir is located as follows:

Twp	Rng	Mer	Sec	Q-Q
16 S	11 E	WM	32	SE SE
16 S	11 E	WM	33	S ½ SW ¼
17 S	11 E	WM	4	NE NW
17 S	11 E	WM	4	W ½ NW ¼
17 S	11 E	WM	5	NE ¼

The primary storage (reservoir) right authorizes storage of 1100.00 acre-feet of water.

4. The primary storage water right (Certificate 76684) is the source of water for the following secondary certificates and their specified uses:

74146	74147	76106	74149	76520
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5. Transfer Application T-11833 proposes to change the location of a portion of the stored water to:

Twp	Rng	Mer	Sec	Q - Q	Tax lot	District Notice #
17 S	11 E	WM	13	NE NW	828	T14S.001
17 S	11 E	WM	13	NW NE	828	T14S.001
17 S	11 E	WM	13	NW SW	828	T14S.001
17 S	11 E	WM	13	NW SW	824	T14S.001
17 S	11 E	WM	13	SE NW	828	T14S.001
17 S	11 E	WM	13	SE NW	824	T14S.001
17 S	11 E	WM	13	SW NW	828	T14S.001
17 S	11 E	WM	13	SW NW	824	T14S.001
17 S	11 E	WM	13	NE SW	824	T14S.001

The subject property for the proposed transfer is approximately 79 acres in size and consists of two adjacent tax lots: tax lot 824 and tax lot 828. The property is developed with two man-made,

lined reservoirs. The larger reservoir is elongated in shape, located on tax lots 824 and 828, and has a capacity of approximately 67 acre-feet of water. The smaller reservoir, located on tax lot 828 has a capacity of 41 acre-feet of water. The reservoirs are approximately 22 acres in combined size.

6. A Land Use Information Form did not accompany TID's application.

7. On July 18, 2014 the Department requested TID to provide a Land Use Information Form containing a Land Use Compatibility Statement (LUCS) from Deschutes County specifying whether the proposed action is consistent with applicable land use laws.

8. On August 18, 2014, the Department received a LUCS that contained TID's characterization of the transfer as follows:

This is an intra-district transfer in place of use of 108 a.f. of Tumalo Creek water. TID to TID (Storage water). The transfer of this storage water is necessary for the operations and maintenance of our irrigation system, and allowed as an outright use in the RR-10 zone. The current site was built in the 1920's and no longer serves TID's needs. The new site is a significant upgrade that will enable TID to reduce dependence on Tumalo Creek for natural flow, provide emergency water supplies for the District and Emergency Services responders and provide increased efficiency in the operations and maintenance of the TID system overall.

The LUCS was signed by Nick Lelack, Deschutes County Community Development Director, who determined that the "[l]and uses to be served by the proposed water uses (including proposed construction) are allowed outright or are not regulated by your comprehensive plan" and referred to an attached land use decision that found among other things that the "transferring in-district storage from the Tumalo Reservoir upstream to the Klippel Acres Mining Pit in order to improve the operations of TID's existing irrigation system is a use permitted outright in the zone."

9. On December 16, 2014, the Department received a final decision of the Deschutes County Hearings Officer dated December 15, 2014. The final decision was a result of a challenge to the LUCS submitted to the Department by the TID. The final decision from a Deschutes County Hearing Officer found that the county incorrectly categorized TID's proposed use on the Department's LUCS as a use allowed without review and that the county erred in issuing a LUCS decision finding that the TID's proposed use was allowed without a review. The order reversed and remanded the LUCS to the county to reissue the Department's LUCS form and the LUCS decision to categorize TID's proposed use as one involving discretionary land use approvals that have not yet been obtained. Specifically, the Hearing Officer found that discretionary approvals would need to be obtained including "the conditional use of surface mining for reservoirs in conjunction with operation and maintenance of irrigations systems under Section 18.60.020(W), and/or a recreation-oriented facility requiring large acreage under Section 18.60.030(G)."

10. The 2014 irrigation season ended on October 31, 2014.

Conclusions of Law

1. The temporary transfer is expired and all uses of water must revert to the terms and conditions of Certificate R-76684. ORS 540.570(1).
2. The Department's actions to approve the District's temporary transfer must be compatible with acknowledged comprehensive plans. ORS 197.180; OAR 690-005-0025(3); OAR 690-005-0035.
3. The Department may not conditionally approve the temporary transfer because the proposed action is not authorized by ORS 540.570. OAR 690-005-0035(4).
4. The temporary transfer of a primary reservoir right is not authorized under ORS 540.570.

Opinion

A. The Temporary Transfer is Expired

ORS 540.570(1) specifies that a district with a manager may, "for one irrigation season" temporarily transfer the place of use of water appurtenant to any land. In this case, an application for temporary transfer was made for the 2014 irrigation season which ended on October 31, 2014. Upon expiration of the temporary transfer period, "all uses of water for which a temporary transfer is allowed * * * shall revert automatically" to the terms and conditions of the original water right certificate. Because the 2014 irrigation season is ended, all water subject to transfer as described in the temporary transfer application must revert to the terms and conditions of Certificate 76684.

B. Land Use Approval is Necessary and has not Been Obtained

Pursuant to ORS 540.570, the Department must issue an order approving a petition for a temporary transfer if, among other things "[a]ny other applicable requirement for district [temporary] water right transfers are met." OAR 690-385-3500(4). Other provisions of law, namely OAR Chapter 690 division 05 (OWRC rules governing land use compatibility) provide "applicable requirements" that in this case, may not be met.

Oregon's land use planning statutes (ORS 197.180) require state agencies to comply with statewide planning goals and comprehensive use plans when taking actions affecting land use. OAR Chapter 690 division 05 and the Water Resources Department's State Agency Coordination Program (SAC) govern the Department's actions that affect land use and provide the coordination procedures the Department must follow to assure that its actions are consistent with land use laws. OAR 690-005-0010; OAR 690-005-0020(1); OAR 690-005-0035.

The coordination procedure in division 5 applies to Department programs that are considered "land use programs" to which land use laws are applicable. OAR 690-005-0025. Water right transfers are land use programs "except for those":

- (a) Where existing and proposed water uses would be located entirely within lands zoned for exclusive farm use as provide in ORS 215.203 or within irrigation districts;
- (b) Which involve changes in place of use only;

(c) Which do not involve the placement or modification of structures including but not limited to water diversion, impoundment, or distribution facilities, water wells, and well houses; and

(d) Which involve irrigation water uses only.

OAR 690-005-0025(3).

For a transfer to be considered exempt from the Department's land use program it must meet all of the factors in (a) through (d). In this case, the TID's proposed transfer does not qualify as a transfer that is exempt from the Department's land use program. The transfer involves the placement of or modification of "impoundment" facilities because the reservoirs have been modified or created to hold the impounded water the TID seeks to move from the existing Upper Tumalo Reservoir to the two new reservoirs it has created on tax lots 824 and 828. Because the proposed transfer is a land use program, the Department's actions must be consistent with the process in OAR 690-005-0035(4).

OAR 690-005-0035(4) states that land use information must be submitted with requests "prior to the department taking action on the water use approval." OAR 690-005-0035(4). The information must be sufficient to assess compatibility as specified on the Department's land use forms as provided in the SAC. *Id.* The Department may only approve the proposed water use if: the land use served by the proposed water use is allowed outright or does not require discretionary land use approvals under the applicable comprehensive plan or if the applicant has already received necessary land use approvals for the land use served by the proposed water use.

The Department may not approve the temporary transfer because necessary land use approvals have not been received. Although on August 13, 2014, the Deschutes County planner found that the TID's proposed transfer was "allowed outright" this decision was over-turned by the Hearing Officer on December 15, 2014. It is not clear at this point whether the proposed land use approval is being appealed to the Land Use Board of Appeals or whether the land use approval may be deemed denied. If the land use approval is being appealed it may at best, be considered as "pending" but not yet obtained. *Skrepetos v. OWRD*, 172 Or App 9, 12 (2001)(a land use decision is pending before a county until it reaches the state of final disposition or is withdrawn or dispositively rejected at an earlier stage).

Where a land use decision is pending the Department may place conditions on the approval to preclude water use until the applicant obtains all required land use approvals. The Department may only conditionally approve a water use, however, if all requirements of the statutes governing the Department's actions are met. OAR 690-005-0035(4)(c); OAR 690-005-0035(4)(b)(A). In this case, the Department may not conditionally approve the temporary transfer because it is expired and because, as discussed below, the water use is not consistent with ORS 540.570.

Where a land use decision is pending the Department may also withhold issuance of the water use approval until the applicant obtains all required land use approvals. OAR 690-005-0035(4)(c). Here, withholding approval until land use approvals are obtained is not an option because the temporary transfer may not be allowed at all.

In sum, notwithstanding that land use approval may be pending, the Department may not approve the temporary transfer because the 2014 irrigation season is ended and because movement of stored water is not authorized by ORS 540.570.

C. ORS 540.570 Does Not Authorize Movement of Stored Water

The TID has requested the Department to transfer water stored under reservoir right Certificate 76684 to the two reservoirs in tax lots 824 and 828. That is, the TID requests to move water impounded in Upper Tumalo Reservoir to two other reservoirs so that it may be stored in a different location. ORS 540.570 does not authorize this change.

ORS 540.570 governs temporary transfers of water by irrigation districts with a manager. ORS 540.570(1) specifies the type of temporary transfers that may occur:

(1) Provided that the proposed transfer complies with all of the provisions of this subsection and will not result in injury to any existing water right, a district with a manager may, for one irrigation season, temporarily transfer the place of use of water appurtenant to any land within the legal boundaries of the district to an equal acreage elsewhere within the legal boundaries of that district or temporarily transfer the type of use identified in a right to store water. A temporary transfer of the place of use may occur if:

(a) The rate and duty, and the *total number of acres to which water will be applied under the transfer*, do not exceed existing limits on the water use subject to transfer;

(b) The type of use authorized under the water use subject to transfer remains the same; and

(c) The *land from which the water use is being transferred* does not receive any water under the right being transferred during the irrigation season in which the change is made.

(Emphasis added.)

The text of ORS 540.570(1) authorizes a district to temporarily transfer “the place of use of water appurtenant to any land” within the district “to an equal acreage elsewhere” within the district. A temporary transfer of a place of use may only occur if, among other things, the total number of acres to which water “will be applied” under the temporary transfer does not exceed the limits on the water use subject to transfer and if the “land from which the water use is being transferred” does not receive any water under the right being transferred during the irrigation season in which the change is made. That is, the text of the statute only authorizes the transfer of water that is applied to appurtenant lands and requires that the “from” lands be dried up before the “to” lands may receive the transferred water.

Conversely, the TID seeks to move water stored pursuant to primary (reservoir) right Certificate 76684 to another location where it will be impounded in two different reservoirs. Movement of stored water from one location to another is not authorized by ORS 540.570 because, while the water is held in the reservoir, it is water that is impounded rather than applied to lands. TID’s right (Certificate 76684) to store water is not in and of itself a right to apply water to lands, it is a right to impound water for multiple purposes as may be allowed pursuant to other authorizations. ORS 537.400. The authorization to use or apply the stored water to lands is contained in TID’s secondary water rights that enumerate the acres to which the stored water

may be applied. Because ORS 540.570 does not authorize changing the location of stored water, the temporary transfer is denied.

ORDER

Now, therefore, it is ORDERED:

Transfer Application T-11833 is denied.

Dated at Salem, Oregon this 29 day of April, 2015.


Dwight French, Water Right Services Administrator, for
Thomas M. Byler, Director

Mailing date: APR 30 2015

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