

**BEFORE THE WATER RESOURCES DEPARTMENT  
OF THE STATE OF OREGON**

|                                       |   |                           |
|---------------------------------------|---|---------------------------|
| In the Matter of Transfer Application | ) | FINAL ORDER DENYING A     |
| T-11951, Deschutes County             | ) | PERMANENT CHANGE TO WATER |
|                                       | ) | RIGHT CERTIFICATE 76684   |

**Authority**

ORS 540.505 to 540.580 establishes the processes in which a water right holder may submit a request to transfer the point of diversion, place of use, or character of use authorized under an existing water right. OAR Chapter 690, Division 385 implements the statutes and provides the Department's procedures and criteria for evaluating transfer applications and petitions to temporarily or permanently change a water use subject to transfer managed by a district.

Oregon's land use planning statutes require state agencies to comply with statewide planning goals and comprehensive use plans when taking actions affecting land use. ORS 197.180. OAR Chapter 690 Division 05 governs the procedure the Department must follow to assure that its actions are consistent with land use laws. OAR 690-005-0010 – 0060.

**Applicant**

**Sent Certified Mail 04/30/2015**

Tumalo Irrigation District  
64697 Cook Ave.  
Bend, OR 97701

**Attorneys**

**Sent Certified Mail 04/30/2015**

|   |   |
|---|---|
| Carl (Bill) W. Hopp, Jr.<br>168 NW Greenwood Ave.<br>Bend, OR 97701 | Elizabeth A. Dickson<br>Hurley Re, P.C.<br>747 SW Mill View Way<br>Bend, OR 97702 |
|---|---|

**Other**

Deschutes County  
Planning Division  
Attn: Community Development  
PO Box 6005  
Bend, OR 97708-6005

**Commenters**

See attached list.

**Findings of Fact**

1. On September 25, 2014, Tumalo Irrigation District (TID) filed a notice of intent to transfer a portion of water stored under Certificate 76684 to two reservoirs in a different location.
2. On September 30, 2014, the Department published information related to TID's intent to change the location of a portion of water stored under Certificate 76684 in its Weekly Water Rights Public Notice.

This order is a final order other than contested case subject to judicial review under ORS 183.484. Exceptions to this order may be filed with the Oregon Water Resources Commission within 20 days of the mailing of this order. ORS 540.580(10). If no timely exceptions are filed this order will become final 21 days after the mailing date of this order. If this order becomes final, appeal of this order is to the Circuit Court of Marion County or to the circuit court of the county in which all or part of the property affected by the order is situated. ORS 536.075. A petition for judicial review must be filed within the time specified by ORS 183.484.

3. On December 22, 2014, TID filed an application with the Department for a District Permanent Water Right Transfer for a Change in Place of Use. The Department assigned the application number T-11951.
4. Notice of the TID's petition was published on January 6, 2015, pursuant to ORS 540.580(6). Comments were filed in response to the notice. The comments raised several concerns regarding the transfer. In addition, Thomas and Dorbina Bishop, TID water users, filed a protest asserting that the transfer would result in injury.
5. 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:** 124.79 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.

6. The primary storage water right (Certificate 76684) is the source of water for the following secondary certificates and their specified uses: Certificate 74146, Certificate 74147, Certificate 76106, Certificate 74149 and Certificate 76520.
7. Transfer Application T-11951 proposes to change the storage 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.

8. A Land Use Information Form including a Land Use Compatibility Statement (LUCS) did not accompany TID's application.
9. The TID has allowed the change specified in its application before obtaining the Department's approval.

**Conclusions of Law**

1. Land use approval is necessary for this proposed action. ORS 197.180; OAR 690-005-0025(3); OAR 690-005-0035.
2. The change proposed in Transfer Application T-11951 is not authorized by ORS 540.580.

**Opinion**

**A. ORS 540.580 Does Not Authorize Moving the Location of Stored Water**

The TID has requested the Department to approve its request to transfer water stored under primary (reservoir) right Certificate 76684 to the two reservoirs in tax lots 824 and 828. That is, the TID requests to move some water impounded in Upper Tumalo Reservoir to two other reservoirs in a different location. Although TID characterizes this change as a "change in place of use" ORS 540.580 does not authorize the change.

ORS 540.580 governs permanent transfers of place of use of water within irrigation districts. ORS 540.580(1) specifies when the Department may approve the permanent transfer of the place of use of water within a district:

- (1) In accordance with this section, a district may by petition request that the Water Resources Department approve the permanent transfer of the place of use of water within a district as long as the proposed transfer complies with all of the following:

- (a) *The rate, duty and total number of acres to which water is to be applied* under the water use subject to transfer are not exceeded;
- (b) The use authorized under the water use subject to transfer remains the same;
- (c) The change in place of use will not result in injury to any existing water right; and
- (d) *The land from which the water right is removed by the transfer shall receive no water* under the transferred right.

(Emphasis added.)

ORS 540.580(1) states that the Department may request the Department to approve a transfer of the place of use of water within a district so long as the proposed transfer complies with “all” of the requirements in (a) – (d). The requirements, in turn, refer to water that is applied to land. For example, the rate, duty and total number of acres “to which the water is to be applied” may not exceed the amount authorized by the right subject to transfer. Further, the land “from which the water right is removed by the transfer” may not receive any water from the transferred right. From the text of the statute, it is clear that the only rights that may be transferred to a different place of use are those rights authorizing the application of water to land (i.e. irrigation rights).

The context, being ORS 540.580(3), supports this interpretation. If the district allows the change in place of use of water before obtaining the Department’s approval it must notify the department in advance of the change. ORS 540.580(3). In the district’s notice to the Department the district must provide, among other things, the names of the users within the district from “whose lands and to whose lands water rights are to be transferred” and “[a] general description of the users’ lands by township, range, quarter-quarter section and tax lot number, and of the water right, for each parcel from which and to which water rights are to be transferred.” The notification is specific to the change in place of use of water applied to land and requires that the water users of the “from” lands and the “to” lands be sufficiently noticed of the proposed change.

Certificate 76684, however, is a primary water right authorizing storage of water in Upper Tumalo Reservoir for multiple purpose uses. A primary water right authorizes the storage of water for beneficial use under secondary permits. ORS 537.400(1). The water stored in Upper Tumalo Reservoir is applied to lands as specified in secondary water rights that enumerate the acres to which the water stored in Upper Tumalo Reservoir may be applied. The water impounded in Upper Tumalo Reservoir, however, is not itself applied to land. Instead, it is water impounded in the reservoir for use and application to lands pursuant to authorized secondary water rights for which the Upper Tumalo Reservoir is the source. Although impounded water occupies land, it is not applied to land and may not be considered the type of use authorized for transfer pursuant to ORS 540.580.

## **B. Land Use Approval is Necessary for this Proposed Action**

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 that 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 has modified or constructed reservoirs on the Klippel mine site and seeks to move water stored in the Upper Tumalo Reservoir to the developed ponds on tax lots 824 and 828. In addition, the proposed transfer does not involve irrigation water uses, it involves a primary right for multipurpose storage. For these reasons, the exemption does not apply, and the proposed transfer is a land use program. The Department's actions must therefore be consistent with the process in OAR 690-005-0035(4).

Land use information must be submitted with requests "prior to the department taking action on the water use approval." OAR 690-005-0035(4). TID has not sent any land use information with its application, and the Department is unable to determine the compatibility of the proposed action with acknowledged comprehensive plans. Thus, even if ORS 540.580 authorizes the type of transfer TID seeks, the Department may not take any action to approve the transfer absent receiving land use information sufficient to determine the consistency of the Department's actions with acknowledged comprehensive plans.

**ORDER**

**Now, therefore, it is ORDERED:**

Transfer Application T-11951 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

**NOTICE:** Pursuant to ORS 540.580(10) the district may file exceptions to this order with the Oregon Water Resources Commission. Exceptions must be in writing and addressed to:

OREGON WATER RESOURCES COMMISSION  
c/o Oregon Water Resources Department  
725 Summer Street NE, Suite A  
Salem, OR 97301

Exceptions must be in writing and postmarked within 20 days of the mailing date of this order. The commission shall issue an order granting or denying the exceptions within 30 days after receiving any exceptions.

If no timely exceptions are filed this order will become final 21 days after the mailing date of this order. If this order becomes final, appeal of this order is to the Circuit Court of Marion County or to the circuit court of the county in which all or part of the property affected by the order is situated. The review shall be conducted according to the provisions of ORS 183.484, 183.486, 183.497 and 183.500.

**Commenters:**

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