

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

In the Matter of Transfer Application)
T-11951, Deschutes County) ORDER ON PROTEST

Authority

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 prior to or subsequent to the change in place of use. ORS 540.580(1) & (2). Within 15 days after the filing of a petition the department shall notice the petition in the weekly notice published by the district. ORS 540.580(6).

Within 30 days after the publication of the department's weekly notice any potentially affected holder of an existing water right may file, jointly or severally, with the department a protest against approval of the petition. *Id.* If a water user within the district files a protest claiming injury to a water right delivery by the district, no contested case hearing shall be required, but the district shall resolve the matter directly with the water user. ORS 540.580(8).

Whenever a timely protest is filed or in the opinion of the Water Resources Director a hearing is necessary to determine whether the proposed changes as described in the petition would result in injury to existing water rights, the department may hold a hearing on the petition pursuant to ORS chapter 183. ORS 540.580(7). The department must hold a contested case hearing on a protest asserting injury to existing water rights if the department approves the district petition. OAR 690-385-4600; OAR 690-385-4700.

Findings of Fact

1. Thomas and Dorbina Bishop (Bishops), Tumalo Irrigation District (TID) water users, filed a protest asserting that the transfer would result in injury to water deliveries made to them by TID.
2. The Bishops also asserted other issues regarding insufficient protection of the TID from the KC Development Group (KCDG), failure of the District to follow proper procedures and legal requirements pertaining to the transfer, failure to obtain market value for TID assets and failure of TID or KCDG to obtain permits for its newly-constructed reservoirs.

Conclusions of Law

1. Protest assertions regarding water deliveries must be heard by TID. ORS 540.580(8).
2. The Bishop's other assertions are not assertions of "injury to an existing water right." ORS 540.580(7).

3. A hearing is unnecessary and is not required. ORS 540.580(8); OAR 690-385-4600 – 4700.

Opinion

A. Assertions Claiming Injury to a Water Delivery by the District May not be Heard by the Department

If a water user within the district files a protest claiming injury to a water right delivery by the district, no contested case hearing shall be required, but the district shall resolve the matter directly with the water user. ORS 540.580(8).

The Bishops assert that they have a water right that is senior to TID's Certificate 76684 and to KC Development Group's (KCDG's) water rights. The Bishops argue that because 11% of the storage capacity of the Upper Tumalo Reservoir will be transferred into private reservoirs on private land controlled by KCDG, this will result in preferential and excessive use by KCDG. They further argue that there is insufficient information about the operation of the KCDG reservoirs to determine whether the TID will be able to manage its water to benefit all of TID's patrons.

The Bishops assertions all pertain to how the TID will deliver water as between the Bishops and KCDG or between KCDG and all TID patrons. Because these assertions pertain to how the TID will deliver water as between district patrons, no contested case hearing shall be required, but the district shall resolve the matter directly with Bishops.

B. Other Assertions are not Injury

A protest may be filed to a petition asserting that the proposed changes as described in the petition would result in "injury to existing water rights." ORS 540.580(7). Injury means "a proposed transfer would result in another existing water right not receiving previously available water to which it is legally entitled." OAR 690-385-0100(6).

The Bishops assert that the transfer will cause the District to exceed the amount of water legally stored and as a consequence the District will violate the "one-fill rule." The Bishops have not asserted these purported effects would result in the Bishops not receiving water previously available to them to which they are legally entitled and so have not asserted injury to an existing water right.

The Bishops argue that the transfer provides insufficient protection to the TID and to its members, including the Bishops against liabilities arising from the agreement entered into between TID and KCDG on October 14, 2014 involving the transfer of water. The Bishops do not assert this will result in the Bishops not receiving water to which they are otherwise entitled and so have not asserted injury to an existing water right.

The Bishops assert that the TID's failure to follow proper procedures and legal requirement pertaining to the transfer and its failure to obtain fair market value for District assets

injures the Bishops and other District patrons. The Bishops have not asserted how the failure to follow proper procedures and legal procedures will result in their not receiving water to which they are otherwise entitled. The failure to obtain fair market value for District assets does not mean that the Bishops will not receive water that they would otherwise be entitled to. The Bishops have not asserted injury to their existing water rights.

The Bishops argue that TID's and KCDG's failure to obtain proper permits for the newly-constructed reservoirs injures the Bishops and members of the public because these entities have not complied with ORS 537.130 or ORS 537.400 and associated administrative rules. The Bishops, however, have failed to assert how noncompliance with statutes they believe are applicable will result in the Bishops not receiving water to which they are otherwise entitled.

None of the Bishops claims are claims of injury to an existing water right.

D. A Contested Case Hearing is Unnecessary

Whenever a timely protest is filed, or in the opinion of the Water Resources Director a hearing is necessary to determine whether the proposed changes in a petition would result in injury to existing water rights, the department "may hold a hearing on the petition." ORS 540.580(7). The department must hold a contested case hearing on a protest asserting injury to existing water rights if the department approves the district petition. OAR 690-385-4600; OAR 690-385-4700.

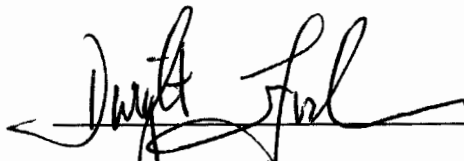
A protest of transfer was filed with the department on February 5, 2015 by the Bishops. Because the department is denying the TID transfer, as opposed to approving the petition, it is not required to hold a contested case hearing. Because the department is denying TID's transfer, it is within the Director's discretion to find that a hearing on the protest is unnecessary.

ORDER

Assertions of injury to a water delivery by the district is referred to the district for resolution.

The protest's other assertions will not be heard by the department.

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 or any protestant may file exceptions to the final 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 after the mailing date of this order. The commission shall issue an order granting or denying the exceptions within 30 days after receiving any exceptions.

JUDICIAL REVIEW OF THIS ORDER: 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 Court of Appeals pursuant to ORS 183.482.