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June 25, 2015

BY HAND DELIVERY

RECEIVED BY OWRD

Mr. Tom Byler
Director
Oregon Water Resources Department
725 Summer St NE Ste A
Salem OR 97301-1271

JUN 26 2015

SALEM, OR

Re: Petition for Reconsideration: Transfer T-11833 (Temporary District Transfer for Tumalo Irrigation District)

Dear Tom:

This Petition for Reconsideration ("Petition") is filed pursuant to ORS 183.484(2) and OAR 137-004-0080 on behalf of the applicant, Tumalo Irrigation District ("TID" or "District") in connection with a Final Order issued April 29, 2015, for the above-referenced District Temporary Transfer Application (the "Final Order"). TID also requests a Stay of the Final Order under OAR 137-004-0090. The Petition is filed jointly by TID's attorneys: Martha O. Pagel, of Schwabe, Williamson & Wyatt as co-counsel in cooperation with Ms. Elizabeth Dickson, Hurley Re, PC; and Mr. Carl W. (Bill) Hopp, Jr.

I. Background

In separate petitions filed this date, the District seeks reconsideration of two related final orders issued by the Oregon Water Resources Department ("OWRD") on April 29, 2015. The Final Order that is the subject to this petition denied Application T-11833, requesting a Temporary District Transfer under ORS 540.570. A separate final order denied Application T-11951, requesting a Permanent District Transfer under ORS 540.580. Both applications seek to change the place of use of a portion of existing reservoir storage rights held by TID under Certificate 76684.

The purpose of the proposed temporary and permanent changes is to enhance the in-district delivery system of water currently stored by TID in the Upper Tumalo Reservoir. The changes

involve addition of a new reservoir system consisting to two interconnected ponds at the top of the system that will provide for improved management and distribution of water pursuant to an agreement between TID and one of its patrons and irrigation customers, KC Development Group, LLC (“KCDG”). Under the plan, the amount of water authorized for storage in Upper Tumalo Reservoir under Certificate 76684 would be permanently reduced by a total of 124.79 acre-feet, and that amount of storage would be transferred to the new reservoir located on KCDG property.

The temporary district transfer application (T-11833) was filed by TID in June, 2014, to allow for initial testing of the system using 108 acre-feet of water. The permanent district transfer application (T-11951) was filed in December, 2014, requesting the actual storage capacity of 124.79 acre-feet. Both applications were filed by TID following consultation with OWRD staff, and were based on an understanding by TID that the proposed changes to Certificate 76684 could be made under the in-district procedures in ORS 540.570 and 540.580. Under these statutes and the related OWRD rules, districts are authorized to implement changes after complete applications are filed, but prior to final action by the Department.

After each application was filed, OWRD provided public notice and initiated a public comment period. Neighboring landowners Thomas and Dorbina Bishop submitted comments objecting to the project and a formal protest on the permanent transfer application. The Bishops also challenged related land use actions by the County.

In late 2014, TID became aware that OWRD was considering legal questions raised by the Bishops concerning the proper interpretation and use of the in-district transfer process, and that OWRD was reviewing the issues with its attorneys. On April 29, 2015 – coincidentally, the same day the two Final Orders were signed by OWRD on the TID transfer applications but before TID had notice of OWRD’s action – the District filed amended applications seeking review under the general transfer process in ORS 540.520 for permanent changes and ORS 540.523 for temporary changes. The action was taken to help avoid questions and controversy associated with processing the requested changes under the in-district transfer statutes. The Final Orders issued by OWRD did not take into consideration the District’s amended applications.

This Petition asks OWRD to reconsider the Final Order issued in connection with the temporary transfer application and to approve the amended application pursuant to ORS 540.523.

II. Grounds for Reconsideration and Argument

The District requests reconsideration of the Final Order for T-11833 on the following specific grounds:

A. The Temporary Transfer Application Should Not Be “Denied” on the Basis That It Has “Expired.”

The Final Order denies the application, in part, on the basis of a finding that the application has “expired.” This conclusion is in error. If the application in fact “expired” before OWRD completed review and action on the application, the proper procedural response would have been



to issue an order stating the application is of no further force and effect and to close the file. There is no legal justification for denying a properly filed application simply because OWRD failed to take action within the specified time period.

ORS 540.570 authorizes a district to make temporary changes for “one irrigation season.” The statute expressly permits a district to implement the change prior to OWRD action on an application when certain requirements are met. In this case, TID filed the application during the 2014 irrigation season, and gave notice of its intention to proceed with the change as required under ORS 540.570. OWRD accepted the application as complete and took no action during the 2014 irrigation season to stop TID from proceeding with the change. In April, 2015, before OWRD gave notice to TID of its intended denial of the temporary transfer application, TID filed an amended application to request processing under the general temporary transfer provisions of ORS 540.523. As described further in Section II.C., below, a temporary transfer under ORS 540.523 may be approved for up to five years, and the application does not “expire” after a single irrigation season.

TID contends the amended application replaced and supplanted the original application, and should be considered upon reconsideration. Alternatively, if OWRD continues to assert the application “expired” at the end of the 2014 irrigation season, the Final Order should be reconsidered and corrected to state that it expired without action by OWRD.

B. The Final Order Should Be Reconsidered to Modify the Analysis and Findings relating to Land Use Compliance.

The Final Order denies the application, in part, on the basis of a conclusion that necessary land use approvals have not been obtained. The Final Order recognizes that OWRD has authority to delay action on a water use application while land use approvals are pending, or, to condition the OWRD approval upon successful completion of land use approval. In this case, however, OWRD determined neither option was appropriate because the “temporary transfer cannot be allowed at all.” This conclusion is tied to other findings that the application has expired, and that ORS 540.570 cannot be used to authorize the “movement” of stored water.

As described above, if OWRD takes the position that a district temporary transfer application “expires” after the end of the irrigation season in which it is filed, the proper action in this case is to issue a Final Order stating the time period has expired and the application is no longer active. The application should not have been “denied” for any reason. Alternatively, as described below, the application should have been considered under the general temporary transfer process in ORS 540.523. Under that process, the application would not have “expired” and OWRD’s action on the application could have been delayed to provide time for completion of the land use process, or conditioned as permitted under OAR690-005-0035(4)(b)(A). In either case, the application should not have been denied on the basis of failure to comply with OWRD land use compatibility requirements.



C. The Amended Application Should Be Considered and Approved Under the General Transfer Statutes.

The Final Order denies the application, in part, on the basis of a finding that ORS 540.570 – the district temporary transfer statute – does not authorize the movement of stored water. This finding is in error, and the Final Order should be reconsidered because it fails to acknowledge that the application was amended on April 29, 2015, to request consideration under the general temporary transfer provisions of ORS 540.523.

Under the general temporary transfer process in ORS 540.523, the proposed change can be approved for a period of up to five years and the application does not “expire” after one irrigation season. Further, if TID had submitted its application under the general transfer process in the first place, the issue of statutory authorization for the proposed change could not reasonably have been asserted or sustained. There is no wording in the general temporary transfer statute that would open the door to the type of limiting interpretation that OWRD is now applying to the in-district transfer process. ORS 540.523 states clearly that any “person” (defined to include districts) who holds a water use subject to transfer may apply to temporarily change the place of use for a period not to exceed five years.

It is not necessary to further address the question of whether ORS 540.570 does or does not allow for the movement of stored water. If Application T-11183 was effectively amended on April 29, 2015, then analysis of ORS 540.570 is no longer required. If the application was not effectively amended, OWRD failed to act on the application in a timely manner and the Final Order should be corrected to indicate the application expired without action.

D. Conclusion

OWRD cannot deny an application that has expired. If OWRD takes the position that the application “expired,” it must accept the consequence that it missed its opportunity to take action on the application. In that case, the Final Order should be reconsidered and corrected to clarify that the application expired without action by OWRD and has no further force and effect. If the application did not expire, it should be processed under the general transfer statutes in accordance with TID’s request that the application be amended for that purpose.

II. Stay Request

Pursuant to OAR 137-003-0090, TID hereby requests a Stay of the Final Order titled “Final Order Denying A Temporary Change To Water Right Certificate 76684,” dated April 29, 2015.

Name, address, telephone number of the person filing the request: The Stay is filed by Tumalo Irrigation District. The District’s address is 64697 Cook Ave, Bend, OR 97701. The District’s phone number is 541-382-3053.

Attorneys filing the request: The attorneys representing TID in this Petition for Reconsideration and Stay Request are Schwabe, Williamson & Wyatt PC by Martha Pagel;



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Hurley Re, P.C. by Elizabeth Dickson and J. Kenneth Katzaroff ; and Carl W. (Bill) Hopp, Jr.,
whose contact information is as follows:

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Bend, OR 97701
541-388-3606

Summary of the agency decision: The Final Order denies the proposed district temporary transfer, as described further above.

Other parties to the agency proceeding: None.

Facts and Reasons for the Stay: The District is seeking a Stay on the basis of the facts and reasons described above in its Petition for Reconsideration of the Final Order. As described further below, TID will suffer irreparable injury if the Final Order is not stayed, there is a colorable claim of error giving rise to the reconsideration request, and there will be no substantial public harm if the stay is granted.

Petitioner Will Suffer Irreparable Injury: The reservoir system at issue in the related temporary and permanent transfer applications was constructed and filled with water in accordance with and in reliance upon the procedures described for in-district transfers under ORS 540.570 and 540.580. This action was taken with full knowledge by OWRD and with no indication to the District or KCDG at the time that the storage use was not allowable. Construction of the reservoir involved lining two pre-existing mining pits on the KCDG property with a polymer material to prevent seepage and ensure efficient storage. The ponds are utilized together in the reservoir system. If the Stay is not granted while OWRD reconsiders the Final Order, the two ponds will have to be drained, or the amount of storage substantially reduced. Such action would expose the polymer liners to direct sunlight, which would degrade the integrity and could lead to substantial damage. Exposing the liners would also increase the very real risk of damage by deer and elk in walking across the exposed material. If the liners are



substantially damaged, it is unlikely that TID will have the funds necessary to remove and replace the liner.¹

Once properly permitted and placed into full use, the reservoir system will provide a significant improvement to the District's infrastructure. If a Stay is not granted and the liners are damaged, TID will likely have to abandon the project because of a lack of funds, resulting in the loss of a significant benefit for all of its patrons.

Based on the reasoning contained in OWRD's Final Orders, the requested change in location of use was denied primarily because of the procedural approach selected by TID to utilize the in-district transfer process described in ORS 540.570 and 540.580. This procedural approach was initially selected in consultation with OWRD and with a reasonably-based understanding by TID that the applications could be approved under that process. When it became clear that OWRD was likely to change its position with respect to use of the in-district process, TID requested consideration of the applications under the standard transfer processes. Although TID disagrees with the legal analysis and conclusion reached by OWRD in the Final Order, there is no reason to believe the applications cannot be approved when considered under the general statutes. As a result, TID should not be punished, and the investment in the existing reservoir placed at substantial risk, by requiring the reservoir to be drained, or water levels substantially reduced.

Colorable Claim of Error: As described in the above Petition, there is a colorable claim of error in the Final Order.

No Substantial Public Harm: Granting the requested stay will not result in substantial public harm. In fact, no public harm will result if TID is allowed to maintain the status quo while legal issues surrounding the proposed transfer are resolved. Use of water by TID for storage purposes is allowed under Certificate 76684. No public water is being diverted or used beyond the amounts already authorized, and OWRD's denial of the transfer application was not based on a finding of injury to other water uses. Construction and use of water in the new reservoir was done in reliance, in good faith, on authorization provided under the in-district transfer processes for temporary and permanent changes. (See, OAR 690-385-4100, authorizing a district to allow a change in the place of use prior to the Department issuing an order approving a district permanent transfer application.) As a result, public values are served and not harmed by not punishing or allowing undue financial harm to come to the district while legal disputes are resolved.

Persons Injured by the Stay: TID does not believe there will be injury to any persons, including the public, if the stay is granted. Although challenges to the use of the new reservoirs have been raised by neighboring landowners Thomas and Dorbina Bishop, TID does not believe the objections rise to the level of "injury" to the Bishops.

¹ On June 16, 2015, OWRD issued a Limited License in Conjunction with Enforcement Order that provided temporary authorization for the reservoir system and thereby avoids irreparable injury to the system. The requested Stay would provide alternative authorization and protection in the event the Limited License is challenged and subject to a stay, itself, under ORS 536.075.



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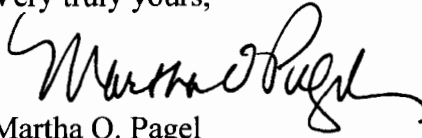
Additional Procedures to be Followed: None.

Appendix: Attached

IV. Conclusion

For all of the above reasons, the District respectfully requests reconsideration of the Final Order denying transfer application T-11833, and a stay of the Final Order pending reconsideration.

Very truly yours,



Martha O. Pagel

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APPENDIX

OAR 137-004-0090(2)(i)

Petitioner/Applicant relies on the following evidence in support of the Petition for Stay:

- I. Petition for Reconsideration and Request for Stay
- II. The OWRD Application Record for T-11951 and T-11833