

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

In the Matter of Transfer Application)
T-11951, Deschutes County)
)
) **FINAL ORDER DENYING A
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. 168 NW Greenwood Ave. Bend, OR 97701	Elizabeth A. Dickson Hurley Re, P.C. 747 SW Mill View Way Bend, OR 97702
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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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Copies Sent to the Above:
04/30/2015 BJW



Oregon Water Resources Department
 725 Summer Street NE, Suite A
 Salem Oregon 97301-1266
 (503) 986-0900
 www.wrd.state.or.us

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Application for District Permanent Water Right Transfer

Please type or print legibly in dark ink. If your application is incomplete or inaccurate, we will return it to you. If any requested information does not apply to your application, insert "N/A" to indicate "Not Applicable." As you complete this form, please refer to notes and guidance included on the application. A summary of review criteria and procedures that are generally applicable to the application is available at www.wrd.state.or.us/OWRD/PUBS/forms.shtml#app_criteria_review.

Change in Place of Use Only

1. APPLICANT INFORMATION

District: Tumalo Irrigation District

Address: 64697 Cook Avenue

City: Bend

State: OR

Zip: 97701

Phone: 541-382-3053

Fax: n/a

E-Mail address: fran@tumalo.org

2. PROPOSED CHANGE(S) TO WATER RIGHT(S)

- List **all** water rights to be affected by this transfer. Indicate the certificate, permit, decree or other identifying number(s) in the table below: *(Attach additional pages as necessary.)*

	Certificate	Permit / Previous Transfer	Decree
1.	76684	-	
2.		-	
3.		-	
4.		-	
5.		-	
6.		-	

*The District is not proposing a change to certificate 74146, 74147, or 76106 which are served by storage certificate 76684 as the proposed new storage site will also serve these certificates.

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3. ATTACHMENTS

*Check each of the following attachments included with this application.
The application will be returned if all required attachments are not included.*

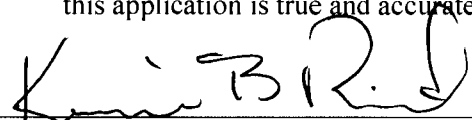
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<p>Supplemental Form A – Description of Proposed Change(s) to a Water Right <input checked="" type="checkbox"/> A separate Supplemental Form A is enclosed for each water right to be affected by this transfer. Map <input checked="" type="checkbox"/> Permanent Transfer A map meeting the requirements of OAR 690-385-3300 must be included but need not be prepared by a Certified Water Right Examiner (CWRE).</p>	<p>Fees: <input checked="" type="checkbox"/> Amount enclosed: <u>\$1,000.00</u> See the Department’s Fee Schedule at www.wrd.state.or.us or call (503) 986-0900.</p>
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4. SIGNATURES

The district certifies the following:

- (1) The water rights proposed for transfer are water rights subject to transfer and are not subject to forfeiture for nonuse under ORS 540.610;
- (2) Each user affected by the proposed transfer has provided written authorization for the transfer and such authorization is on file with the district; and
- (3) On behalf of the district, I affirm to the best of my knowledge the information contained in this application is true and accurate.



District Manager signature

Kenneth B. Rieck

name (print)

12/12/14

date

OR

Authorized District Representative signature

name (print)

date

Before submitting your application to the Department, be sure you have:

- Answered each question completely.
- Included all the required attachments.
- Included a check payable to the Oregon Water Resources Department for the appropriate amount.



**District Permanent Water Right Transfer Application
Supplemental Form A**

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DESCRIPTION OF PROPOSED CHANGE(S) TO A WATER RIGHT

List only one water right per page. A **separate Supplemental Form A must be completed for each** certificate, permit, decree, or other right involved in the proposed transfer.

Attach additional copies of Supplemental Form A as needed to describe other certificates, permits, decrees or other rights involved in this transfer.

1. CURRENT WATER RIGHT INFORMATION

Water Right Subject to Transfer (check and complete one of the following):

<input checked="" type="checkbox"/> Certificated Right	76684	
	Certificate Number	
<input type="checkbox"/> Adjudicated, Non-certificated Right	_____	_____
	Name of Decree	Page Number
<input type="checkbox"/> Permit for which Proof has been Approved	-	_____
	Permit Number	Date Claim of Beneficial Use Submitted
<input type="checkbox"/> Transferred Right for which Proof has been Filed	-	_____
	Previous Transfer Number	Date Claim of Beneficial Use Submitted
<input type="checkbox"/> Permit for Supplemental Irrigation	-	
	Permit Number	

- Name on Permit, Certificate, or Decree: Tumalo Irrigation District
- Priority Date(s): December 8, 1961

If there are **multiple Priority Dates** identified on the water right, any information provided in Supplemental Form A of this application must identify which priority date is associated with each of the authorized points of diversion or appropriation and places of use.

Source(s) of Water to be Affected by Transfer: Tumalo Creek

Tributary to: Deschutes River

- Are there **other water rights**, Permits or Ground Water Registrations associated with this land?
 Yes No

If “**Yes**”, what are the Permit, Registration or Certificate Numbers? _____

Any “layered” water use or a right that is supplemental to a primary right proposed for transfer **must be included in the transfer or be cancelled.**

▪ Certificate Number or other identifying number: 76684

The following information must be provided only for those points of diversion or appropriation that are involved in the transfer.

If a point of diversion or appropriation is not numbered on the decree or water right certificate or permit, assign it a unique number in the following table (e.g. POD #1 or POA(well) #1). Use the number to refer to the point of diversion or appropriation serving the place of use described in Tables I and II. Note: Permanent district transfers do not allow for a change in point of diversion or appropriation to serve the proposed place of use.

Government lot and donation land claim numbers must be included in the table below **only** if the information is reflected on the existing water right.

Location of Existing Authorized Point(s) of Diversion (POD) or Appropriation (POA):

(i.e., the allowed point(s) of diversion or appropriation listed on the water right for the "FROM" or "OFF" lands)

AUTHORIZED POINT(S) of DIVERSION (POD) or APPROPRIATION (POA)							
POD# or POA#	TWP	RNG	SEC	QQ	DLC	GOVT LOT	MEASURED DISTANCES
3P	17 S	11 E	23	SE NE			2080 Feet South & 1310 Feet West from the NE Corner of Section 23.

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▪ Certificate Number or other identifying number: 76684

TABLE II. – PROPOSED PLACE OF USE

POD / POA #	PRIORITY DATE	USE	LEGAL DESCRIPTION							ACRES	USER NAME	DINN
			TWP	RNG	SEC	QQ	DLC	GOV'T LOT	TAX LOT			
#3	12/8/1961	Storage	17 S	11 E	13	NE NW			00828	Acre Feet	Tumalo Irrigation District	T14S.001
#3	12/8/1961	Storage	17 S	11 E	13	NW NE			00828	Acre Feet	Tumalo Irrigation District	T14S.001
#3	12/8/1961	Storage	17 S	11 E	13	NW SW			00828	Acre Feet	Tumalo Irrigation District	T14S.001
#3	12/8/1961	Storage	17 S	11 E	13	NW SW			00824	Acre Feet	Tumalo Irrigation District	T14S.001
#3	12/8/1961	Storage	17 S	11 E	13	SE NW			00828	Acre Feet	Tumalo Irrigation District	T14S.001
#3	12/8/1961	Storage	17 S	11 E	13	SE NW			00824	Acre Feet	Tumalo Irrigation District	T14S.001
#3	12/8/1961	Storage	17 S	11 E	13	SW NW			00828	Acre Feet	Tumalo Irrigation District	T14S.001
#3	12/8/1961	Storage	17 S	11 E	13	SW NW			00824	Acre Feet	Tumalo Irrigation District	T14S.001
#3	12/8/1961	Storage	17 S	11 E	13	NE SW			00824	Acre Feet	Tumalo Irrigation District	T14S.001

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T14S.001

Attachment A		TU MALO IRRIGATION DISTRICT CERTIFICATES	
		SOURCE/POINT OF DIVERSION	
ID #	Primary Cert. #	Source	Location
1P	74146 Tumalo Decree V1, P135 & V16, P188.	Tumalo Creek, tributary to the Deschutes River 8/5/1900, Sept. 1900, 4/28/1905, 5/27/1907 & 6/1/1907	17S 11E W.M. 23 SW/NE - Tumalo Feed Canal - N 70° 21' W.; 1550 feet from East 1/4 corner of Section 23 (Tumalo Creek POD #1) 18S 10E W.M. 2 NW/SW - N. 14° 02' E.; 1713 feet from South 1/4 corner of Section 2 (Tumalo Creek POD #2)
2P	74147 Permit #19628	Tumalo Creek, tributary to the Deschutes River 10/29/1913	17S 11E W.M. 23 SW/NE - Tumalo Feed Canal (Tumalo Creek POD #1) - N. 70° 21' W.; 1550 feet from East 1/4 corner of Section 23
3P	76106 Permit #27840	Tumalo Creek and Upper Tumalo Reservoir, constructed under Permit R-2743, tributaries of the Deschutes River 12/8/1961	17S 11E W.M. 23 SE/NE - Tumalo Creek - 2080 feet South and 1310 feet West from NE Corner of Section 23 16S 11E W.M. 33 SE/SW - Upper Tumalo Reservoir
9P	83571	TID Bend Feed Canal 10/31/1900	2050 Feet West from NE Corner of Section 32 (POD #9)
Supp. Cert. #			
1S	74147 to 74146 Permit #19628	Tumalo Creek, tributary to the Deschutes River 10/29/1913	17S 11E W.M. 23 SW/NE - Tumalo Feed Canal (Tumalo Creek POD #1) - N 70° 21' W.; 1550 feet from East 1/4 corner of Section 23
2S	74148 to 74146, 74147, 74149 Permit #624	Crescent Lake Reservoir, constructed under Permit R-102, tributary to Crescent Creek 4/7/1911	24S 6E W.M. 11 SE/SW and SW/SE
3S	74149 to 74146, 74147, 76106 Duffy Decree V9, P362	Deschutes River, tributary to the Columbia River 1905	17S 12E W.M. 32 NW/NE - Bend Feed Canal - 100 feet South and 550 feet East from N1/4 corner of Section 32
4S	76520 to 74146, 74147, 74148 74149, 76106 Permit #27841	Crescent Lake Reservoir, constructed under Permit R-2744, tributary to Crescent Creek and the Little Deschutes River 12/8/1961	17S 12E W.M. 32 NW/NE - Deschutes River (Tumalo ID Bend Feed Canal) - 2050 feet West from NE corner of Section 32 24S 6E W.M. 11 SE/SW - Crescent Lake Reservoir
11S	76714	Crane Prairie Reservoir, constructed under Permit R-1687, tributary of Deschutes River 2/28/1913	COID North Canal: 850 Feet North and 630 feet West from the E1/4 Corner of Section 29 (POD #11)

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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.

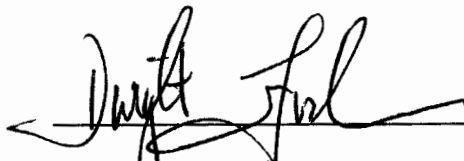
A protest of transfer was filed with the department on February 5, 2015 by the Bishops. Because the department is denying the TID transfer, as opposed to approving the petition, it is not required to hold a contested case hearing. Because the department is denying TID's transfer, it is within the Director's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

June 25, 2015

BY HAND DELIVERY

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

RECEIVED BY OWRD

JUN 26 2015

SALEM, OR

Re: Petition for Reconsideration: Transfer T-11951 (Permanent District Transfer for Tumalo Irrigation District)

Dear Director Byler:

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 Permanent 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 filed 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 and approve the permanent change pursuant to the district transfer procedures under ORS 540.580, or in the alternative to reconsider and approve the amended application pursuant to ORS 540.520. The Petition also addresses land use issues raised in the Final Order.

II. Grounds for Reconsideration and Argument

The District requests reconsideration of the Final Order for T-11951 on the following specific grounds:

A. The Permanent District Transfer Application Filed Under ORS 540.580 Should Be Approved.

In its Final Order, OWRD determined that ORS 540.580 does not authorize districts to make changes in the location of use for reservoir storage. OWRD concludes the district transfer statute



allows only for changes related to the location of use for irrigation purposes. We believe this interpretation is in error and should be reconsidered.

ORS 540.580 authorizes irrigation districts to make in-district transfers of the place of use of water. The statute provides:

- (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.)

The plain wording of the statute allows for a change in the place of use of a district's water right subject to transfer, without restriction as to the type of water right, whether storage or otherwise. Additionally, as set forth below, we believe the legislature's use of the term "water use subject to transfer" is critical to the analysis and reflects an intention that the statute should be interpreted broadly to include changes to the place of use for any type of water right held by a district.

In its Final Order, OWRD focuses only on the wording of ORS 540.580(1)(a) that makes reference to the number of "acres to which water is to be applied." Based on this wording, OWRD concludes the in-district transfer process does not authorize changes to reservoir storage. This analysis places undue emphasis on the reference to acreage, and completely ignores the significance of the term "water use subject to transfer" in the full text and context of the statutory wording.

The term "water use subject to transfer" is used throughout ORS Chapter 540 and is defined in ORS 540.505 as follows:

- (4) "Water use subject to transfer" means a water use established by:
 - (a) An adjudication under ORS chapter 539 as evidenced by a court decree;
 - (b) A water right certificate;
 - (c) A water use permit for which a request for issuance of a water right certificate under ORS 537.250 has been received and approved by the Water Resources Commission under ORS 537.250; or
 - (d) A transfer application for which an order approving the change has been issued under ORS 540.530 and for which proper proof of completion of the change has been filed with the Water Resources Commission.



This definition addresses only the status of a water right and makes no distinctions as to the type of water right or character of use.

ORS 540.580 was originally enacted under Senate Bill 494 (“SB 494”) in 1995. The general purpose of the legislation was to create a simplified process by which irrigation districts could work with OWRD to make permanent in-district transfers in the location of use of water. *See*, Minutes of Senate Committee on Water & Land Use, February 21, 1995, **Exhibit A**.

During the same 1995 Session, the Legislative Assembly also enacted House Bill 2184 (“HB 2184”), a measure that made several changes to existing water management programs, including, changes to the general transfer process described in ORS Chapter 540.510 *et seq.* Significantly, HB 2184 introduced the term “water use subject to transfer” to describe the types of water rights that could be considered in a transfer application under the general transfer process and included the definition now shown in ORS 540.505.

As enacted in 1995, HB 494 did not use the defined term “water use subject to transfer” but instead listed water rights evidenced by a “certificate or decree” in describing district water rights that could be modified under the in-district transfer program. This was an apparent oversight that was corrected four years later. In 1999, House Bill 2833 (“HB 2833”) applied the defined term of “water use subject to transfer” directly to the irrigation district transfer statute, ORS 540.580.

HB 2833 was a “housekeeping” bill submitted by the Oregon Water Resources Congress in cooperation with OWRD. The general intent of the 1999 bill was to clarify the types of rights subject to transfer under the district transfer statute, and to “clean up” the definitions that had been adopted throughout ORS Chapter 540 during the previous two sessions. Testimony offered by OWRD in support of HB 2833 confirms the intention to clarify that irrigation districts had the same authority and ability to make changes under the district transfer statutes as were available to other water right holders under the standard transfer process:

Mr. Chairman, Members of the Committee. For the Record, Tom Byler,
Legislative Coordinator with the Water Resources Department.

Let me give you a few examples of the types of—of the natures of the amendments in the bill. For example, one amendment involves updating what is now antiquated, outdated language regarding what types of rights are subject to transfer. Throughout most of the transfer statutes for entities other than irrigation districts, the term of trade is called a “water use subject to transfer.” This includes certificated rights, decreed rights, and permitted rights, which are virtually certificated, in essence they’ve gone through almost every stage of the permit process, except they haven’t received the final order yet. *The irrigation district transfers, through an oversight more than anything, the statutes for the irrigation*



district transfers did not include that term: “water use subject to transfer.” This bill would—would add that language in.

Testimony of Tom Byler before the Senate Committee on Rules & Elections, June 10, 1999 – HB 2833 (Emphasis added.) **Exhibit B**, attached.

Fundamentally, HB 2833 worked to harmonize the irrigation district transfer statutes with the general transfer statutes. In SB 494 and HB 2833, the Legislature provided irrigation districts with an option to utilize a simplified transfer process for making in-district changes in the place of use for any water rights subject to transfer. The legislation specifically empowered irrigation districts to use those statutes “in lieu of” the general transfer method, as described in related changes made to the general transfer statutes:

(1) Except as provided in subsections (2) to (8) of this section, *all water used in this state for any purpose* shall remain appurtenant to the premises upon which it is used and no change in use or place of use of any water for any purpose may be made without compliance with the provisions of ORS 540.520 and 540.530. However, the holder of any water use subject to transfer may, upon compliance with the provisions of ORS 540.520 and 540.530, change the use and place of use, the point of diversion or the use theretofore made of the water in all cases without losing priority of the right theretofore established. *A district may change the place of use in the manner provided in ORS 540.572 to 540.580 in lieu of the method provided in ORS 540.520 and 540.530.*
(Emphasis added.)

This wording expresses a clear statutory intention that irrigation districts may use the process described in ORS 540.572 to 540.580 as an alternative to the process in ORS 540.520 and 540.530 for making changes in the place of under a qualifying water right (a “water right subject to transfer”). Nothing in ORS 540.510 or ORS 540.580 expresses an intention to limit the types of water rights that districts may change to only those used for irrigation purposes.

OWRD’s interpretation of ORS 540.580, as expressed in the Final Order, creates a new limitation on the statutory authority that was neither stated nor intended by the Legislative Assembly. The Department’s interpretation relies upon an ambiguity created by the reference in ORS 540.580(1)(a) to the “rate, duty and total number of acres to which water is to be applied.” Although we agree with OWRD that this wording logically relates to use of water for irrigation, interpreting the statute to mean that it is intended to allow *only* changes involving irrigation would ignore other plain wording in the statute and would be inconsistent with the legislative history and intent.

If the legislature had intended to limit the changes authorized under ORS 540.580 to only the location of use for irrigation, it would have said so. It did not. Instead, the Legislative Assembly created broad authority in ORS 540.510 allowing the holder of a water right “for any purpose” to change the place of use, *and* authorizing districts to change the place of use under the process



described in ORS 540.580 “in lieu of” the method described in ORS 540.520 and 540.530 for any water rights subject to transfer.

B. Alternatively, the Amended Application Should be Considered and Approved Under the General Transfer Statutes.

Before TID received notice that OWRD was issuing the Final Order to Deny T-11951, TID submitted an amended application to request consideration under the general transfer provisions in ORS 540.510 *et seq.* 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. OWRD has an established practice of interpreting the general transfer statutes to allow for changes in the location of use for a reservoir. Moreover, there is no wording in the general transfer statutes that would open the door to the type of limiting interpretation that OWRD is now applying to the in-district transfer process. ORS 540.510 states clearly that the holder of “any water use subject to transfer” may change the place of use, type of use or point of diversion upon compliance with the statutory process.

In this case, TID consulted with OWRD staff prior to submitting its application under the in-district process, and reasonably relied on agency guidance in doing so. When it became clear that OWRD was considering a change in its position with respect to use of the in-district process, TID requested the application be processed under the general transfer statutes instead. When the amended application was submitted, TID had no knowledge of issuance of the Final Order. Similarly, when OWRD issued the Final Order, it was not aware of the requested amendment. Therefore, OWRD should reconsider the Final Order to allow for appropriate consideration of the amended application.

C. The Final Order Should Be Reconsidered to Allow Time for Completion of Land Use Approvals or for the Addition of Appropriate Conditions.

The Final Order denies the application, in part, on the basis of a conclusion that land use approval is necessary and the Department has not received sufficient information to determine whether the proposed action is consistent with the applicable local land use plan. Final Order, p. 4-5. The Final Order states the applicant failed to submit “any land use information with its application” that would provide the Department with information needed to make required land use findings. *Id.*, at 5. In making these findings, OWRD ignores the fact that land use compatibility forms were not initially required by OWRD as part of the district transfer application process. The Final Order also fails to recognize the connection between the temporary transfer application (T-11833) and this permanent application and the fact that TID did provide additional land use information when requested in connection with the temporary transfer application, and could have provided similar information, if requested, for this application.

As reflected in the OWRD record, when this application was first submitted, TID understood the standard land use compatibility form would not be required. (Submission of the land use form is



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not identified as an application requirement under OAR 690-385-2000.) In fact, OWRD confirmed receipt of a complete application without requiring the land use form and never gave further notice to TID of the apparent need to submit the form for the permanent transfer application. Upon request by OWRD, TID did provide a signed form showing land use compliance for T-11833, the temporary transfer application. The County's action in signing that land use form was subsequently challenged by third parties, and as a result of the process, it was determined that further land use action was needed in the form of Conditional Use approval. TID then promptly submitted the required land use application, which is currently pending before the county. OWRD never requested additional land use information for the permanent transfer application.

In sum, the issue of land use compatibility in connection with the temporary and permanent transfer applications should not be a basis for denial of the applications. OWRD initially did not require TID to provide a signed land use form for either of the applications. Upon request, TID did provide a signed land use form for T-11833, but TID was not asked to provide a similar form for T-11951 and OWRD did not notify TID of a deficiency in the application by failing to submit the land use information. If OWRD had notified TID, the District could have taken immediate steps to file the Land Use Form with the County, and deliver evidence of having done so to OWRD.

Under OWRD rules, when a land use action is pending, OWRD is directed to withhold action on the application or to condition approval upon successful completion of the land use process. OAR 690-005-0035(4)(c). Therefore, the Final Order should be reconsidered to provide time for the applicant to provide evidence of the pending land use action and for the Department to make corrected findings with respect to land use compliance.

II. Stay Request

Pursuant to OAR 137-003-0090, TID hereby requests a Stay of the Final Order titled "Final Order Denying A Permanent 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; Hurley Re, P.C. by Elizabeth Dickson and J. Kenneth Katzaroff; and Carl W. (Bill) Hopp, Jr., whose contact information is as follows:

Martha O. Pagel
Schwabe, Williamson & Wyatt PC
530 Center St. NE, Suite 400
Salem, OR 97301
503-540-4260



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Elizabeth Dickson
J. Kenneth Katzaroff
Hurley Re, P.C.
747 SW Mill View Way
Bend, OR 97702
541-317-5505

Carl W. (Bill) Hopp, Jr.
168 NW Greenwood Ave.
Bend, OR 97701
541-388-3606

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

Other parties to the agency proceeding: None. Although a protest was filed by Thomas and Dorbina Bishop, the protest was denied by OWRD in a separate Final Order issued April 29, 2015, and no parties have been named in this proceeding. Therefore, this stay request does not require a statement to “other parties” as provided in OAR 137-004-0090(2)e).

Facts and Reasons for the Stay: The District is seeking a Stay because the Final Order presents a novel interpretation of the irrigation district transfer statutes that should be reconsidered for the reasons described in the above Petition. 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 transfer application 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

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.



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 Order, the requested change in location of use was denied because of the procedural approach selected by TID to utilize the in-district transfer process described in ORS 540.580. This procedural approach was initially selected in consultation with OWRD and with a reasonably-based understanding by TID that the application could be approved under that process. When it became clear that OWRD may change its position with respect to use of the in-district process, TID requested consideration of the application under the standard transfer process. Although TID disagrees with the legal analysis and conclusion reached by OWRD in the Final Order, there is no reason to believe the application will not be approved when considered under that process. 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.

Additional Procedures to be Followed: None.

Appendix: Attached.

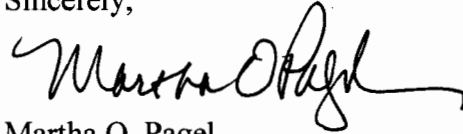


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IV. Conclusion

For all of the above reasons, the District respectfully requests reconsideration of the Final Order denying transfer application T-11951, and a stay of the Final Order pending reconsideration.

Sincerely,



Martha O. Pagel

MOP:kdo



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, with Exhibits (Enclosed)
- II. The OWRD Application Record for T-11951 and T-11833

SENATE COMMITTEE ON WATER & LAND USE

Hearing Room

Tapes - 34

MEMBERS PRESENT:

Sen. Rod Johnson, Chair

Sen. Neil Bryant

Sen. Ron Cease

Sen. Bill Dwyer

Sen. Bob Kintigh

STAFF PRESENT:

Karen Quigley, Committee Counsel

Kimberly Shadley, Committee Assistant

Mitch Hack, Senate Floor Staff

MEASURES HEARD:

SB 494

SB 501

SB 513

These minutes contain materials which paraphrase and/or summarize statements made during this session. Only text enclosed in quotation marks report a speaker's exact words. For complete contents of the proceedings, please refer to the tapes.

TAPE, SIDE A

008 VICE-CHAIR KINTIGH: Calls the hearing to order. (1:08)

PUBLIC HEARING ON SB 494

Witnesses: Gail Achterman, Oregon Water Resources Congress
Jan Boettcher, Oregon Water Resources Congress
Bruce Estes, Professional Land Surveyor and Certified Water Right Examiner
Ladd Henderson, Santiam Water Control District
Martha Pagel, Director, Water Resources Department
Bob Maine, Water Resources Department, Bend Oregon
Todd Hiedgerken, Executive Director, Water for Life
Doug Myers, Water Watch
Reed Benson, Attorney, Water Watch
Kip Lombard

EXHIBIT A

Feb. 21, 1995 – Senate Bill 494

013 GAIL ACHTERMAN, OREGON WATER WATER RESOURCES CONGRESS: Testifies in support. Submits written testimony, (EXHIBIT A).

046 ACHTERMAN: The intent here is that the water use would still be reported annually to the Water Resources Department as measured at the point of diversion from the natural stream or reservoir.

Section three will require anyone who wants to protest a transfer, other than district transfers, would have to file that within thirty days.

095 VICE CHAIR KINTIGH: Is the rate for the district or individual holders?

ACHTERMAN: It is set for the district as a whole under their water rights.

VICE-CHAIR KINTIGH: Could these changes be made annually?

ACHTERMAN: That would be up to the district.

120 SEN. DWYER: Why limit the ability of the public from being able to protest? Why are we getting rid of the filing and examination fees on page four? Why are we eliminating a penalty for falsifying maps and how that benefits the public? Refers to situation in the Umatilla Basin.

ACHTERMAN: In terms of the situation in West Linn, Teal in the Umatilla basin, this bill wouldn't affect that; describes situation.

This allows irrigation districts to be treated the same as other municipalities in the state.

175 JAN BOETTCHER, OREGON WATER RESOURCES CONGRESS: Testifies in support. Potentially one can't participate in the transfer process unless injury can be shown; this wouldn't take away the ability to comment.

We will propose an amendment on line thirteen and fourteen; we would add "representatives" in case there is an attorney involved.

In response to Subsection O, page four, line six to nine; both that section and subsection three on line thirty six are part of the existing 3111 process that was adopted in 1989.

That language is removed because we would no longer have the 3111 process which is repealed in section six; these sections weren't in our original work, but were added by Legislative Counsel to clear up conflicts in existing statutes.

223 SEN. CEASE: The removal of the word "commission"; what is the intent?

ACHTERMAN: The Oregon Water Resources Congress is proposing that the bulk of the administrative work associated with issuing water rights and administering water rights would be handled by the department and not explicitly by the commission.

SEN. CEASE: Page three; what is the intent of 5?

ACHTERMAN: The holder of an in-stream water right is the Department of Water Resources and if they were concerned that an in-stream water right was going to be adversely affected, or presumably the Department of Fish and Wildlife or DEQ or the Parks and Recreation Department could bring this potential adverse effect to the attention of the Water Resources Department.

There is a policy question that the legislature needs to resolve; anyone else who had comments on the proposed transfer and its potential affects who didn't hold an existing water right wouldn't be able to be a party to a protest proceeding, but could comment.

ACHTERMAN: Line thirty eight, page two; the newspaper notice isn't required for changes in place of use or changes in the point of diversion that are less than one quarter mile where there are no intervening diversions.

288 SEN. DWYER: Describes danger in the bill.

ACHTERMAN: You need to distinguish between section two of the bill which only relates to the district's ability to shift water to different lands within the district.

SB 494 only authorizes the District Board of Directors, as opposed to the Department, to allow shifts in places of use within the existing boundary.

The change in the point of diversion couldn't be done by the irrigation district.

SEN. BRYANT: Gives history of HB 3111 (1989).

SB 494 is a different approach; there is no intent that there be an expansion of water rights. The limit in protesting only relates to the internal use of the water right, it couldn't affect streams in existence, for example.

SEN. DWYER: I appreciate the history, but I think we're going overboard when trying to take the public out of it.

ACHTERMAN: The purpose we are seeking is addressed by section two of the bill and I want to make sure that we don't confuse the two pieces.

Section three is a different policy issue.

SEN. CEASE: Section three would cut the protests in half as some of the environmental groups wouldn't be able to protest; is that the intent?

ACHTERMAN: Yes, except for comments.

SEN. CEASE: It would take the public out, remove more than half the protests and say to the public that they have no business being in the process unless they have a direct immediate interest.

482 ACHTERMAN: Oregon doesn't have a public interest test on transfers of water rights; Oregon has a no injury test on transfers of water rights.

EXHIBIT A

Feb. 21, 1995 – Senate Bill 494

TAPE 33, SIDE A

047 BOETTCHER: Testifies in support of SB 494.
Submits written testimony, (EXHIBIT B).

132 BRUCE ESTES, PROFESSIONAL LAND SURVEYOR AND CERTIFIED WATER RIGHT EXAMINER:
Testifies in support.
Refers to maps hung on the wall for the members to see.
The biggest concern we had was that the courts didn't allow the same acreage as on the maps.
Uses overhead projector showing maps, testifying in support.

300 LADD HENDERSON, SANTIAM WATER CONTROL DISTRICT: (In response to Sen.
Dwyer) We don't really care, we don't have a real position or love for that portion.

ACHERMAN: Legislative Counsel felt that should be deleted; OWRC has never proposed that
that be deleted.

HENDERSON: Our intent was to give the district a good starting point; to trace water rights was
difficult not only for the Department, but the district.

396 SEN. DWYER: Why repeal ORS 541.329?

BOETTCHER: The 3111 process could be completed without that legislation so we didn't feel it
was necessary to maintain that statute.

440 MARTHA PAGEL, DIRECTOR, OREGON WATER RESOURCES DEPARTMENT: Submits written
testimony, (EXHIBIT C).
The department understands the desire of districts to move water around; we thought we
addressed those concerns a few years back with an expedited process, (2191).
Our concern with SB 494 is that it seems to go too far or doesn't have the current safeguards.

TAPE 32, SIDE B

040 PAGEL: The measure does make changes in who can protest; we think that the current statute
has worked well and don't see any need for that.
Describes the delay on rule making referred to by Sen. Dwyer.

SEN. BRYANT: How would SB 494 be to the detriment of the district?

080 BOB MAINE, WATER RESOURCES DEPARTMENT, BEND: Describes situation in Deschutes area.
I could imagine an irrigation district with this power transferring all the water from the low part
to the high part, knowing the water would run down, irrigating more land.
Increased demand on the water source would hurt junior districts that draw from the same

water source.

125 SEN. DWYER: Expand the definition of water district?

PAGEL: We think it is intended for certain cooperative districts; LaPine Water Coop.

PAGEL: We would want to work on the language.

SEN. DWYER: I have concerns with extending boundaries.

190 PAGEL: It appears that the intent of the bill is for section two to apply to certificate water rights but as written it would apply to both permits and certificates.

SEN. BRYANT: I've asked Mr. Maine to work on conceptual amendments and we will work on some of the issues Sen. Dwyer has.

252 TODD HIEDGERKEN, EXECUTIVE DIRECTOR, WATER FOR LIFE: Testifies in opposition to SB 494. There is potential for injury to water users outside the district. The second issue is notification of transfers occurring. We would be supportive of the amendments from OWRC with the additional amendment on page two, line eleven, adding "duty".

290 SEN. DWYER: On the notice requirement, how is a person to know when the last appearance in the newspaper?

SEN. BRYANT: In the notice we say the date of the last publication.

340 DOUG MYERS WATER WATCH: Introduces Benson.

REED BENSON, ATTORNEY, WATER WATCH: Testifies in opposition to SB 494. Submits written testimony, (EXHIBIT D). This bill is broader than 3111; describes differences.

TAPE 33, SIDE B

060 SEN. BRYANT: Have you protested any of the three petitions filed under 3111?

BENSON: We can't protest; we have talked with folks in Salem and Bend who have reviewed the petitions for Santiam and LaPine.

085 KIP LOMBARD: Testifies in support. This bill doesn't deal with nor allow out of district transfers. It is important to set some time frame for transfers. We need to provide a process for notice to those water users outside of the district that may be

affected by the transfer process.

PUBLIC HEARING ON SB 513

Witnesses: Grace Gantt
Martha Pagel, Director, Oregon Water Resources Department

275 GRACE GANTT: Testifies in support; submits informative materials, (EXHIBIT E).

SEN. DWYER: How did they change the water right from five families to four?

GANTT: We've asked that.

343 MARTHA PAGEL, DIRECTOR, OREGON WATER RESOURCES DEPARTMENT:

The first situation that came to mind with this bill is the Gantt's problem; I can offer our support for the kind of changes proposed here as they were caught in a difficult situation that resulted in a hardship for them.

Describes situation.

GANTT: I feel there were a lot of discrepancies; the Water Resources Department says that with a cancellation there is a process to go through and none of that happened.

401 SEN. DWYER: There wasn't a cancellation, they just didn't give all the water that was requested in the permit, only certifying a portion of the water applied for.

GANTT: I went through five appeals for the right to build to find out that our water rights have been taken away?

PAGEL: The effect of the bill is a good one.

CHAIR JOHNSON: We need to change the law; this bill may be the right approach?

TAPE 34, SIDE B

PAGEL: Yes, we may want to do some wordsmithing.

050 CHAIR JOHNSON: I will close the hearing and ask you each to stay after the hearing to talk about this.

We are adjourned. (3:01 p.m.)

Submitted by, Reviewed by,

Kimberly Shadley Karen Quigley
Committee Assistant Committee Counsel

EXHIBIT A

Feb. 21, 1995 – Senate Bill 494

EXHIBIT SUMMARY:

- A - SB 494: Written testimony in support submitted by Achterman, pp 4
- B - SB 494: Written testimony in support submitted by Boettcher, pp 3
- C - SB 494: Written testimony submitted by Pagel, pp 4
- D - SB 494: Written testimony in opposition submitted by Benson, pp 4
- E - SB 494: Informative material submitted by Gantt, pp 7

EXHIBIT B

TRANSCRIPT EXCERPT

STATE OF OREGON LEGISLATURE

SENATE COMMITTEE

ON

RULES & ELECTIONS

June 10, 1999

Hearing Room B

8:00 A.M. Tapes 87 - 88

MEMBERS PRESENT: Sen. Charles Starr, Chair

Sen. Randy Miller, Vice-Chair

Sen. Lee Beyer

Sen. Peter Courtney

Sen. Neil Bryant

HB 2833A Public Hearing & Work Session

Tape 87, A, 0:00

CHAIR STARR: Posted schedule shows thir—Senate Bill 1329 had passed, got to the floor last night, so is not on the schedule. The executive appointment—we're going defer for a bit. House Bill 2885, we've requested amendments that are not ready, so we're—we're going to set that at the bottom of the agenda, at least. May set it over for another day. We're going to start with House Bill 2833, and I'm opening the Public Hearing on House Bill 2833. Is that—Tom Byler? Tom Byler.

TOM BYLER: Mr. Chairman, Members of the Committee. For the Record, Tom Byler, Legislative Coordinator with the Water Resources Department. I was hoping that Jan Lee would be here today. She's with the Oregon Water Resources Congress, this is their bill. And I had not prepared written testimony, I apologize for this, but I can tell

EXHIBIT B

1 you some things about the bill, and the bottom line is that we are very supportive of
2 this bill.

3 In the most general sense, this bill involves probably the overused phrase of
4 technical changes to irrigation district law related to transfers for those districts. I do
5 think that truly this is a housekeeping measure. The bill involves four or five different
6 changes which are minor and have little substantive impact, but would allow the
7 Department and the districts to have more clarity in the procedures involved in these
8 transfers.

9 Let me give you a few examples of the types of—of the natures of the
10 amendments in the bill. For example, one amendment involves updating what is now
11 antiquated, outdated language regarding what types of rights are subject to transfer.
12 Throughout most of the transfer statutes for entities other than irrigation districts, the
13 term of trade is called a “water use subject to transfer.” This includes certificated
14 rights, decreed rights, and permitted rights, which are virtually certificated, in essence
15 they’ve gone through almost every stage of the permit process, except they haven’t
16 received the final order yet. The irrigation district transfers, through an oversight more
17 than anything, the statutes for the irrigation district transfers did not include that term:
18 “water use subject to transfer.” This bill would—would add that language in.

19 The bill will also extend a time period for the Department to give public
20 notice of a request for a transfer for these irrigation district permit transfers, from 7 to
21 15 days. This avoids kind of a technical glitch that we can run into at the agency,
22 where we have a weekly notice that goes out on a certain day of each week, and when
23 we receive a notice of transfer a day or two prior to that weekly notice, it puts us in a
24 bind in terms of being able to issue that notice within the time required by statute.
25 Extending this for another 8 days will allow us the flexibility to move these forward
26 without a snag.

EXHIBIT B

1 The bill would also provide some safety for irrigation districts to—safety from
2 forfeiture while their transfer application is pending before the Department. Forfeiture
3 simply means that a water right could be subject to cancellation should it not be used
4 within a five-year period. We would not count any time against a water right holder
5 while their water right is in our process being reviewed for a transfer application. This
6 would hold them harmless during that period, basically. A similar provision exists in
7 the other transfer statutes.

8 The bill would also allow the Department to modify existing certificates
9 without issuing a new certificate. This is kind of a housekeeping, administrative
10 detail, which will make us more effective, and exclude and prohibit some red tape that
11 you would find in shuffling the papers for these types of transfers.

12 Again, I apologize for not having written testimony, I expected that I would be here in
13 more of a head-nod role. But I'm happy to respond to any questions.

14 **CHAIR STARR:** Thank you. Jan Lee, please.

15 **JAN LEE:** I'm Jan Lee, Executive Director with Oregon Water Resources Congress. We
16 represent a number of water suppliers, specifically irrigation districts And the bill as
17 presented, as amended, meets the needs both of our districts and the Department in a
18 number of areas. I don't want to repeat what Tom may have already testified to. I'm
19 sorry, the Salem traffic was not as productive this morning. But basically, the bill
20 allows for the Department to modify certificates rather than replace them with a new
21 number when they're a transfer application, and that will be an effective tool for both
22 us and the Department.

23 There's another housekeeping amendment on definition of a water right
24 subject to transfer that was affected in the statutes earlier for other portions and would
25 make this section comply as well.

EXHIBIT B

1 Notice provisions gives the Department a little more time to respond to our
2 transfers, and the exemption from forfeiture regarding House Bill 3111 is a temporary
3 provision which would be reversed in a couple years if it were adopted.

4 A repeal of the transfer constraint that was adopted back in 1995 has been
5 offered in this bill because it was found to be an unnecessary provision.

6 With that, I'd be glad to respond to any specific questions.

7 **CHAIR STARR:** Are there any questions of the witnesses? I believe then, well, we've got a
8 bill that has little controversy, and so we should be able to move it right along. With
9 that—with you approval, we're going to close the Public Hearing and open the Work
10 Session.

11 **SEN. BRYANT:** Mr. Chair I would move House Bill 2833A in gross to the floor with a do-
12 pass recommendation.

13 **CHAIR STARR:** Senator Bryant has moved House Bill 2833 to the floor with a do-pass
14 recommendation. Any discussion? Clerk, call the roll.

15 **CLERK:** Senator Beyer.

16 **SEN. BEYER:** Aye.

17 **CLERK:** Senator Bryant.

18 **SEN. BRYANT:** Aye.

19 **CLERK:** Senator Courtney.

20 **SEN. COURTNEY:** Yes.

21 **CLERK:** Senator Miller.

22 **SEN. MILLER:** Yes.

23 **CLERK:** Chair Starr.

24 **CHAIR STARR:** Aye. *Inaudible* . . .

25 **SEN. BRYANT:** I'll carry.

26 **CHAIR STARR:** Okay. Senator Bryant with carry. Close the Work Session on 2833.

EXHIBIT B

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Transcribed by:

Monica L. Stringer
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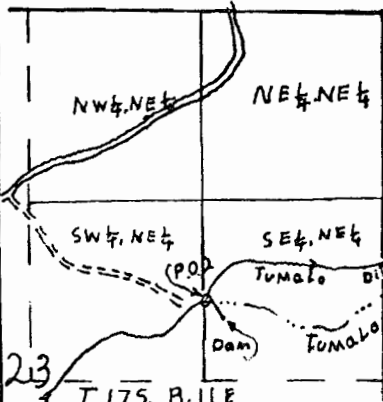
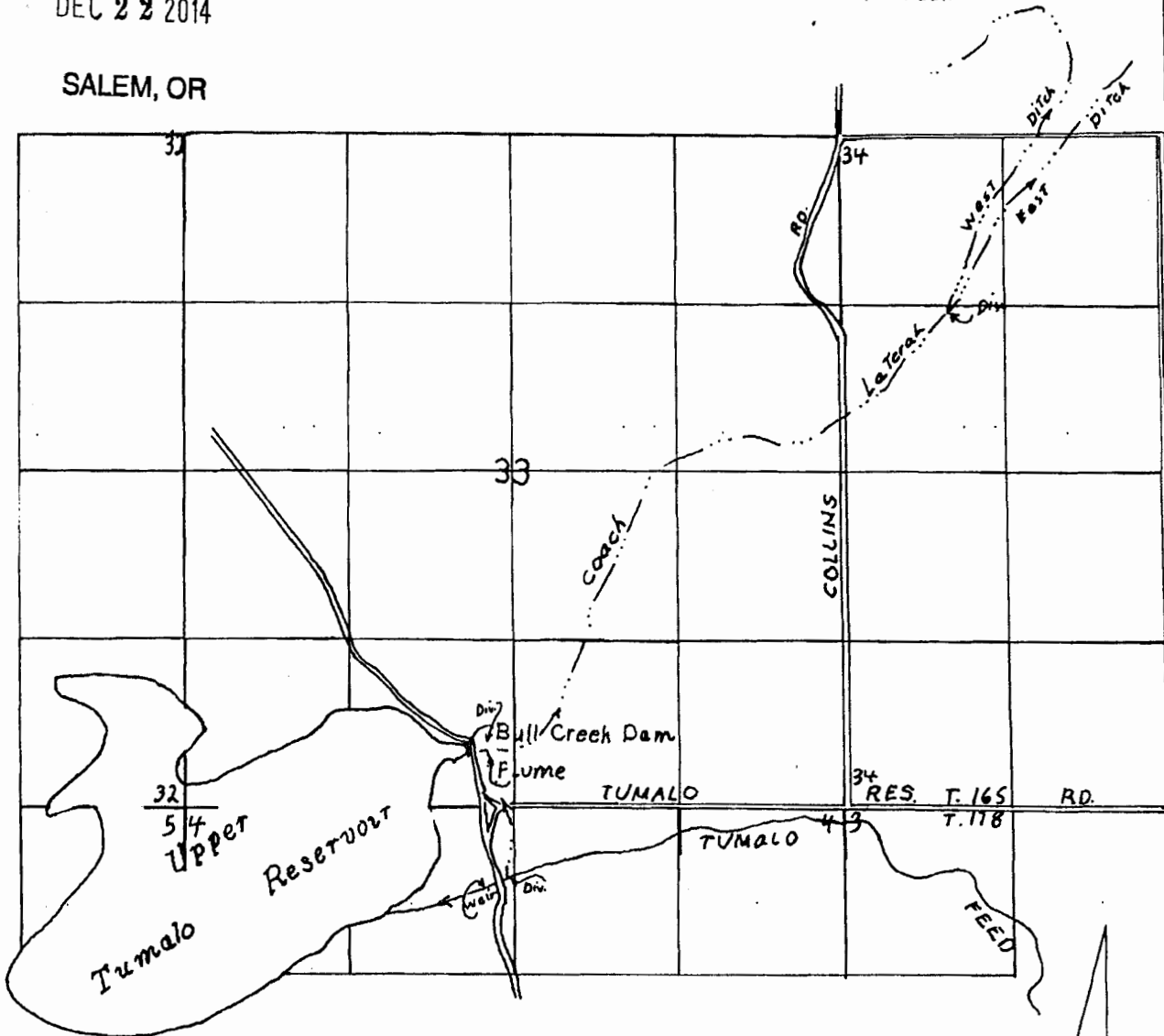
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OCT 05 1998

WATER RESOURCES DEPT
SALEM, OREGON

DEC 22 2014

SALEM, OR



FINAL PROOF SURVEY UNDER

Application No. R-37238 Permit No. R-2743
IN NAME OF

TUMALO IRRIGATION DISTRICT

Surveyed AUG.26. 1998., by R.M.SUTTERFIELD

DIV. PT. 2080'S & 1310' W FROM
NE COR. OF SEC. 23.

7 1/2 quad - Tumalo Dam Date 9-16-98 by R.M.S.

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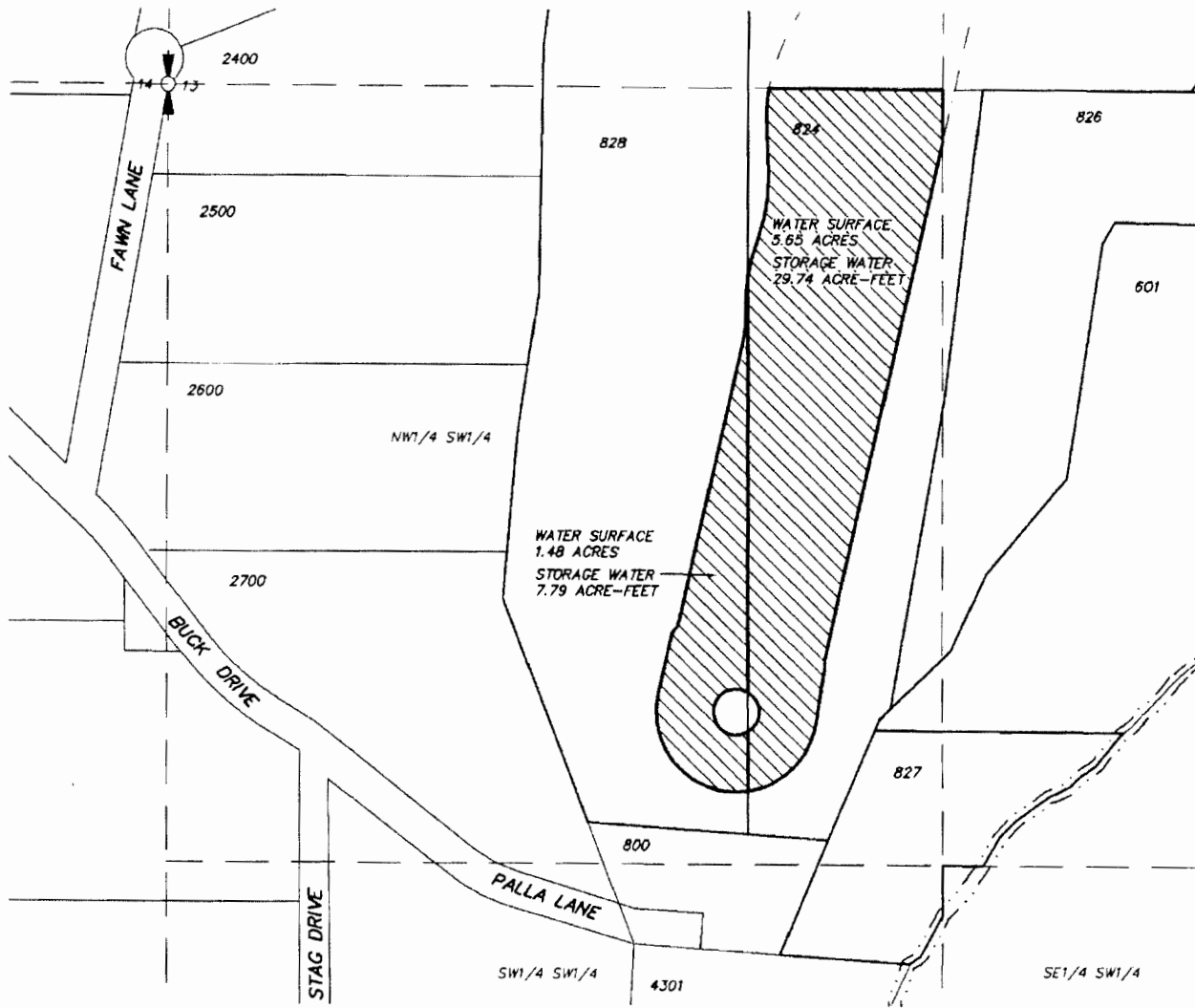
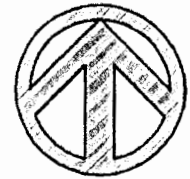
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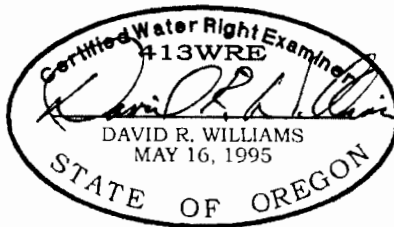
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SALEM, OR

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STORAGE MAP



12/12/14

TAX LOT NO. 828: 7.70 ACRE-FEET
 TAX LOT NO. 824: 29.39 ACRE-FEET



STORAGE RIGHT

HWA SURVEYORS, ENGINEERS & PLANNERS
 HICKMAN, WILLIAMS & ASSOCIATES, INC.
 1201 NW WALL STREET, SUITE 100
 BEND, OREGON 97701
 PHONE: 541.389.9351 FAX: 541.388.5416

APPLICATION FOR STORAGE RIGHT TRANSFER
 KC DEVELOPMENT GROUP, LLC

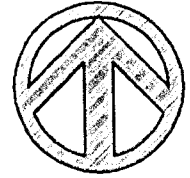
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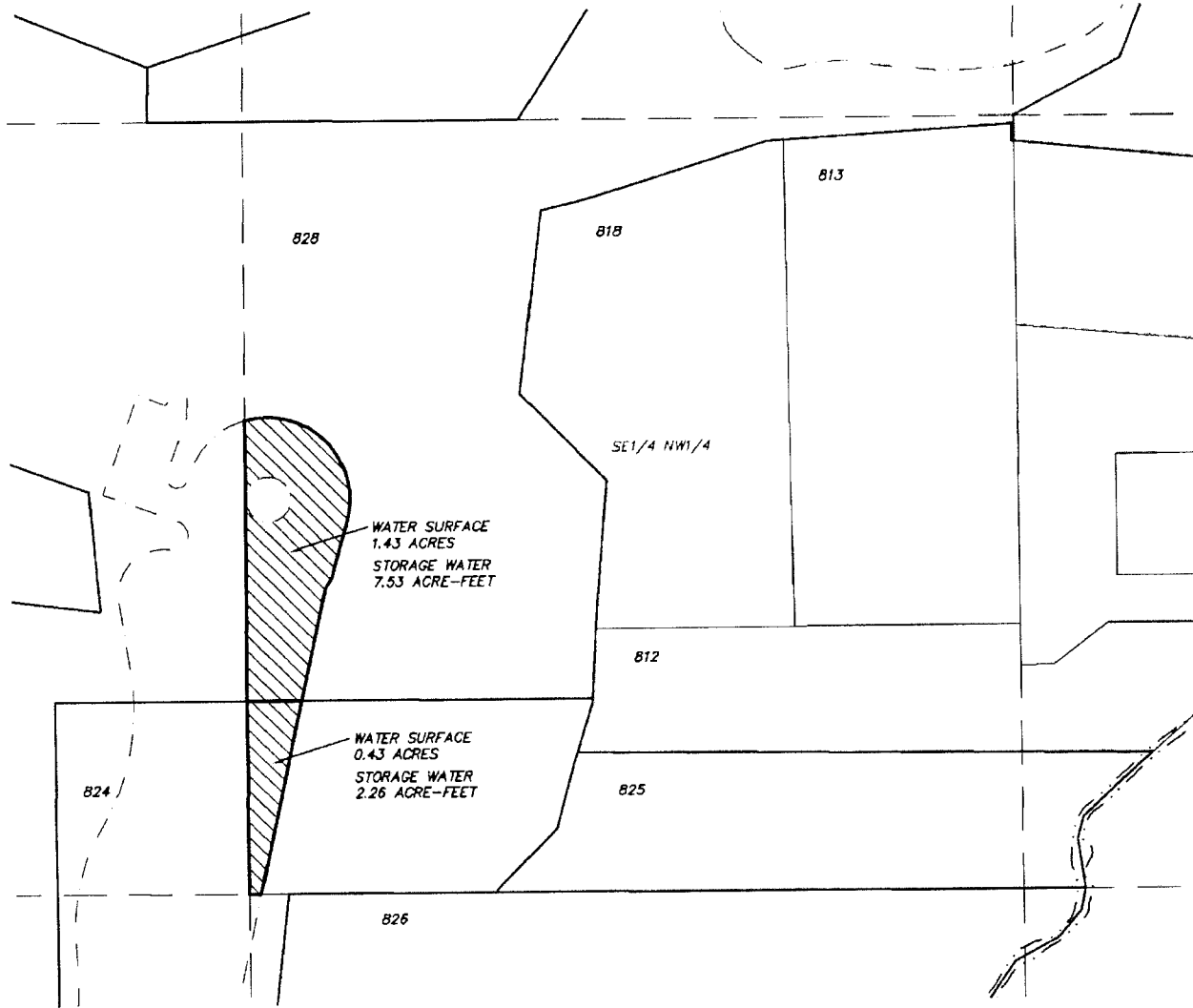
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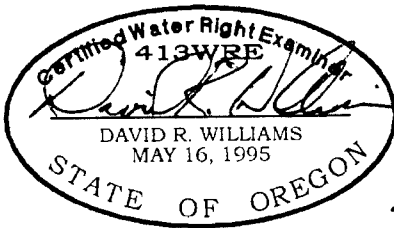
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SCALE: 1"=300'

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STORAGE MAP



TAX LOT NO. 828: 7.44 ACRE-FEET
TAX LOT NO. 824: 2.23 ACRE-FEET

12/12/14



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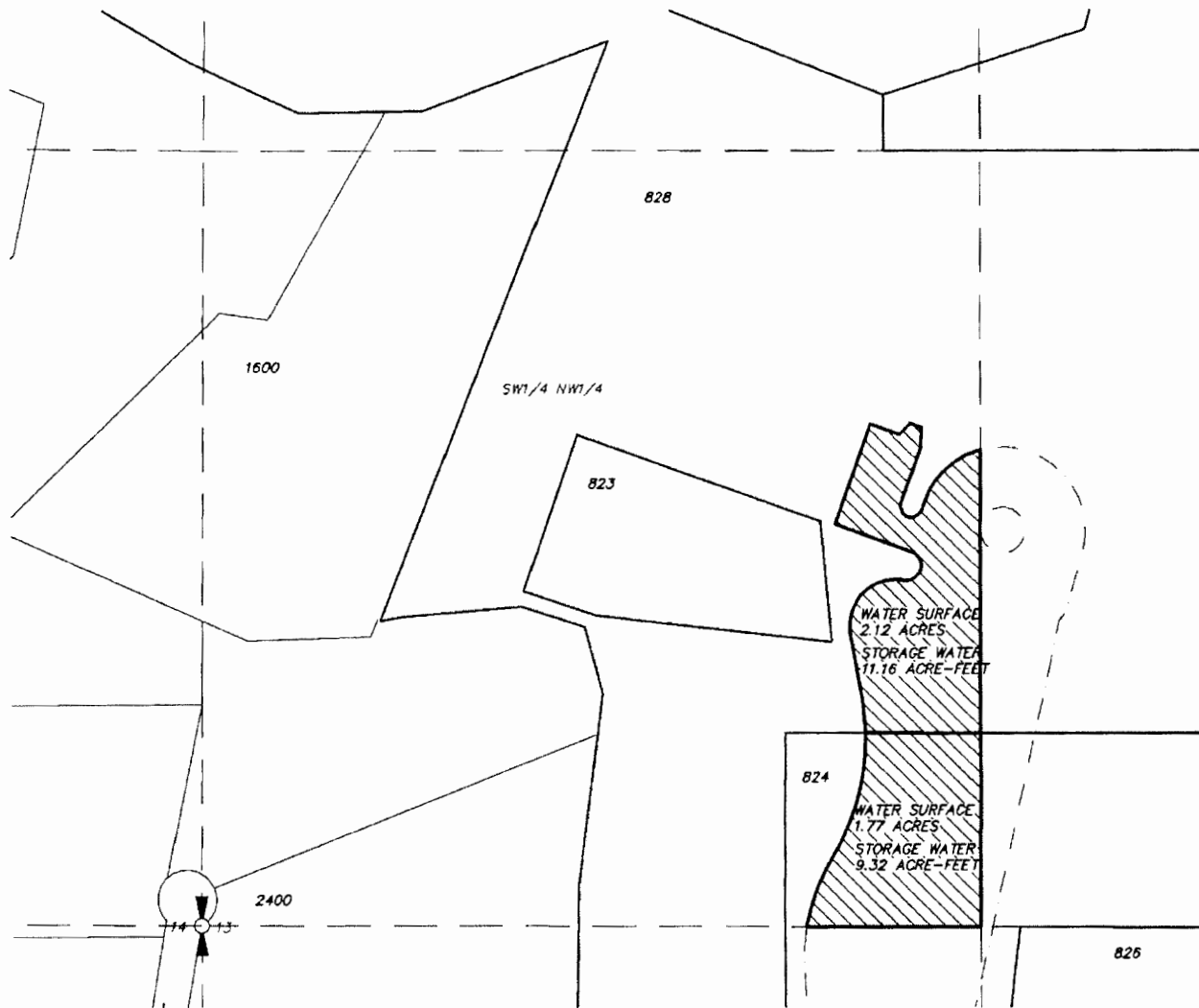
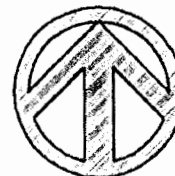
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SW 1/4 OF THE NW 1/4

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TAX LOT NO. 828: 11.03 ACRE-FEET
 TAX LOT NO. 824: 9.21 ACRE-FEET



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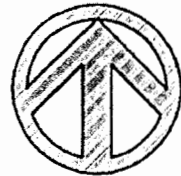
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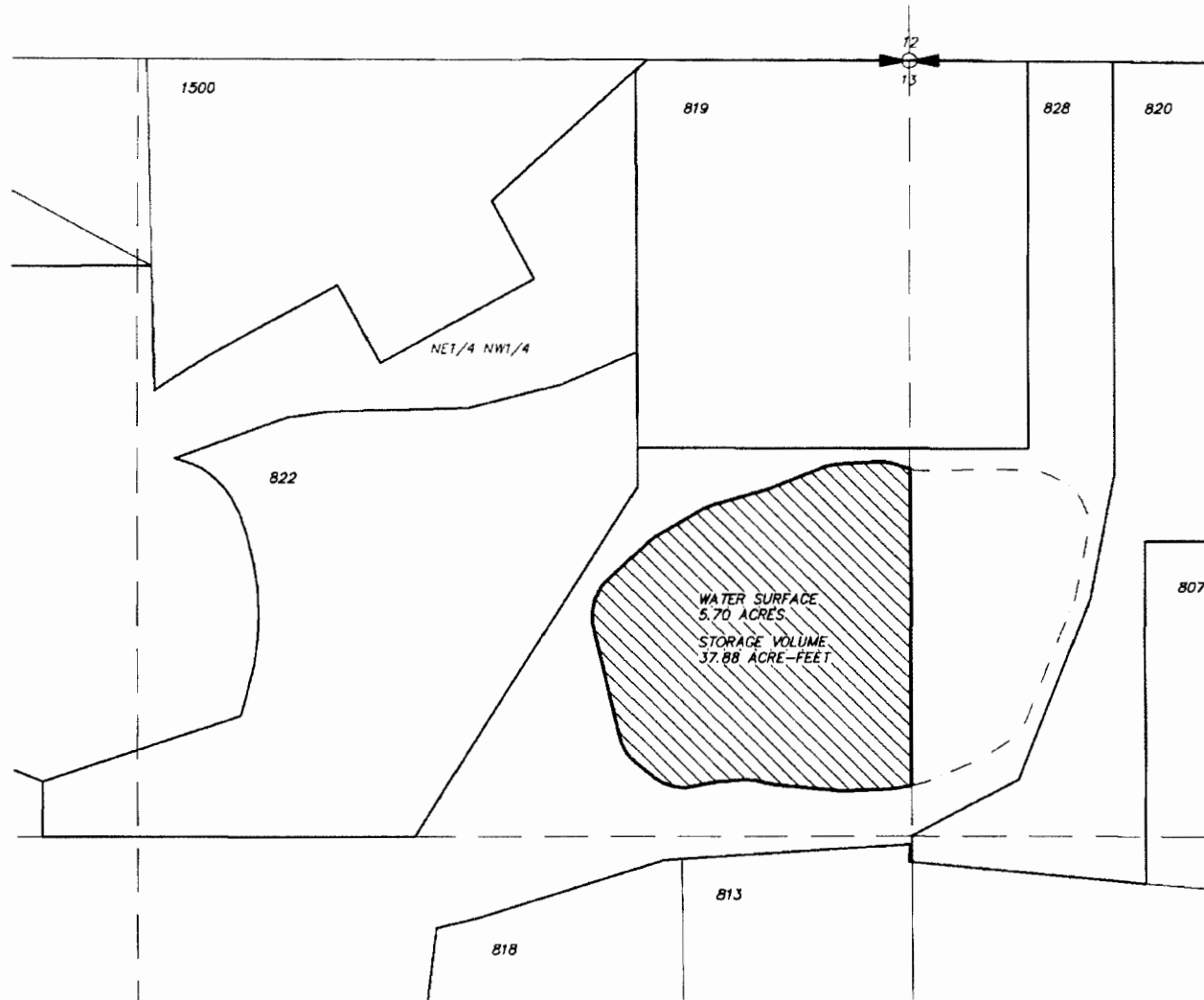
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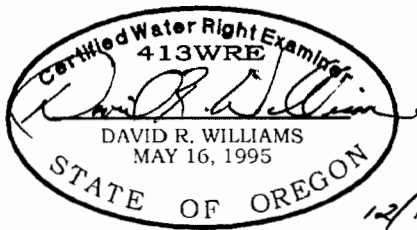
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TAX LOT NO. 828: 27.23 ACRE-FEET



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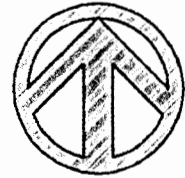
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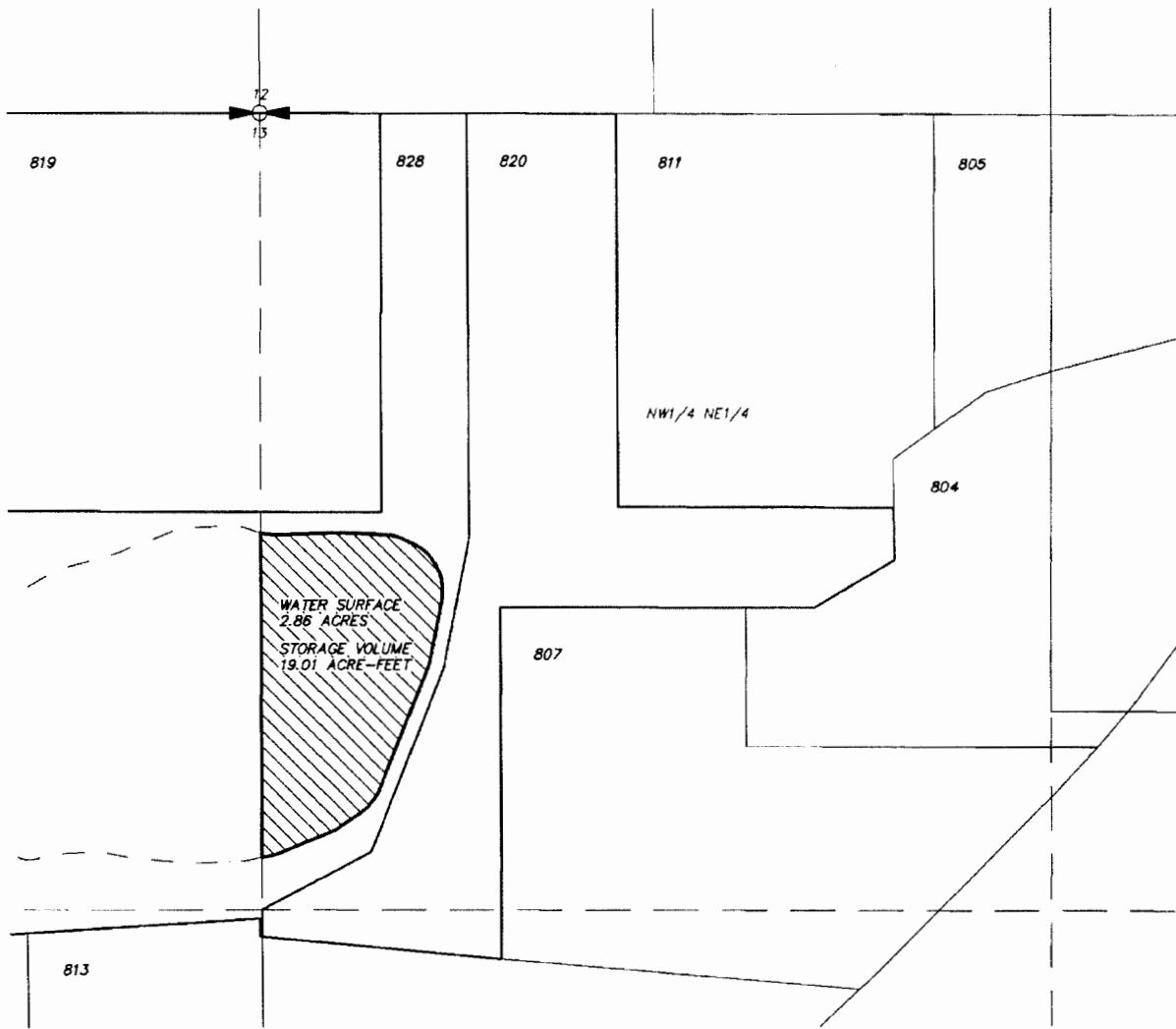
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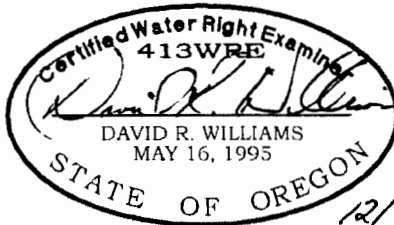
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TAX LOT NO. 828: 13.67 ACRE-FEET



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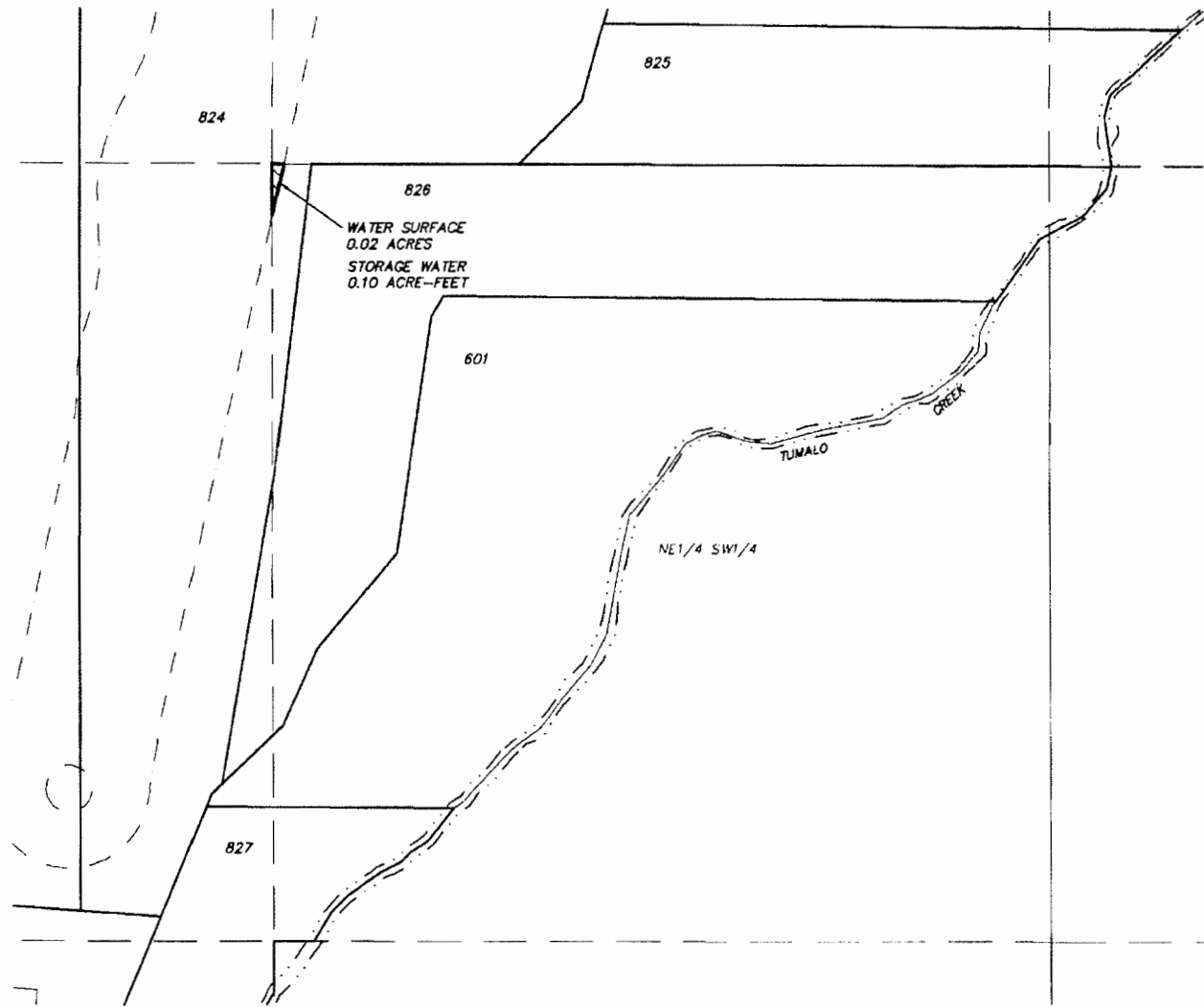
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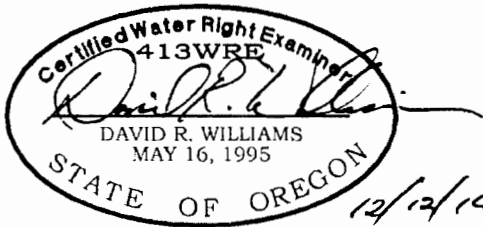
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