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**VIA E-MAIL**

Mr. Jerry Sauter  
Oregon Water Resources Department  
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**Re: Limited License Application LL-1689**

Dear Mr. Sauter:

I represent Thomas and Dorbina Bishop, who live at 63382 Fawn Lane, Bend, Oregon 97703. The Bishops' property is adjacent to property owned by KC Development Group LLC ("KCDG"), the applicant for a limited license under Application LL-1689.<sup>1</sup> The Bishops are also patrons of the Tumalo Irrigation District ("TID") and their property has appurtenant water rights under TID's Certificate 74146. They are also members of Klippel Water, Inc. ("KWI"), which supplies domestic water to the Bishops and 26 other households in the Klippel Acres Subdivision adjoining the KCDG property on the south and west, from two wells located on KWI's property just south of KCDG's water ski lake and authorized by Certificate 89406.

The Bishops oppose this limited license application. Before discussing the specific grounds for their opposition, a brief history is in order, as this application cannot be considered in a vacuum.<sup>2</sup>

**I. LL-1689 in Context**

**A. KCDG's Construction of Two Artificial Lakes**

In March of 2014, KCDG began excavation and construction of two large artificial lakes on its property. KCDG intends the lakes to be the centerpiece of a planned luxury home

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<sup>1</sup> "KCDG" is used in these comments to refer to the KC Development Group, LLC, and also collectively to its members Eric Cadwell and Harris Kimble.

<sup>2</sup> Although lengthy, the material submitted with these comments reflects only a small part of the documentation that the Bishops have gathered and submitted to various agencies over the past three years. Because KCDG is requesting a limited license as a "jump start" on a permit application, the Bishops feel compelled to marshal arguments and build an appropriate record on the license application. The Bishops also reserve the right to raise these arguments, and possibly others, in response to G-18422 in due course.

development. Appendix A pp. 001-015.<sup>3</sup> The KCDG property is adjacent to the Klippel Acres rural residential area where the Bishops live. KCDG did not apply for a storage permit as required by ORS 537.130 and 537.400, nor for any land use approvals. KCDG claimed that Watermaster Jeremy Giffin and County planning staff had verbally told them in informal meetings that they did not need any permits.<sup>4</sup> As soon as excavation began, the Bishops and other neighbors registered concerns with the Oregon Water Resources Department ("OWRD" or "the Department"), Deschutes County, and TID questioning how KCDG could construct a project of this magnitude without first receiving a water storage permit from OWRD or any kind of prior land use approval from the County. *See, e.g.*, Appendix A pp. 016-033. In spite of this immediate opposition, KCDG continued to build and fill its artificial lakes.

By July, KCDG had excavated several hundred thousand cubic yards of material to create a water ski lake and a second recreational lake on its rural residential property. Appendix A pp. 153-167. By August, KCDG had finished filling both lakes with more than 100 acre feet of TID's irrigation water. The 13-acre water ski lake is constructed to the specifications of the International Water Ski Federation Association, which generally recommends private water ski lakes with dimensions of 2000 feet by 300 feet and a depth of at least 5 feet, with reinforced edges and turn-around islands to eliminate backwash. *See* "A Blueprint for Building a Private Ski Site," Appendix A pp. 034-049.

KCDG's water ski lake is approximately 2000 feet long by 275 feet wide, in the shape of a barbell, with turn-around-islands, rock-covered reinforced edges, and a depth of 5 to 6 feet in some parts and 10 feet in other parts. Photographic evidence show these approximate dimensions and characteristics of the water ski lake. Appendix A pp. 050-051, 155. The lake's design also incorporates a boathouse, a boat ramp, a dock, and a boat waiting area. The second lake is an 8.5-acre recreational lake for fishing, swimming, and other water activity, complete with three recreational docks.

From the beginning, KCDG's plan has been to build a cluster development of many luxury homes, with the lakes as the centerpiece of the development. Appendix A pp. 001-015. Knowing the risk, KCDG chose to try to develop the property piecemeal and they continue to

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<sup>3</sup> The Bishops obtained the Draft Development Agreement cited here from public court records in litigation between Harris Kimble (one of KCDG's principals) and one of his creditors. This Agreement shows the intent of the parties from the outset to construct the water ski lake as the first phase of their cluster development.

<sup>4</sup> The Bishops acknowledge that KCDG had communications with OWRD and County staff. However, it later became evident that the early discussions did not address the full scope and intent of KCDG's project. Moreover, any such conversations did not reflect official agency positions. KCDG knew soon after it began construction that the Bishops and others questioned the advice the developers claimed to have received, and once the matters were elevated within the agencies, and the issues were fully developed, any such informal comments became irrelevant.

postpone submitting a conditional use permit application for the full cluster development.<sup>5</sup> Appendix A p. 052.

Lakes—especially artificial ones—need water, but it is not easy to find "new water" in Deschutes County. Significant new surface water appropriations are impossible to get, surface water and groundwater are closely interconnected, and new groundwater uses must be mitigated by restoring or protecting additional surface water flows. In order to obtain water for its artificial lakes, KCDG first embarked on a plan—ultimately unsuccessful—to fill its lakes with water held by TID.

### **B. OWRD Water Use Proceedings**

With the assistance of TID, KCDG initially tried to obtain authorization to store District water in the two lakes using the irrigation district transfer statutes to "change the place of use" of stored water from TID's properly-permitted Upper Tumalo Reservoir to KCDG's facilities, which would have no storage permits. KCDG would build its lakes and then would enter into an agreement with TID to store some of the District's water in KCDG's lakes. TID would transfer water from Upper Tumalo Reservoir to KCDG's lakes, and KCDG would pay TID for the privilege and would also cover all legal and technical costs of the transfer. Appendix A pp. 053-069.

After full consideration the Department concluded that a transfer of stored water is not allowed under the expedited irrigation district transfer statutes, which are intended to allow districts flexibility in the land they irrigate, not in moving stored water. The Department therefore denied TID's requests (on KCDG's behalf) for temporary and permanent district transfers on April 29, 2015.<sup>6</sup> Appendix A pp. 070-084.

Notwithstanding the denials, TID continued to deliver water to KCDG's lakes after April of 2015. OWRD issued an Enforcement Order on June 16, 2015 stating that neither TID nor KCDG had any authority to deliver or store water on KCDG's property, beyond a small amount to serve as a bulge-in-the-system ("BIS") for KCDG's irrigation rights. Appendix A pp. 085-090. The Department also initially issued a Limited License in Conjunction with Enforcement Order ("LLEO") authorizing TID to add a small amount of water to the reservoirs for a period of time and hold water in the reservoir to keep KCDG's pond liners covered with water. *Id.* The Bishops challenged the issuance of the LLEO, and upon reconsideration, OWRD rescinded the

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<sup>5</sup> The Bishops have consistently stated their position that KCDG should submit a full cluster development permit application to the County to receive full agency and public review of its full development plan, and short of that, KCDG must at least obtain any required permits for each phase of development.

<sup>6</sup> TID then filed applications for a regular non-district transfer to authorize storing water in KCDG's facilities and what it called a "bridge" limited license for the same purpose while the transfer application was pending. The Bishops and many other parties registered opposition to both of these applications, and TID eventually withdrew the applications in December of 2016 prior to any final action by OWRD.

license on November 23, 2015. Appendix A pp. 091-100. The Department said that upon a review of the facts, it could "not find that the TID did not knowingly violate state laws regarding a water use permit" in continuing to deliver water to keep the lakes full, thus leaving TID and KCDG with no authorization for holding water in the lakes. *Id.*

TID and KCDG's joint attorney filed two petitions for judicial review in TID's name against the Department in Deschutes County Circuit Court. The first (Case 15CV28751, filed in October of 2015) challenged OWRD's determination that the irrigation district transfer statutes do not allow a change in the place of use of stored water. The second petition (Case 16CV01703, filed in January of 2016) challenged OWRD's rescission of the LLEO. TID did not actively pursue either lawsuit, but by filing the petitions TID and KCDG were able to take advantage of the automatic stay of enforcement under ORS 536.075(5), thus continuing to keep water in KCDG's lakes—now going on three years. Indeed, in its second petition for review, TID emphasized that their legal maneuvers halted enforcement, despite the waste of letting the District patrons' water evaporate from shallow, black-lined recreational lakes. In December of 2016, OWRD moved to dismiss the first petition for lack of prosecution and as moot, since TID had announced that it had withdrawn from its agreement to let KCDG store District water in its private reservoirs. TID responded by filing a notice of voluntary dismissal and arguing that OWRD's motion was therefore moot. The Deschutes County Circuit Court dismissed the case later that month. Appendix A pp. 101-104.

In the second case, after no action since filing the petition, TID moved in February of 2017 for an order setting a judicial pretrial settlement conference.<sup>7</sup> No further activity has occurred in that case to date.<sup>8</sup> Appendix A pp. 105-111.

On December 29, 2016, KCDG finally submitted an application to OWRD for a permit to store water, as the Bishops and others had been urging for nearly three years. However, KCDG is still not requesting the full permit that they need to legitimize the lakes for their intended uses. In Application G-18422 KCDG proposes to appropriate groundwater from an existing well in the amount of 124.79 acre feet initially, plus 44 acre feet annually, for "reservoir storage in two existing interconnected ponds . . . and for on-going use for reservoir

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<sup>7</sup> Notably, however, TID's own motion does not demonstrate genuine willingness to engage in actual settlement discussions. TID says "Outstanding issues include: 1) resolving Respondent's unfounded determination that Petitioner knowingly violated the law, leading to Respondent's Order on Reconsideration; 2) whether Petitioner must wastefully dump the stored water within the ponds; and 3) if the water is to be dumped, whether Petitioner may continue to store water in the ponds until its patrons, KC Development Group, have new water rights in place to refill the ponds so as to avoid the costs to replace the pond liners, a cost estimated at \$1.9 million." TID (and KCDG) seem to be demanding capitulation to a settlement on their terms, rather than seeking a negotiated settlement.

<sup>8</sup> The Bishops question why the Department should process a new limited license application for this project while this lawsuit is pending.

maintenance." KCDG says it wants "to fill and maintain the two ponds for aesthetic and fire protection purposes" and that it "does not intend to withdraw water from the reservoir system for secondary use, except as may be required for emergency fire-fighting purposes." The permit application has not yet been noticed for public comment.

On March 2, 2017, KCDG submitted the subject application to OWRD requesting a limited license to serve "as a bridge while pursuing approval of Application G-18422." Application LL-1689 describes the requested water use in terms identical to the groundwater permit application.

Parallel to the OWRD proceedings, TID and KCDG were also active in Deschutes County on the land use front.

### C. Deschutes County Land Use Proceedings

In conjunction with the OWRD transfer review proceedings that began in 2014, TID applied for Land Use Compatibility Statements ("LUCS") from Deschutes County. TID's first LUCS application in August of 2014 said simply that it was changing the place of use of water pursuant to an irrigation district transfer, and the County's planning staff issued a LUCS saying that its Code did not regulate that activity. But after the Bishops appealed that decision, the County decided that TID had misrepresented the project. The County determined that TID and/or KCDG should have applied for two different conditional use permits before constructing and using the reservoirs.<sup>9</sup>

KCDG and TID then applied for retroactive conditional use permits as directed by the County—a permit for surface mining in conjunction with an irrigation district, and a permit for a recreational facility requiring large acreage. After further lengthy public proceedings, including another decision by the Hearings Officer, the County issued a final decision *denying both permits*. Appendix D.<sup>10</sup> That was the status of land use proceedings until December of 2016.

### D. Flanking Battles

Meanwhile, KCDG was also busy on other fronts, advancing other components of its piecemeal development plan and striking back at those who questioned its approach. In early July of 2016, KCDG, along with KCDG principal Eric Cadwell and his wife Brianna, filed a lawsuit against the Bishops. (Deschutes County Case Number 16CV20854.) The gist of KCDG's claim was that the Bishops had improperly interfered with KCDG's contract with TID

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<sup>9</sup> This decision was considered by a County Hearings Officer, the Board of County Commissioners, and the Land Use Board of Appeals.

<sup>10</sup> Appendix D pp. 1-14 contains a portion of the minutes of the BOCC meeting at which the Board voted not to hear appeals of the Hearings Officer's CUP denials—see page 8, thereby accepting the Hearings Officer's Decision (Appendix D pp. 15-102) as the final County action.

and were trying to "deprive the Plaintiffs of their right to develop their property." KCDG and the Cadwells demanded injunctive relief and damages in excess of three million dollars.

KCDG's lawsuit was a textbook "SLAPP" complaint—a "strategic lawsuit against public participation." In page after page, the complaint detailed the Bishops' efforts to get KCDG to comply with state and County approval requirements.<sup>11</sup> KCDG complained about the written comments submitted by the Bishops to the various agencies—comments prepared by the Bishops' lawyers and supported by extensive documentation. The Bishops moved to dismiss the complaint under ORS 31.150—Oregon's "Anti-SLAPP" statute—precisely designed and targeted to prevent just such lawsuits aimed at chilling public opposition to development projects. A Deschutes County judge had no hesitation in granting the Bishops' motion, dismissing the suit and awarding the Bishops attorney fees. Appendix E.

In another flanking move, KCDG and other parties sued Klippel Water, Inc. ("KWI"), claiming an easement across KWI's property, which adjoins KCDG's property at the southern end of the water ski lake. As noted earlier, KWI is a small municipal water company that provides water from two wells on its property to 27 households (KWI's owners and members) in the Klippel Acres subdivision, which adjoins KCDG's property on the west and south, and which includes the Bishops' home. During its 2014 construction, KCDG drove heavy construction vehicles onto KWI's property and placed material excavated from the lakes across KWI's property to connect two non-contiguous roads that dead-end on opposite sides of the KWI parcel. KWI objected and placed barriers to prevent KCDG (and others) from using the newly-graveled, unauthorized "road" connection across KWI's property.

KCDG then filed a lawsuit against KWI claiming an implied or prescriptive easement across the KWI parcel and demanding removal of the barriers.<sup>12</sup> KWI moved to dismiss the complaint for failure to state a claim. The plaintiffs were given two opportunities to amend their complaint to try to allege the necessary facts supporting the easement claims, but they were unable to do so, and on March 13, 2017, the Court dismissed the case with prejudice. The Court also found that most of the claims were not objectively reasonable and therefore awarded KWI's motion for attorney fees and costs on those claims. Appendix A pp. 112-114.<sup>13</sup>

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<sup>11</sup> KCDG maintains to this day that it did not need any permits to construct and fill its two lakes, and that the string of subsequent decisions to the contrary by OWRD, DOGAMI, and the County represent some sort of improper "new interpretation" or "re-interpretation" by those agencies. Appendix A pp. 118-124.

<sup>12</sup> Deschutes County Case Number 16CV03207. The Bishops and others believe that this lawsuit against KWI is part of KCDG's efforts to secure a second access to their property to improve the chances for approval of a cluster housing development. Indeed, there is no public road access to the lots on which the lakes are situated. Without such access, storing water in large, unfenced, open reservoirs carries an increased risk of harm to public health and safety and is inconsistent with making water available for fire-fighting purposes."

<sup>13</sup> In a separate action in Deschutes County Court, one of KCDG's principals, Harris Kimble, was involved in a lawsuit brought by one of his creditors. The creditor garnished Kimble's bank account, but

### E. KCDG's New Plan

In late 2016, KCDG moved forward with a new plan to obtain retroactive approval for its unpermitted reservoirs. On November 30, 2016, KCDG submitted a LUCS application to the County. The LUCS application said that KCDG was applying to OWRD for a permit to store 124.79 acre feet of groundwater for:

"one time fill plus 44 acre feet per year in mitigation water to be stored in 2 ponds by KC Development Group for landscape aesthetics, emergency fire protection, and temporary pass through irrigation water for personal irrigation use by KC Development Group ("bulge in system")." Appendix A pp. 118-123.

KCDG's application was accompanied by a letter from its counsel oversimplifying the land use history and claiming that its only problem was TID's use of the ponds, but that now its self-serving re-characterization of the lakes as just aesthetic lakes somehow justifies the unpermitted surface mining and continued storage of TID water. *Id.* The "ponds" are already constructed and the County *has already denied permits for them*. The Bishops cannot fathom how KCDG continues to ignore reality in this current application.

The County issued the LUCS, saying: "The Deschutes County Zoning Code does not regulate the *use of water* to be stored in 2 ponds for aesthetic landscaping, emergency fire protection, or pass-through irrigation for the property owner." (Emphasis added.) The LUCS notably did not say that the ponds themselves are not regulated by the Code and Plan, nor could it have said that, since the County's previous decisions did find them to be regulated and denied permits for them. Appendix A pp. 124-127.

On January 4, 2017, the Bishops appealed the County's decision to LUBA.<sup>14</sup> KCDG intervened on the side of the County, and Central Oregon Land Watch ("COLW") intervened on the side of the Bishops. As noted, after obtaining the LUCS, KCDG finally submitted an application to OWRD for a permit to store water, as the Bishops and others had been urging for nearly three years. Application G-18422, proposing to appropriate groundwater from an

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Kimble claimed that a portion of the account was not subject to garnishment because of the "homestead exemption." The Court disallowed the exemption and suggested in a Letter Opinion that Kimble was fraudulently holding his Tumalo property and related funds from the supposed sale of the property to Carlton Cadwell (Eric Cadwell's father and apparently an investor in the KCDG development project). Kimble still lives in the house he "sold" to Cadwell and the Court opined that there was no true sale, but rather a legal maneuver to keep the Kimbles in the house and prop up the KCDG investment. Appendix A pp. 115-117.

<sup>14</sup> The Bishops also simultaneously sought a local appeal from the County to ensure exhaustion of local remedies and to raise the same issue—that the lakes were constructed without proper permits for the intended uses as the centerpieces of a luxury cluster development. But the County did not accept the local appeal. Therefore, the Bishops also appealed this denial to LUBA. The cases have been consolidated as LUBA Nos. 2017-002/003.

existing well to fill its two lakes, is apparently the permit referred to in the December LUCS described above. This permit application G-18422 has not yet been noticed for public comment.

On February 7, KCDG filed another LUCS application with the County, saying that it was applying to OWRD for a "limited water use license" to use 124.79 acre feet of groundwater "to provide temporary authorization while awaiting Department approval of groundwater permit application G-18422, authorizing storage of water in two ponds for fire protection, aesthetics and pass through irrigation water." This LUCS did not mention KCDG's request for 44 acre feet of annual maintenance water. And, again, no mention was made of the inconvenient truth that the County had already issued final decisions denying permits for the two "ponds."

The County signed off on the limited license LUCS with the same language it had used on the groundwater permit LUCS.<sup>15</sup> The Bishops appealed this County decision to LUBA as well, and KCDG and COLW have intervened as in the first case. Both LUBA appeals are currently pending.<sup>16</sup>

On March 2, KCDG filed the limited license application referred to in the February LUCS. KCDG seeks a limited license to serve "as a bridge while pursuing approval of Application G-18422." Application LL-1689 describes the requested water use in identical terms as in the groundwater permit application—KCDG proposes to appropriate groundwater from an existing well in the amount of 124.79 acre feet initially, plus 44 acre feet annually, for "reservoir storage in two existing interconnected ponds . . . and for on-going use for reservoir maintenance." KCDG says it wants "to fill and maintain the two ponds for aesthetic and fire protection purposes" and that it "does not intend to withdraw water from the reservoir system for secondary use, except as may be required for emergency fire-fighting purposes." KCDG calls its two facilities "ponds" when in fact they are two large reservoirs, holding 68 acre feet and 57 acre feet of water, respectively—both much larger than the 9.2 acre feet allowed in "alternate" reservoirs under ORS 537.409. The water ski lake alone is 2,000 feet long and 275 feet wide.

The extensive and contentious history described above provides important context for OWRD's review of KCDG's limited license application. That brings us to these comments.

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<sup>15</sup> Similarly, the Bishops filed a local appeal of the County decision on the second LUCS. The County also refused to accept this local appeal, and the Bishops then appealed this decision to LUBA. These cases were consolidated as LUBA Nos. 2017-018/019. All of the LUBA timelines are suspended pending resolution of a Motion to Dismiss for Lack of Jurisdiction in the first set of LUBA appeals. Appendix A pp. 128-130.

<sup>16</sup> Due to the ongoing LUBA appeals, the LUCS that KCDG submitted with its limited license application is far from final. As discussed further in section II.B below, OAR 690-005-0025(4) thus prevents OWRD's approval of the license.



## II. Discussion

The Department should not grant KCDG's license application for four reasons. First, the applicable statute does not authorize the Department to grant a limited license under these circumstances. Second, LL-1689 should not be approved because KCDG does not have the necessary land use approvals from the County, and KCDG's implications to the contrary are misleading. Third, issuing this limited license to KCDG is not in the public interest. Fourth, KCDG's application should be denied because it is premature to determine the necessary mitigation requirements at this time.

### A. The Department is not authorized to issue "bridge" licenses.

ORS 537.143 and OAR 690-340-0030 authorize the Department to issue limited licenses for "short-term or fixed duration" uses. In 1995, an OWRD staff person testified to the legislature about the purposes of limited licenses, saying that they are intended "to authorize short term water uses that are legitimate needs but don't need a full-blown water right because they are not going to go on for very long."<sup>17</sup>

The statute explicitly lists several uses that are eligible for limited licenses, including general construction, road construction and maintenance, and forestland or rangeland management. Irrigation can only be authorized under a limited license in three situations: (1) to establish a crop that will not need irrigation after it is established, (2) to mitigate the impacts of drought outside of a prescribed irrigation season to avoid irreparable crop damage; or (3) for one year only, where the applicant has a contract with a governmental entity for the use of stored water. ORS 537.143(6).

KCDG's use does not fall into any of these categories, and it does not satisfy the statute's purposes. Nothing in ORS 537.143 or OAR 690-340-0030 authorizes "bridge" licenses. A limited license is not meant to be a substitute for a regular permit when a permanent water right is required. Nor is it meant to act as the first phase of a permit application. KCDG is not proposing a short-term use—instead it wants *short-term authority* for what is admittedly a *long-term use*. The application says as much: "This application requests short-term *authorization* to use and store groundwater as a bridge *while pursuing approval* of Application G-18422." (Emphasis added.) If a limited license can be used to authorize up to five years of water use while a permit application is pending, there is nothing to prevent every permit applicant from requesting a "bridge" limited license simultaneously with filing a permit application—especially since the review process for licenses is considerably expedited compared to the full permit review process.

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<sup>17</sup> Testimony of Beth Patrino, Water Resources Department, on House Bill 2184 (House Committee on Water Policy, January 19, 1995).

In fact, KCDG's application is distinguishable from other limited licenses issued by the Department during the past two years. Since November 3, 2015, the Department has published notice of 80 limited license applications.<sup>18</sup> Appendix B contains a chart summarizing these 80 licenses. Thirty of those were for road construction or other general construction purposes, including dust suppression, or forestland or rangeland management, directly in line with the examples listed in the statute. Twenty three licenses were for temporary irrigation to establish vineyards, orchards, or other plantings, also consistent with the statute's explicit provisions. Twelve were for limited duration testing or research. The remaining licenses—even a few mentioning other pending applications—were also very different than what KCDG is trying to do. In most of them, the applicants were seeking temporary minor changes to previously permitted or certificated water rights—such as substitution of one well for another—pending completion of transfer proceedings. In others, the applicants were appropriately requesting the temporary use of stored water for irrigation under ORS 537.143(9). The distinctions are readily apparent from the application summaries provided in Appendix B. *None* of these limited licenses—except KCDG's Application LL-1689—would authorize "phase one" of a use that does not yet have approval, much less under a permit application that has not even been noticed for public comment.

KCDG's project has been controversial since the first excavators and dump trucks started working in March of 2014. Only now—three years after constructing and filling the reservoirs—has KCDG finally applied for a permit to store water. The fact that KCDG is now proposing a different source of water for the reservoirs does not change what has already happened on the ground. In fact, KCDG's new request adds an unnecessary layer of complexity. KCDG proposes a new appropriation of groundwater in the Deschutes Basin, where new groundwater uses must be carefully scrutinized and fully mitigated. Public review of G-18422 has not even begun, and, given the contentiousness surrounding KCDG's activities, it is completely inappropriate for KCDG to presume the outcome of that process. KCDG should not be allowed to jump the line and obtain premature approval of its permit in the form of a limited license. KCDG should have begun this process by submitting a full permit application *before* constructing its two private reservoirs and filling them with water. The Department should not allow KCDG to mis-use a limited license to transition seamlessly from where it finds itself today to where it wants to be.

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<sup>18</sup> The Bishops submitted comments on TID's earlier limited license application, LL-1613, on November 9, 2015. At that time, we reviewed limited license applications that had been published in the weekly notice bulletin for all of 2015 through November 3, 2015. For purposes of these comments, we picked up the review where the earlier review left off. Of these 80 new licenses, three are not considered here as they were already covered in our 2015 comments.

**B. The Department must postpone processing LL-1689 until the County's land use decision is final.**

The Department's administrative rules governing land use coordination prevent the approval of LL-1689. OAR 690-005-0035(4)(d)(B) provides that OWRD shall "[n]ot issue water use approvals . . . if [t]he land use served by the proposed water use is not allowed by the comprehensive plan and local approvals have already been denied." As detailed in Section I.E above, Deschutes County's LUCS decision pertaining to this limited license application is not final. The decision has been appealed to LUBA and that action is pending. The basis of the appeal is that the County has already denied conditional use permits to KCDG for the *existing land uses*, and that KCDG and the County cannot alter or ignore those denials by going along with KCDG's self-serving representation that the *water use* is only for aesthetics and fire-fighting purposes. KCDG was denied permits for the surface mining that created the reservoirs and the construction of a recreational feature requiring large acreage. Until the land use issues are resolved, OWRD should not approve this limited license application.

KCDG's description of the "Proposed Project" in its application is misleading in significant ways, thus obfuscating the lack of land use compatibility of the existing lakes. KCDG describes only part of the contentious history of its attempts to authorize (retroactively) storing water in its water ski lake and second recreational lake. The application's description of the land use process is incomplete:

"The reservoir system was originally constructed in cooperation with Tumalo Irrigation District ("TID"), with the intention of being used as part of the TID irrigation distribution system and for recreational use by KCDG. . . . *Because of the inability to secure required land use approvals for the proposed uses by TID . . .* KCDG now seeks authorization to fill and maintain the two ponds for aesthetic and fire protection purposes." (Emphasis added.)

As the Bishops have pointed out on many previous occasions, the claim that the reservoirs were constructed as part of the TID irrigation distribution system has never rung true, and when KCDG says it is requesting authorization to fill the ponds for aesthetic and fire protection because of TID's inability to secure required land use approvals, it is not telling the whole story. From the beginning, the ponds were intended to serve KCDG's private purposes, and the agreement with TID was only ever about finding a source of water to fill the lakes.<sup>19</sup> Even though the lakes now hold TID water, there has never been a way to remove water from the ponds for the use of anyone other than KCDG. During the past three irrigation seasons, the

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<sup>19</sup> The lakes were substantially constructed before KCDG and TID even entered into an agreement in June of 2014 to allow KCDG to store TID's water, which agreement was contingent on OWRD approval. The lakes were designed and built to recreational specifications, and were never designed for water storage. Indeed, KCDG agreed to pay TID for the privilege of storing TID water. However, as noted, OWRD denied approval on April 29, 2015.

water in KCDG's lakes was never delivered to any of the District's other patrons, in spite of declared droughts, early end dates for irrigation seasons, and periodic cutoffs of water deliveries by TID. Meanwhile, the members of KCDG did use the lakes for recreation, including water skiing until the County issued a Notice of Violation in response to County Code violation complaints.

There is no question that the water ski lake was KCDG's idea and facility, not TID's. The same is true of the second recreational lake. As for the surface mining that created both lakes, the County determined that the construction constituted "surface mining in conjunction with an irrigation district" because of TID's agreement with KCDG. The Bishops always disagreed with this aspect of the County's decision, because KCDG itself performed the construction and substantially completed it before the KCDG/TID Agreement was approved by the TID Board and executed.<sup>20</sup> But as far as KCDG is concerned, the project needed land use approval either way. If the County had found—as the Bishops argued—that KCDG had engaged in *private* surface mining, separately from TID, a whole different land use approval would have been required—KCDG would have needed a Comprehensive Plan Amendment and zoning change, because private surface mining is not allowed in an RR-10 zone.<sup>21</sup>

After the County decided that CUPs were required, KCDG and TID jointly applied for the permits. As noted earlier, *the permits were denied*, and that decision involved KCDG as well as TID. Now, KCDG wants OWRD (and the County) to ignore the fact that the very facilities for which KCDG's permit applications were denied still exist in exactly the same form, and nothing about the history of their development has changed in any way. KCDG is trying to change what already exists on the ground by waving a magic wand and saying that all they want now are a couple of pretty ponds—and moreover, they will be magnanimous and allow the ponds to be used for fire suppression in an emergency.<sup>22</sup> The lakes are shallow and lined with

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<sup>20</sup> In fact, when the Bishops challenged TID for not following public contracting rules on the KCDG project, TID maintained that those rules did not apply because it was KCDG who did the construction, not the District.

<sup>21</sup> Significantly, TID's lack of continued involvement presses the point that unpermitted surface mining occurred, leaving no obvious land use path forward, except a zone change. But the site had been previously mined and reclaimed prior to KCDG's excavation, begging the question of whether a zone change back to surface mining could ever be approved. Furthermore, KCDG did not obtain a required DOGAMI operating permit for its activities.

<sup>22</sup> KCDG's application says that no water will be withdrawn for secondary use, except for emergency fire-fighting. Yet the LUCS application submitted to Deschutes County for the limited license includes irrigation use. Once again, KCDG does not even seem to be clear about its own proposal. It is difficult to know which document accurately reflects KCDG's true plan. It is unclear whether KCDG now intends to irrigate with groundwater on the KCDG lands, or whether KCDG is still claiming a right to put TID irrigation water through its lakes. Further, it is further unclear how TID will get its stored water back, and whether TID's easement from KCDG in the 2014 KCDG/TID agreements is still in place. Finally, it is not even settled which KCDG acres carry an irrigation right, since the Department has never acted on TID's Transfer Application T-11834 requesting to transfer irrigation rights off the 21 acres now covered

black plastic, not designed for emergency water storage. The water ski lake does not look anything like other amenity "ponds." It is still a water ski lake, as it was specifically designed to be, whether it has a skier on it or not. And both lakes were constructed by illegal surface mining—whether in conjunction with TID or not. Those are not permitted land uses.

Furthermore, in spite of what KCDG's attorneys Katzaroff, Pagel, and Ramis have said to the County and OWRD about KCDG's intended use of the lakes, KCDG's principal Eric Cadwell himself has made it clear that KCDG still fully intends to pursue the original development plans and fully intends to water ski on the water ski lake. Appendix A p. 133. Until KCDG can satisfactorily demonstrate that its two lakes comply with the Deschutes County Code, as it has already been interpreted and applied by the County to this project, the Department cannot approve Application LL-1689 according to the terms of its own rules in Division 5 of OAR Chapter 690.

**C. Issuing a limited license to KCDG is not in the public interest.**

As the Bishops have pointed out during the past three years, the public continues to be deprived of the benefits and protections provided by the water rights permit process, and abrupt issuance of this limited license would perpetuate that problem. KCDG's proposal to store water in its two private lakes—whether for aesthetics and fire-fighting, or for its true purpose of providing recreational amenities for its planned housing development—should not be allowed without a full technical and public interest review. Even if the Department believes it has authority to issue a limited license as a bridge to a permit, the Department must find that the proposed water use "will not impair or be detrimental to the public interest." OAR 690-340-0030(2). Issuing LL-1689 would be detrimental to the public interest for several reasons.

**1. LL-1689 should be denied because of impacts on nearby wells.**

First, KCDG proposes to use an existing well, DESC 59909, as the source of water to store in its lakes. This well was originally drilled in February of 2014 as an exempt domestic well. Such a well is allowed to use a maximum of 15,000 gallons per day for domestic purposes, though a normal domestic well would rarely approach the maximum.<sup>23</sup> Even if a domestic well pumped the maximum amount allowed, that comes to less than 17 acre feet per year, which is a fraction of what KCDG now proposes to use. A well that might perform more than adequately for domestic use cannot necessarily provide an exponentially greater amount of water without significantly greater impacts.

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by the two lakes. These issues should be fully developed in the permit review, and they cannot be swept under the rug for purposes of the limited license.

<sup>23</sup> A normal domestic well would rarely use that much water, as regular household water use is only about 400 gallons per day.

In fact, it appears that is not even possible for this well to produce the large amount of water being requested by KCDG. The well log notes an estimated capacity of 50 gallons per minute, and KCDG's limited license application asks to be authorized to pump at that full rate. Curiously, pumping the well at the full rate would not even give KCDG the full amount of water it is requesting. The limited license application asks for a one-time fill of 124.79 acre feet, and 44 acre feet of annual maintenance pumping. But a year's worth of pumping at 50 gallons a minute amounts to approximately 81 acre feet per year. If the well can only produce 81 acre feet in a year of continuous pumping, while the lakes lose 44 acre feet each year to evaporation, it would take between three and four years to "fill" the reservoirs.

This discrepancy suggests at the very least that KCDG has no intention of returning TID's water to the District patrons and substituting groundwater in its lakes. It also highlights the excessive and wasteful nature of this request, concepts which are developed further below.

KCDG's proposed use of the well has the potential for significant impacts on surrounding wells, both permitted and exempt. The well log for KCDG's well DESC 59909 shows that the well is 751 feet deep. Appendix A p. 134. The log also notes that water was encountered at a depth of 635 feet, and that the static water level was measured at 533 feet, suggesting that the water was at least semi-confined at depth. The well was cased, thus creating an open space between the casing and the outer walls of the drilled hole—called an "annular space." Therefore, water that was previously confined at depth can now find its way into the annular space and move vertically, thus connecting formerly-discrete water-bearing zones. This means that the KCDG well is drawing on the same groundwater as other area wells.

As discussed earlier, the Bishops and 26 other households in the adjacent Klippel Acres subdivision are served by two municipal wells owned and operated by Klippel Water, Inc. ("KWI") on property immediately adjacent to KCDG's property at the southern end of the water ski lake. KWI's water right, Certificate 80406, has a priority date of 1996. Appendix A pp. 135-138. KWI's well depths are similar to the depth of KCDG's well. Well DESC 50699 is generally used as KWI's primary well, and DESC 57927 generally serves as the secondary well. Two wells previously used by KWI failed over the years, even after being deepened, leading KWI to drilling the wells used now. KWI currently needs to use the secondary well for about two months of each year when demand exceeds the primary pump's supply. KCDG's increased pumping from a well located so close to KWI's wells could very well adversely affect KWI's available water supply, if KWI must turn to its secondary well more often or pumping is otherwise impacted.<sup>24</sup>

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<sup>24</sup> KWI's members have been the targets of KCDG's unwarranted litigation and efforts at intimidation. The members were assessed by KWI for funds to defend the easement lawsuit brought by KCDG. It is understandable that some of them are now reluctant to comment to OWRD or otherwise speak out about the possible harms to KWI or others if LL-1689 were to be approved. Their fears of possible retribution are informed by their experiences with KCDG and its members since 2014.

Several other homes in the surrounding neighborhood are served by their own domestic wells, which pump from various depths. These wells, too, are likely to be affected by significantly increased use of groundwater by KCDG.

The Department should not allow KCDG to begin pumping on an expedited basis under a limited license until the impacts to the surrounding municipal and domestic wells have been fully considered. A genuine *prospective* proposal for ponds to be used as an amenity and for emergency fire-fighting would involve smaller, deeper ponds. Furthermore, the location of *proposed* ponds—as opposed to two that already exist—would need to take into account the existence of these nearby wells. This type of full review is the very point of the public process applicable to permit applications, and of applying for a permit *before* building and filling two large water storage facilities. KCDG should not be allowed to use a limited license to either postpone or evade completely a proper review of these impacts, and the Department cannot find issuing this license to be in the public interest without that review.

**2. LL-1689 should be denied as a wasteful and excessive use of water.**

Additionally, KCDG's proposed use of water is wasteful, and the amount of water requested by KCDG is clearly excessive for its stated purposes. A property owner proposing water for "aesthetics and emergency fire-fighting" does not need two large reservoirs holding 124.79 acre feet of water, replenished on an annual basis to maintain full volume. Of course, KCDG is calling this a proposal for aesthetics and fire-fighting because it has convinced itself and County planning staff that if it simply re-characterizes its use of *water*, it does not need *land* use approvals. But the amount requested is the same as it has been all along—the amount to satisfy KCDG's true proposal, which is to fill its existing 13-acre water ski lake and 8.5-acre recreational lake, which are intended to serve a cluster housing development.

Bend is in the high desert. The water in KCDG's well is very cold—53 degrees, according to the well log. It is contrary to the public interest to remove cold, clear water from the ground in the Deschutes Basin and place it in shallow, black-plastic-lined lakes, where it will evaporate at a rate of *at least* 44 acre feet per year, by KCDG's own admission. The real reason that KCDG is requesting such a large volume of water is most likely to keep its plastic lake liners covered.<sup>25</sup> Even with mitigation, this equation does not make sense.

Deschutes County groundwater levels are declining overall in the area of KCDG's well.<sup>26</sup> OWRD recognized this fact in reviewing a groundwater application from the Cascade Academy of Central Oregon ("Cascade") recently. Cascade is a private school located less than two miles

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<sup>25</sup> See note 7, *supra*.

<sup>26</sup> Appendix A p. 137 is a graph showing water levels in several OWRD observation wells in the general vicinity of the KCDG property, prepared from OWRD data on these wells. The graph shows a steady decline in the level of water in these wells since the base year of 1994.

north of KCDG's property. The school applied for a permit to pump 15.75 acre feet of groundwater annually, at a rate of 0.11 cfs, from Well DESC 59549. The Department's Groundwater Review of Application G-18028 noted that the nearest state observation well (DESC 3581)

"has been monitored periodically since 1993" and "shows a relatively steady decline since 1994. The water level has dropped about 16.9 feet during the period of record, mostly as a result of decreased natural recharge. The water level decline is also likely influenced by decreased incidental recharge (canal lining and piping) and increased water use." Appendix A pp. 140-148.

TID has conducted significant piping projects within its District. This is undoubtedly affecting all of the wells in this area, making large new groundwater uses such as KCDG's proposal even more of a problem.

Groundwater management statewide is currently under considerable scrutiny, as a result of last summer's "Draining Oregon" series of investigative reports by *The Oregonian*, and of the Secretary of State's Audit Report on OWRD released in December of 2016. The Audit Report highlighted several groundwater issues as areas of concern needing further attention.<sup>27</sup> The Water Resources Commission discussed groundwater extensively at its meeting in October of 2016, and asked Staff to prepare a work plan to address groundwater issues. At the January 2017 Commission Meeting, Director Byler presented the results of the Audit Report, and Staff presented the work plan to the Commission. The Commission is very interested in these issues.

The Department has ample authority and responsibility to manage groundwater responsibly, and this authority is not limited to designated critical groundwater areas. In a 1990 Opinion, the Attorney General emphasized the Department's "broad authority" to prevent undue depletion of groundwater supplies.<sup>28</sup> The Department should exercise that authority to deny this limited license application. This is not the time for OWRD to be approving a wasteful use of groundwater.

**3. LL-1689 should be denied due to impacts on the surrounding neighborhood and on fish and wildlife.**

KCDG's lakes act as a significant east/west migration barrier within the designated Tumalo Deer Winter Range—a protected Goal 5 resource under the Statewide Land Use Goals and the County's comprehensive plan—on more than 21 acres of what was previously open space. The Oregon Department of Fish and Wildlife registered this concern in a letter to DOGAMI in January of 2015. Appendix A p. 149. Recently, a herd of elk drowned trying to

<sup>27</sup> See OREGON SECRETARY OF STATE AUDIT REPORT 2016-33, WATER RESOURCES DEPARTMENT, WATER SUPPLY MANAGEMENT at 13-19. (December 2016).

<sup>28</sup> Or. Op. Atty. Gen. OP-6368 at 6 (May 16, 1990), attached as Appendix C.



cross a frozen lake in Baker County, and the same thing could very well happen here. Appendix A pp. 150-151.

Furthermore, this limited license application needs to go through the Division 33 review process because of its potential impact to sensitive, threatened or endangered fish species. Appendix A p. 152. In addition to careful consideration by the Department of the results of the interagency review, the public should have an opportunity to review the agency comments before a decision is made on this application.

The KCDG lakes also create an unfenced, unsupervised attractive nuisance for human trespassers, with concomitant public safety risks. The County's building requirements require a fence around a swimming pool, yet these massive lakes have no protection against their attractive nuisance potential. . Even County staff concluded that fencing is required to make the use safe. However, fencing is not allowed in the Wildlife Overlay zone under the County's Code because it serves as an additional barrier to the movement of wildlife.

KCDG's two large lakes are not compatible with the surrounding RR-10 Rural Residential Zone. See photos in Appendix A pp. 153-167. The County Hearings Officer's decision denying the conditional use permit for the water ski lake specifically found that the lake was not compatible with the neighborhood because of the scale and intensity of the use, the unnatural design, and steep slopes. This was one of several factors in the County's decision denying the conditional use permit for the water ski lake. Appendix D pp.15-102.

#### **D. The Department cannot properly determine mitigation at this time.**

New uses of groundwater in the Deschutes Basin require mitigation under OAR 690-505-0600 et seq., as KCDG acknowledges in the limited license application. However, it is premature and hasty to determine appropriate mitigation requirements at this time.

A decision about necessary mitigation should not be made in the expedited time frame allowed for review of limited licenses, because as discussed earlier, KCDG is not requesting a short-term *use* of water. KCDG seeks a limited license as "phase 1" of the requested groundwater permit—the proposal is to start pumping groundwater now, keep pumping throughout the license term, and then to move seamlessly into permanent pumping. We have already argued that KCDG cannot presume permit approval and that bridge licenses are not authorized. Furthermore, since the actual proposal before the Department is for continuous pumping from here on, the mitigation requirements must be applied accordingly.

### **III. Conclusion**

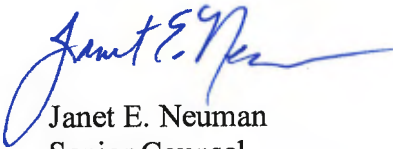
The Bishops have argued for the past three years that KCDG's facilities need a reservoir permit under ORS 537.130 and 537.400. That requirement remains the same, no matter where the water comes from. For three years, and even now, KCDG and TID have tried to get every

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other possible form of approval available under the Water Code except the one that actually applies to them. Now that KCDG has finally submitted a permit application, the Department should not allow them to jump the line and get approval for their project until the Department has conducted the full permit review and until County and LUBA land use review is complete. Granting this limited license would reward KCDG for failing to apply for a reservoir permit and the required land use approvals at the proper time, and will encourage KCDG in its assumption that OWRD will automatically approve its permit application. KCDG put the cart before the horse in undertaking a substantial development project without the necessary permits. The Department should not allow KCDG to use a limited license to try to maneuver the horse back around to the other end of the cart.

Thank you for your consideration of these comments on LL-1689. I would appreciate written notice, on behalf of the Bishops, of the Department's decision regarding this limited license application. Thank you.

Sincerely,



Janet E. Neuman  
Senior Counsel

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