

DEVELOPMENT AGREEMENT

This Development Agreement ("Agreement") is dated as of the ____ day of _____, 2013, by and between KC DEVELOPMENT GROUP LLC (hereinafter referred to as the "KCDG"), ERIC CADWELL (hereinafter referred to as "Eric"), HARRIS C. KIMBLE (hereinafter referred to as "Harris"), KLIPPEL LAKES LLC (hereinafter referred to as "KLIPPEL"), BRIANNA CADWELL (hereinafter referred to as "Brianna"), NANCY KIMBLE (hereinafter referred to as "NANCY"), and CARLTON CADWELL (hereinafter referred to as "CARLTON"). KCDG, Eric, and Harris are hereinafter referred to as a "Party" and collectively as the "Parties." Klippel, Brianna, Nancy and Carlton are hereinafter referred to as "Others".

RECITALS

- A. Eric, Brianna, Harris and Klippel are owners of adjacent property off of Johnson Rd, in Bend, Oregon. Eric and Harris desire to develop the property as a Planned Unit Development ("PUD") ("Development Project"). Their current proposal for the PUD includes two private lakes with residential lots and is depicted on the proposed lot layout map attached as Exhibit "A".
- B. The Parties have created an Oregon limited liability company whose purpose is to own the property and dig the 2100 foot long water ski lake. The Parties will contribute property to the LLC in accordance with this Agreement. The LLC will then borrow money from Carlton, Eric's father, to dig the 2100 foot long water ski lake and pay the other Project Development expenses.
- C. Once the water ski lake is complete the Parties plan to submit a PUD proposal to Deschutes County for approval. The Parties acknowledge they may sell the property to another LLC prior to submitting the PUD proposal. They will evaluate this option prior to submission of the PUD proposal.
- D. This Agreement outlines the process and the Parties rights and obligations in the Development Project.

AGREEMENTS

The parties agree as follows:

1. Property Description.

1.1 The current configuration of the property is depicted on the map attached as Exhibit "B".

1.2 Eric and Brianna own the real property described on Exhibit "B-1", commonly known as Tax Lots 1711130000819, 1711130000822, 1711130000828, and 1711140011401

consisting of two legal lots referred to as LR1 and LR2 and a portion of the legal lot referred to as LR3 as shown on the map on Exhibit "B" ("Cadwell Property").

1.3 Klippel Lakes LLC owns the real property described on Exhibit "B-2", commonly known as Tax Lots 1711130000820, 1711130000821, 1711130000823, 1711130000824 and 1711130000826 which consists of five legal lots referred to as LR4, LR5, LR6, LR7 and LR9 as shown on the map on Exhibit "B" ("Klippel Property").

1.4 Harris owns the real property described on Exhibit "B-3", commonly known as Tax Lot 1711140011600 which consists of a portion of the legal lot referred to as LR3 as shown on the map on Exhibit "B" ("Kimble Property").

2. Creation of an Oregon Limited Liability Company

2.1 Eric and Harris have filed Articles of Organization creating an Oregon Limited Liability Company named KC Development Group LLC. Eric and Harris are the sole members of KCDG.

2.2 Eric and Brianna shall contribute the Cadwell Property using a Warranty Deed transferring the Cadwell Property free and clear of any and all encumbrances except those described on Exhibit C-1 in exchange for 51% Membership Percentage in KCDG. Eric and Brianna's basis in the Property is \$1,803,253.77.

2.3 Harris shall contribute the Kimble Property and the Klippel Property using a Warranty Deed transferring the Kimble Property and Klippel Property free and clear of any and all encumbrances except those described on Exhibit C-2 in exchange for 49% Membership Percentage in KCDG. Harris is the sole member of Klippel Lakes LLC and therefore the contribution by Klippel Lakes LLC to KCDG shall be treated as though Harris individually contributed the Klippel Property. Additionally, following the payment of the Steven's Note as described in Section 2.4, Harris represents and warrants the Klippel Property is free and clear of any and all encumbrances except those described on Exhibit C-2. Harris' basis in the Kimble Property and Klippel Property is \$1,094,312.66.

2.4 In order for Harris to convey the Property known as LR5 and LR9, Klippel must first pay off a Promissory Note in the amount of \$150,000 payable to Kenneth D. Stevens and Patricia A. Stevens, Trustees of the Kenneth D. Stevens Trust UADTA August 20, 1993 and Kenneth D. Stevens and Patricia A. Stevens, Trustees of the Patricia A. Stevens Trust UADTA August 20, 1993 dated May 24, 2010 ("Steven's Note"). Klippel gave Stevens a Bargain and Sale Deed for tax lots 1711130000821 and 1711130000826 the property referred to as LR5 and LR9 ("Steven's Deed") as Security for the Steven's Note. The Steven's Note and Steven's Deed are attached hereto as Exhibit _____. Immediately upon executing this Agreement, KCDG shall borrow funds from Carlton Cadwell under the initial personal loan to pay off the Steven's Note. Only upon paying of the Steven's Note and receiving acknowledgment of such funds from Kenneth and Patricia Stevens will the contributions of the property to the LLC occur.

2.5 Eric and Harris's rights and obligations with respect to KCDG are documented in the Operating Agreement of KC Development Group LLC attached hereto as Exhibit "C" ("Operating Agreement").

3. Contribution of Property/Lot Line Adjustments/Easements

3.1 Immediately following the contribution of the Property to KCDG, the parties shall diligently file and prosecute applications with Deschutes County for four (4) lot line adjustments as shown in the four (4) maps attached as Exhibit E, which will create the two (2) ten (10) acre parcels depicted on the map attached as Exhibit A.

3.2 If all four (4) lot line adjustments are not approved, KCDG shall immediately distribute the Cadwell Property to Eric and the LR3, LR4, LR6 and LR7 to Harris. The Olmstead Property and LR5 and LR9 shall remain property of KCDG and shall be subject to the terms of this Section. KCDG shall diligently market the Olmstead Property, LR 5 and LR 9. These lots shall be sold to maximize profits but the \$500,000 minimum price requirement of Section 7.3.2 shall not apply. All profits from such sales will be first applied to any outstanding obligations of the Development Loan or other obligations of KCDG, then to Eric and Harris in accordance with the terms of the Operating Agreement. All costs associated with the lot line adjustments shall be shared equally by Eric and Harris in the event the lot line adjustments are not approved.

3.3 If all four (4) lot line adjustments are approved, KCDG shall execute and record deeds creating the new lots. The Parties acknowledge and agree that in order to reduce the expense of the lot line adjustments, KCDG shall not record transfer deeds and shall only record final deeds creating the new lots. Eric and Harris authorize KCDG to pay the cost of the lot line adjustment using the Development Loan funds described below if the lot line adjustments are approved.

3.4 If the lot line adjustments are approved, upon recording the deeds to complete the lot line adjustments, KCDG shall transfer the two (2) ten (10) acre parcels as follows:

3.4.1 The ten (10) acre parcel depicted on Exhibit A more commonly described on Exhibit F ("New LR4") shall be distributed to Eric. If Eric requests the deed distributing such property may name Eric and Brianna, as husband and wife. The value of New LR4 is \$800,000.00.

3.4.2 The ten (10) acre parcel depicted on Exhibit A more commonly described on Exhibit G ("New LR1") shall be distributed to Harris. If Harris requests the deed distributing such property may name Harris and Nancy, as husband and wife. The value of New LR1 is \$150,000.

3.5 Following the transfer of New LR1 and New LR4 in accordance with this Agreement, the remaining property owned by KCDG not including the Olmstead Property shall be known as "KCDG Property".

3.6 As soon as reasonably practical following the transfer of New LR4 to Eric and Brianna and LR1 to Harris and Nancy, KCDG shall grant Eric and Brianna an access easement for the benefit of LR4 and grant Harris and Nancy an access easement for the benefit of LR1. Such easement is more specifically described in Exhibit H ("Cadwell/Kimble Easement"). The terms of such easement shall be similar to those terms of the Access Easement attached hereto as Exhibit I.

3.7 As soon as reasonably practical following the transfer of New LR4 to Eric and Brianna, Harris and Nancy shall grant Eric and Brianna an access easement on a 30 foot strip of land located on the north boundary of New LR1 for the benefit of LR4 ("Cadwell Easement"). The easement parcel is more specifically described in Exhibit J. The terms of such easement shall be similar to those terms of the Cadwell Easement #2 attached hereto as Exhibit K.

4. Development Loans

4.1 Prior to the effective date of the Development Loan described in this Section, KCDG shall have to borrow money from Carlton and Carlton agrees to loan money to KCDG for the payment of the outstanding property taxes, the purchase of the Olmstead Property and payoff of the Steven's note ("Initial Loan"). The Initial Loan shall be in the amount of \$_____ and bear interest at the then-current applicable federal rate. There shall be no monthly payment under the Initial Loan and entire principal and interest shall be due on or before October 30, 2016. The Initial Loan shall be separate from the Development Loan and evidenced by a separate note and trust deed. The trust deed will be a first position trust deed on the Olmstead Property and LR9. Upon sale of the property or any portion thereof used as collateral for this note, KCDG agrees to pay Carlton as payment of this note the proceeds after Tax Distributions to members and payment of all costs associated with Closing including, but not limited to, real estate brokerage fees, escrow and closing costs are paid. Upon receipt of such proceeds Carlton agrees to release its trust deed from the Property sold. The Initial Loan will not require a personal guaranty.

4.2 In addition to the Initial Loan, but subject to the terms of the Note described herein, Carlton agrees to loan to KCDG, the maximum sum of Four Million Two Hundred Thousand (\$4,200,000) to complete the Development Project ("Development Loan"). The Development Loan will be evidenced by a Line of Credit Promissory Note ("Note") attached hereto as Exhibit "L" and a Line of Credit Trust Deed ("Trust Deed") attached hereto as Exhibit "M". The Development Loan will not require a personal guaranty.

4.3 The Parties acknowledge that Carlton will be borrowing money from Wells Fargo in the maximum amount of \$4,200,000 to fund advances under the Development Loan for the first year. It is the intent of the Parties and Carlton that the terms of the Development Loan mirror the terms of the note between Wells Fargo and Lender.

4.4 Carlton may be willing to lend his own personal funds if KCDG has not requested advances totaling \$4,200,000 in the first 12 months after the Note is signed. Carlton does not have an obligation to lend his own personal funds however in the event Carlton does lend his personal funds such amount advanced to KCDG, shall be evidenced by the Note and shall bear

interest at the then-current Applicable Federal Rate at the time of the advance. All principal and interest advanced by Carlton using his personal funds shall be due on or before

4.5 The Development Loan will be secured in first position by the KCDG Property and the Olmstead Property, as defined in Section 6, upon its purchase by KCDG according to the terms herein. KCDG shall execute and deliver to Carlton the Note and Trust Deed upon execution of this Agreement. Notwithstanding the Note shall not be effective until such time as Carlton secures the loan with Wells Fargo. The recording of the Trust Deed shall occur immediately upon Carlton securing funds from Wells Fargo and the completion of the Lot Line Adjustments, recording of the easements described in Sections 3.6 and 3.7 and the purchase of the Olmstead Property.

4.6 The Development Loan shall only be used for costs and expenses associated with the Development Project and carrying costs for the Development Loan. KCDG shall provide written notice to Carlton of its need for an advance. The notice shall include the amount of the advance requested, what such advance is for, an invoice for such expense, if available, and when the advance is needed. Upon providing such advance under the terms of the Note, Carlton shall provide KCDG with a written statement of whether the advance is from his personal funds or borrowed funds and what interest rate is charged on the advance.

4.7 During the period of time there is an outstanding balance owed by KCDG on the Development Loans or the Initial Loan, KCDG is strictly prohibited from making any distributions or guaranteed payments to any Member. Notwithstanding anything above, Carlton consents to distribution to Members in an amount equal to pay each Member's federal income tax obligations which result from KCDG's net taxable income or gain ("Tax Distributions"), the distribution of the 10 acre parcels to Eric and Harris in accordance with Section 3.4, and the distribution of the lot to Eric in accordance with Section 8.1 of this Agreement prior to payment of all KCDG's obligations under the Development Loan. Carlton acknowledges Kimble's company Harris Kimble Enterprises, Inc. may perform construction services of KCDG and therefore consents to KCDG making payments due under construction contracts to Harris Kimble Enterprises, Inc. for infrastructure construction, if a contract is awarded by KCDG to Harris Kimble Enterprises, Inc.

4.8 Harris acknowledges that Carlton is Eric's father. Harris hereby approves and consents to KCDG borrowing money from Carlton and agrees to the terms and provisions of the Development Loan as provided in the Line of Credit Promissory Note and Line of Credit Trust Deed and the Initial Loan. Harris acknowledges and agrees in the event the Development Project is not successful, KCDG shall remain liable for all outstanding obligations to Carlton and that Carlton may enforce the loan documents in accordance with the terms thereof, including but not limited to foreclosing his interest in the Line of Credit Trust Deed with respect to all KCDG property.

4.9 The parties acknowledge that Carlton and Harris have their own agreement whereby Carlton will loan Harris a monthly amount not to exceed \$5,000 per month. This

Agreement between Carlton and Harris will be evidenced in a written agreement to be drafted and executed between Carlton and Harris.

4.10 Eric as a manager and member and Harris as a member of KCDG give Harris and Eric the power and authority to execute the Line of Credit Promissory Note and Line of Credit Trust Deed on KCDG's behalf.

5. Outstanding Taxes.

5.1 The Parties acknowledge there are outstanding real property taxes owing on the Kimble Property and Klippel Property. The total taxes outstanding through October 15, 2013 are \$18,670.07.

5.2 KCDG shall request an advance on the Development Loan to pay all outstanding real property taxes immediately following approval of the lot line adjustments described in Section 3 of this Agreement.

6. Olmstead Property.

6.1 Harris has executed a Vacant Land Real Estate Sale Agreement for the Property commonly known as 63410 Palla Lane and 63280 Palla Lane Bend, OR ("Olmstead Property") for the purchase price of \$400,000. The Vacant Land Real Estate Sale Agreement is attached hereto as Exhibit N ("Olmstead Agreement").

6.2 Upon execution of this Agreement, Harris shall assign his rights to purchase the Olmstead Property to KCDG and KCDG shall accept and assume all of Harris's obligations under the Olmstead Agreement.

6.3 As soon as reasonably practical, KCDG shall purchase the Olmstead Property in accordance with the terms of the Olmstead Agreement.

6.4 KCDG shall request use proceeds from the loan from Carlton (not the Development Loan) to pay the Purchase Price for the Olmstead Property.

7. Intentions for the PUD

7.1 **Changes to Master Plan.** Harris previously created a master plan for this project. The Parties agree to discuss possible changes to the current master plan Harris prepared, including the possibility of expanding the number of lots available if they can do so by obtaining a zoning change. The Parties agree all final decisions with respect to any changes to the master plan will be made by Eric, manager of KCDG at his sole discretion.

7.2 Eric, Harris and KCDG will work together with a land use attorney to revise the current Master Plan drafted for the Development Project to maximize profits from lot sales within the development. The cost of the land use attorney is a KCDG expense.

7.3 The goal for this Development Project is to maximize profits and therefore, it is the parties' intention, that the following goals are sought:

7.3.1 Common areas and open spaces, as required by the county, will be available for PUD lot owners.

7.3.2 No lot shall be sold for less than \$500,000 without unanimous consent of the members of KCDG.

7.4 In the event the Development Project fails for any reason including, but not limited to failure to obtain necessary water rights for the lakes or the PUD is not approved by Deschutes County, KCDG shall complete lot line adjustments to create the most marketable configuration of lots given the then situation. These lots shall be sold to maximize profits but the \$500,000 minimum price requirement of Section 7.3.2 shall not apply. All profits from such sales will be first applied to any outstanding obligations of the Development Loan, then to Eric and Harris in accordance with the terms of the Operating Agreement.

8. Other Rights

8.1 Eric Lot. Prior to sale of any lots by KCDG, whether or not the PUD is approved, Eric shall choose one lot to be distributed to Eric. KCDG shall distribute such lot to Eric as a distribution immediately upon receipt of notice from Eric of which lot he chooses. In exchange for Eric bringing to the table financing for the project, Harris acknowledges and consents to this distribution which is uneven to Harris' distribution and is in addition to Eric's right to receive 50% of all profits from the LLC.

8.2 Construction. KCDG shall recommend Harris Kimble Enterprises, Inc. as its preferred residential home builder to third party PUD lot purchasers. Eric and Brianna will use reasonable efforts to open their home to prospective builder-clients for Harris Kimble Enterprises, Inc.

8.3 Harris Kimble Enterprises, Inc. is allowed to bid on infrastructure construction work to be done in the Project Development. Upon receipt of all bids for a particular infrastructure construction project, KCDG shall provide Harris Kimble Enterprises, Inc. copies of all bids. In the event Harris Kimble Enterprises, Inc. is not the lowest bidder for infrastructure construction project, Harris Kimble Enterprises, Inc. shall have the right to contract and perform individual line items at or below the lowest bid price submitted so long as all the specifications of KCDG are met. To exercise such right of first refusal Harris Kimble Enterprises, Inc. must give written notice to KCDG within 10 days of KCDG's submittal of the bids to Harris Kimble Enterprises, Inc.

9. No Land Use Agreement. The parties understand that there is no land use action accomplished by this Agreement and that the Agreement merely sets forth the terms and conditions agreed to by the parties prior to any Land Use Application for a Planned Unit Development.

10. General Provisions.

10.1 Survival. The parties to this Agreement acknowledge that the representations, warranties, and obligations made by the parties to this Agreement shall survive this Agreement.

10.2 Effective Date: This Agreement shall be effective upon execution by all parties.

10.3 Provisions For Reservation or Dedication of Land for Public Purposes. This Agreement does not resolve whether or how much KCDG land dedication may or will be required by the County for the Project. The amount of dedication of land will be determined as KCDG prepares and files its Land Use Applications and as those applications are reviewed by the County in accordance with the Deschutes County Code and County policy as applied to all Land Use Applications.

10.4 Effect of Intervening State and Federal Laws. It is not expected that the adoption of any federal or state law will affect the performance of this Agreement. Nevertheless, in the event that such a law or regulation is adopted, the Parties hereto agree that they will cooperate to resolve the effect of the intervening law consistently with the purposes of this Agreement.

10.5 Assignability of Agreement: This Agreement shall not be assigned without the written consent of the Parties and Others.

10.6 Notices. Any notice, demand, request, approval, consent, or other communication (collectively referred to as a "Notice") concerning this Agreement or any matter arising in connection with this Agreement shall be in writing and addressed to the other Party at the address set forth below. Any Notice shall be given by either: (i) personal delivery in which event it shall be deemed given on the date of delivery; or (ii) certified mail return receipt requested in which event it shall be deemed given three (3) business days after the date deposited in any post office, branch post office, or official depository; or (iii) via electronic mail or facsimile in which event it shall be deemed given on the day of confirmed receipt. Any Party may change any address for the delivery of Notice to such Party, by giving Notice in accordance with the provisions of this Section. The attorneys for the Parties may give any Notice.

Notices Addresses:

If to KCDG:

Eric Cadwell _____
63564 Johnson Rd _____
Bend, OR 97701 _____

Email: ecadwell@gmail.com

Facsimile: 541-647-5554

If to Eric: Eric Cadwell
63564 Johnson Rd
Bend, OR 97701
Email: ecadwell@gmail.com
Facsimile: 541-647-5554

With Copy to: Alison Huycke
Francis Hansen & Martin LLP
1148 NW Hill St
Bend, OR 97701
Email: alison@francishansen.com
Facsimile: 541-382-7068

If to Harris: Harris Kimble
PO box 5014
Aloha, OR 97007
Email: harriskimble@aol.com
Facsimile: 541-382-2538

With Copy to: Christopher Hatfield
747 SW Mill View Way
Bend, OR 97702
Email: CDHatfield@hurley-re.com
Facsimile: 541-317-5507

If to Carlton: Carlton M. Cadwell
909 North Kellogg Street
Kennewick, WA 99336
Email: carlc@cadwell.com
Facsimile: 509 783 6503

10.7 Waivers. No covenant, term or condition of this Agreement shall be deemed to have been waived by any Party, unless such waiver is in writing signed by the Party charged with such waiver. Any waiver of any provision of this Agreement, or any right or remedy, given on any one or more occasions shall not be deemed a waiver with respect to any other occasion.

10.8 Entire Agreement/Modifications. This Agreement, the exhibits attached hereto and the Operating Agreement constitute the entire agreement between and among the Parties and Others with respect to the subject matter herein contained and all prior negotiations, discussions, writings and agreements between the Parties and Others with respect to the subject matter herein contained are superseded and of no further force and effect. This Agreement cannot be amended or modified without a writing signed by all of the Parties and Others hereto.

10.9 Captions. The captions contained in this Agreement were inserted for the convenience of reference only. They do not in any manner define, limit, or describe the provisions of this Agreement or the intentions of the Parties.

10.10 Gender/Singular/Plural. Whenever masculine, feminine, neuter, singular, plural, conjunctive, or disjunctive terms are used in this Agreement, they shall be construed to read in whatever form is appropriate to make this Agreement applicable to all the Parties and all circumstances, except where the context of this Agreement clearly dictates otherwise.

10.11 Severability. The un-enforceability or invalidity of any provisions hereof shall not render any other provision herein contained unenforceable or invalid.

10.12 Time of Essence. Time is of the essence of this Agreement.

10.13 Attorney Fees. If suit or action is instituted in connection with any controversy arising out of this Agreement, the prevailing party shall be entitled to recover in addition to costs such sum as the court may adjudge reasonable as attorney fees at trial, on petition for review, and on appeal.

10.14 Governing Law and Venue. This Agreement shall be governed by and construed in the State of Oregon and venue shall be in a Circuit Court in the County of Deschutes.

10.15 Exhibits. The Exhibits attached to this Agreement are fully incorporated into this Agreement where they are first referenced.

10.16 Duty to Cooperate. Execution of this Agreement represents each Party's acceptance of the purposes stated in the Recitals and the ways and means of effecting those purposes. The Parties shall also cooperate fully in the defense of this Agreement.

10.17 Future Assurances. The Parties and Others shall promptly execute and deliver such additional documents and shall perform such acts that are reasonably necessary in connection with the performance of their respective obligations under this Agreement.

10.18 Representation. The law firm of Francis Hansen & Martin LLP has represented Eric Cadwell in the negotiation and drafting of this Agreement. The law firm of Hurley Re, PC has represented Harris and Nancy Kimble in the negotiation and drafting of this Agreement. Carlon Cadwell is advised to consult with an attorney on his behalf.

IN WITNESS WHEREOF, the Parties have signed this Agreement as of the date set forth in the first paragraph of this Agreement.

KC DEVELOPMENT GROUP LLC, and Oregon
Limited Liability Company

By: _____

Name: _____
Title: _____

ERIC CADWELL

HARRIS C. KIMBLE

KIPPEL LAKES LLC

By: _____
Name: _____
Title: _____

BRIANNA CADWELL

NANCY KIMBLE

CARLTON CADWELL

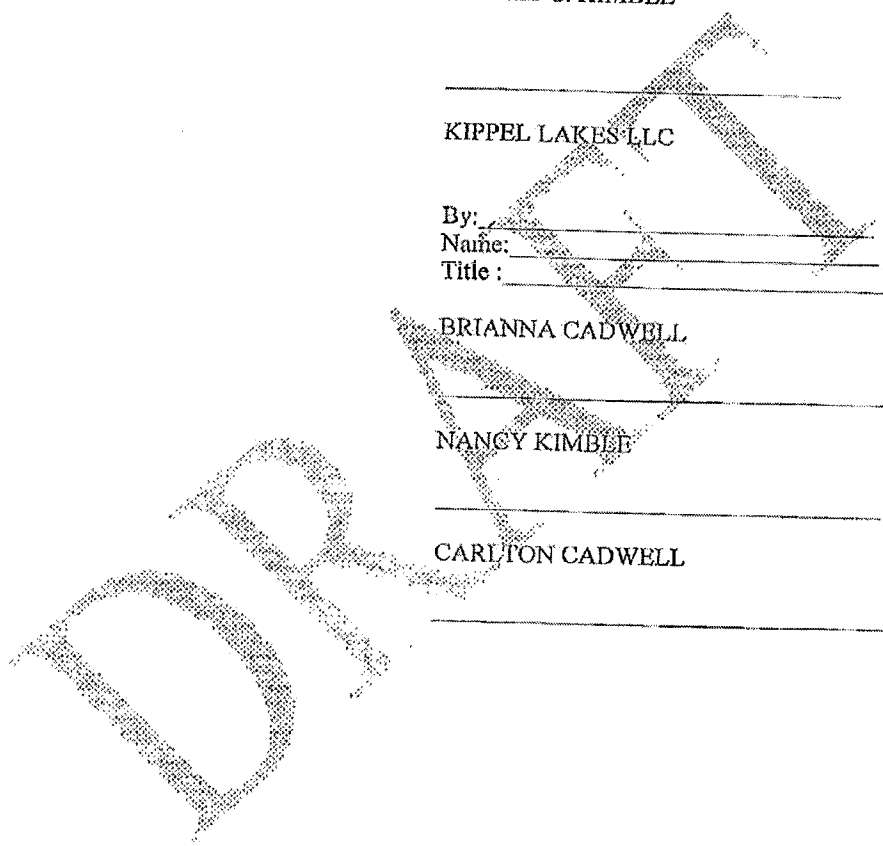


EXHIBIT LIST

<u>Exhibit</u>	<u>Description</u>
A	Proposed PUD Map
B	Current Configuration Map
B-1	Cadwell Property Legal Description
B-2	Klippel Property Legal Description
B-3	Kimble Property Legal Description
C-1	Cadwell Property Encumbrances
C-2	Kimble Property and Klippel Property Encumbrances
D	KC Development LLC Operating Agreement
E	Lot Line Adjustment Maps
F	New LR 4 Legal Description
G	New LR 1 Legal Description
H	Cadwell/Kimble Easement Legal Description and Map
I	Cadwell/Kimble Easement Agreement
J	Cadwell Easement #2 Legal Description and Map
K	Cadwell Easement #2 Agreement
L	Line of Credit Promissory Note
M	Line of Credit Trust Deed
N	Olmstead Vacant Land Real Estate Sale Agreement

KIMBLE RANCH



A

PLANNED UNIT DEVELOPMENT



KIMBLE RANCH PROJECT SUMMARY

Kimble Ranch is a proposed Planned Unit Development that is expected to be the most unique and exclusive neighborhood in Bend, Oregon. The project is located on Bends west side, on the east side of Johnson Market Road, and is just eight minutes from the downtown core. The proposed lots will be a minimum of two acres



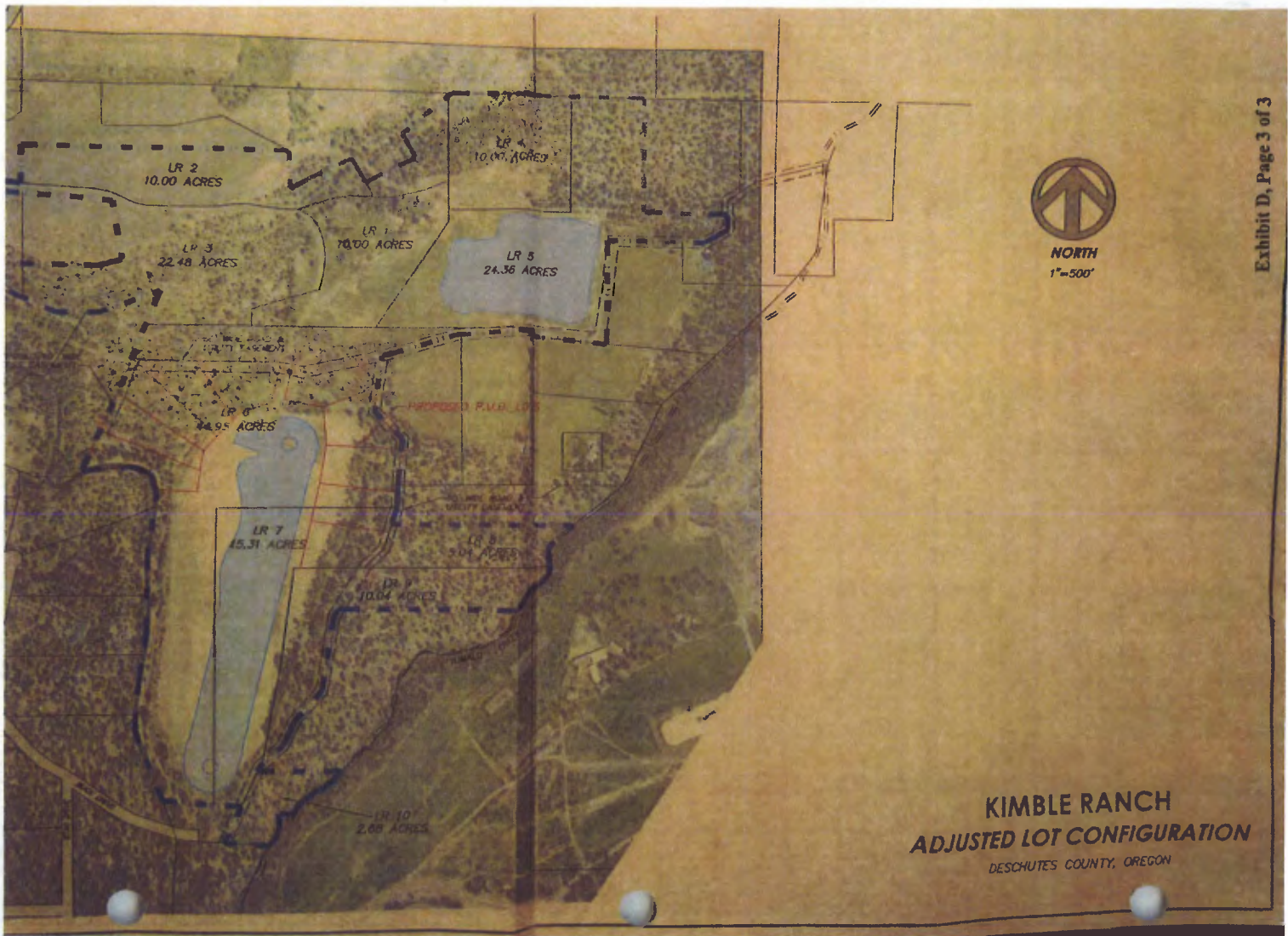
in size and will either front on the proposed lake or sit high atop the rim rock overlooking Tumalo Creek. Kimble Ranch will be a gated community with a focus on outdoor recreation. The homes will be built to exacting standards of quality and craftsmanship while retaining individuality and harmony with the surrounding environment.

Development will commence with the construction of a 2100-foot long water ski lake and surrounding landscaping. After completion of the lake and landscaping, a ten lot PUD will be submitted for approval. The PUD will include ten two acre lots and over eighty acres of open space along with private paved roads and a private domestic water system.



Water for the lake and the landscape irrigation will be provided for by the existing fifty-six acres of Tumalo Irrigation water rights.

A sixteen to eighteen lot homeowners' association will be formed to insure, maintain and protect the shared amenities and infrastructure.





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888 SW Fifth Avenue
Portland, Oregon 97204
503.221.1440

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June 6, 2014

BY E-MAIL AND FIRST CLASS MAIL

Mr. Doug Woodcock, Administrator
Field Services Division
Water Resources Department
725 Summer Street, NE, Suite A
Salem, OR 97301

Re: Unauthorized Use of Water

Dear Mr. Woodcock:

Along with Jennifer Bragar and Ed Sullivan of the Garvey Schubert Barer law firm, I represent Thomas and Dorbina Bishop, who live at 63382 Fawn Lane in Bend. Ms. Bragar and Mr. Sullivan are handling land use and other matters for the Bishops, and I am working with them on several water law issues. Both Ms. Bragar and I have already communicated some of the concerns discussed in this letter to Jeremy Giffin, District 11 Watermaster, but given recent developments, we feel it is time to lodge a more complete and formal complaint.

The Bishops are concerned about unauthorized water use by Eric Cadwell, Harris Kimble, and/or KC Development Group, LLC (collectively, KCDG) in a proposed development on a parcel adjacent to the Bishop property. Both the Bishop property and the KCDG property are within (and served by) the Tumalo Irrigation District. KCDG plans to develop its land for luxury homesites. Although the developers have not yet submitted any plans or land use applications to Deschutes County, they have completed significant site preparation and pre-development activities, including building roads and excavating two large "ponds."¹ This activity involves substantial water use that is not authorized by appropriate permits or other approvals.

I want to raise three specific issues: (1) unauthorized storage of water; (2) excessive storage of water claimed as a "bulge-in-the system;" and (3) unauthorized use of water from an exempt domestic well.

¹ Mr. and Mrs. Bishop are separately undertaking enforcement action through Deschutes County regarding unpermitted land use.

Unauthorized storage. KCDG has excavated two ponds on its property; the approximate locations of the ponds are shown on the enclosed map. The northerly pond was recently completed and was filled with water sometime over the last several weeks. The second pond (identified on the map as a water ski lake) was lined with pond liner over the past few days, and the Bishops are very concerned that it, too, will soon be filled with water.

However, the developers do not have a reservoir right or any other authorization to store water in either of their ponds; accordingly, the Department should prevent them from doing so. KCDG's apparent plan is to fill the ponds with Tumalo Irrigation District water, but they have no permission to do so at this time. The developers have been negotiating with the District for a water storage agreement, pursuant to which the District would agree to change the place of use of a portion of the District's Upper Tumalo Reservoir storage right to the ponds on KCDG's property. The District Board discussed a draft agreement at its May 13, 2014 Board meeting, but tabled a decision on the contract. The KCDG contract is now on the Board's agenda for its June 10 meeting. The Bishops and others object to Board approval of the proposal, on both procedural and substantive grounds; but regardless of any Board decision, any reliance by the developers on an expectation of filling the ponds with TID water is premature. A copy of the letter submitted to the Board on the Bishops' behalf by Jennifer Bragar is enclosed for your information.²

Even if the Board agrees to such a proposal, the District would still need to apply to the Department for permission to store water in the ponds. The draft KCDG/TID agreement anticipates that TID would use first a temporary transfer and then a permanent transfer to request a change in place of use for 108 acre feet of the TID storage rights. However, it is not clear that even a transfer proceeding would provide the necessary authority for the District and KCDG to move water to the ponds. The KCDG ponds are newly-constructed reservoirs that have never held water before, and as such, they should be subject to a new storage permit. Since the ponds are designed to hold at least 108 acre feet of water, they are certainly too large to qualify for alternate reservoir permits under ORS 537.409.

We are unable to determine any legitimate basis for KCDG to store water in these new ponds without obtaining a permit from the Department, or at the very least, a transfer approval order, before filling the ponds with water. As we understand it, the northerly pond has already been filled with Tumalo Irrigation District water. This appears to be an unauthorized use of water that should be immediately addressed by the Department to avoid injury to the other water users within the District. Any attempted filling of the second pond would compound the violation. Indeed, District water users may already be experiencing injury, as we understand

² The enclosed copy includes only one of the attachments accompanying Ms. Bragar's original letter; the omitted attachments have to do mostly with public records requests to the District.

that some of them are not receiving water deliveries, even though it is early in the irrigation season.

Improper claim of "bulge-in-the-system" storage. We understand that Jeremy Giffin has allowed KCDG to fill the northerly pond (though not the water ski lake) with TID water under the auspices of a so-called "bulge in the system" (BIS). On the Bishops' behalf, Ms. Bragar sent a request to Mr. Giffin on May 30, 2014, for information about the calculations he used to determine the amount of water that KCDG could store as a BIS. We have not received a reply to that request, but we want to register our objection to this approach in general, particularly since we fear that KCDG may go ahead and fill the water ski lake as well. If they do so, they will be acting in direct contravention of Mr. Giffin's direction, since he explicitly reminded them that they were not authorized to do so during a site visit on May 23, 2014.³

The BIS concept is problematic as applied to the KCDG ponds. This approach to delivering water is not explicitly allowed by statute, but has apparently been developed by the Department to increase flexibility for irrigators. The idea is that water users are able to take delivery of more water than they can apply immediately, to allow them to manage their irrigation over several days—generally in situations where water users take their water in rotation. The BIS concept certainly is not intended to allow construction of significant reservoirs. If it is necessary for an irrigator to construct a sizable water storage facility in order to take advantage of pre-delivery of a short term supply, the irrigator must still comply with any other applicable requirements for that facility, such as a storage permit or transfer approval order as discussed above.

Furthermore, a BIS is not open-ended in amount, and cannot be used to justify permanent storage of large volumes of water. The Department's Technical Operations Manual (Section 3.01) contains the following guidance for BIS facilities:

- A BIS is defined as "a facility that temporarily holds legally diverted water as part of an irrigation system or other water delivery system."
- "Temporary" is defined in this context as "the period of time between irrigation sets, temperature control applications, agriculture spray applications or other agricultural applications and does not exceed 10 days; or, not more than 72 hours for non-agricultural uses."

³ Mr. Giffin told me this in an email on May 23rd, after he had visited the site in response to my raising concerns with him in a phone call earlier that day.

- "The size of a bulge in the system will be dependent upon various factors such as the use, the number of acres involved in the irrigation that benefit from the system, the amount of water needed for agriculture spray application, and the time period between irrigation sets. . . . *Most BIS are relatively small.*" (Emphasis added.)
- "The temporary storage facility must be drained to a minimum level or emptied at the end of the legal season of use."

As noted, we have not yet had an opportunity to review Mr. Giffin's calculations of what he considers a proper amount for KCDG to claim as a bulge in the system. Regardless of the calculation, we question whether the BIS concept justifies the amount of water already stored in the northerly pond. (Recall that the two ponds are intended to hold at least 108 acre feet of water.)

We understand that KCDG holds water rights for approximately 55 irrigable acres. Some of that acreage will now be flooded by the ponds, and some of the acreage has been replaced with roads. KCDG also intends, as part of its proposed agreement with the Tumalo Irrigation District, to file a transfer application to change the place of use of a portion of the irrigation rights from these no-longer-irrigable acres to other acreage within their ownership. Even if the KCDG contract is approved by the TID Board on June 10, the change cannot be made until the Department has approved the transfer. In the meantime, any BIS calculations must be justified on the basis of currently irrigable land, which is an amount significantly less than 55 acres.

Clearly, KCDG cannot use the BIS concept to justify filling the water ski lake. Indeed, as noted above, Mr. Giffin has cautioned them against doing so. And, since the developers designed these water features to be part of their luxury development, it seems unlikely that they intend to drain them at the end of the irrigation season.

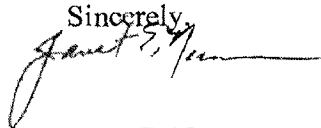
Unauthorized use of an exempt domestic well. Two domestic wells have been constructed on the KCDG property. Well #73259 was drilled in 2005; this well appears to provide household water to the house occupied by Eric Cadwell, one of the KCDG principals. The Cadwell residence is the only house built on the property so far. The house now looks out over the northerly pond.

A second well—ID # 112224—was completed in early 2014. Both of these wells may only be used for domestic and household purposes and the amount of water use must also be within the volume limitations for exempt domestic wells. However, it appears that at least one of these wells is being used instead for construction purposes. Mr. Bishop has photographed a

Water Resources Department
June 6, 2014
Page 5

pipeline leading from the 2014 well to an elevated water storage tank on the property. This tank is being used to fill tanker trucks, which have been (and still are) being used in constructing the two ponds. Our clients have observed these tankers over the past several weeks spraying water on the property in the process of building roads, constructing the northerly pond, and most recently in completing the water ski lake.⁴ On June 3rd, Mr. Bishop took photographs of a water truck applying water at the site of the lake; I sent these photographs to Jeremy Giffin on June 3rd and questioned KCDG's authorization for using the well water for these purposes. Mr. Giffin has told me that the developers believe their water use to be covered by the groundwater exemption for 5,000 gallons per day for industrial use. However, we question whether the use is actually staying below this limit. Our clients are particularly concerned that the developers not be allowed to fill the water ski lake with this domestic well water.

On behalf of Thomas and Dorbina Bishop, I request that the Department investigate the water use by the KC Development Group and address these complaints of unauthorized water use. In addition to the parties listed below, we will also be providing copies of this letter to Jeremy Giffin, District 11 Watermaster, Dwight French, Administrator of the WRD Water Rights Division, and the Tumalo Irrigation District Board.

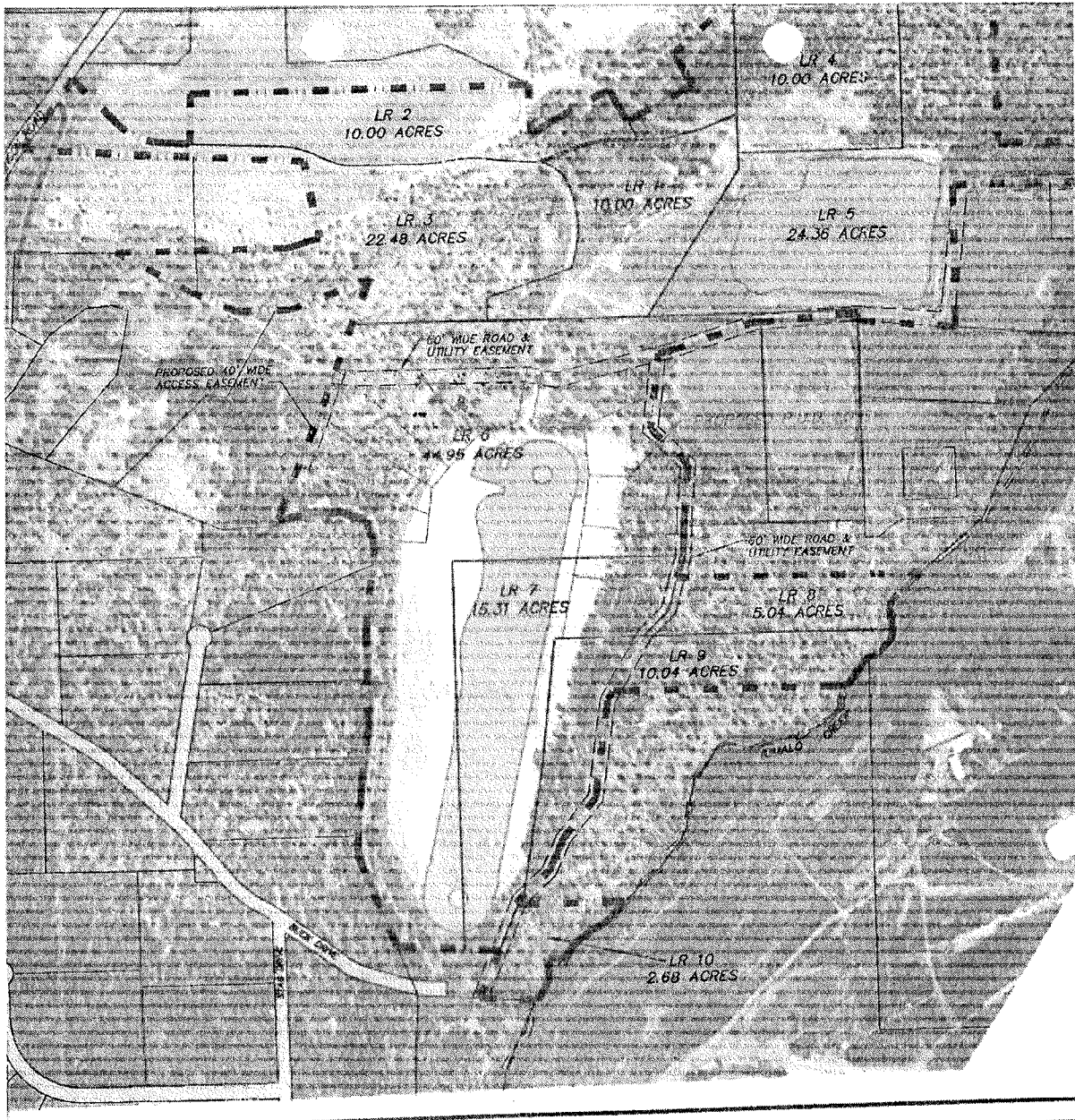
Sincerely,


Janet E. Neuman
Senior Counsel

JEN/jeh
Enclosure
copy: Thomas and Dorbina Bishop
Edward J. Sullivan
Jennifer M. Bragar

097204/97204/5597269v1

⁴ In fact, when the developers received a temporary rock crushing permit from Deschutes County in April of 2014, the county's written finding said "[t]he applicant states that sufficient water is available to provide dust control because there is a well on-site that produces approximately 90 gpm that is used to fill an overhead water tank that can be used to fill a water truck."





PORTLAND OFFICE
eleventh floor
121 sw morrison street
portland, oregon 97204-3141
TEL 503 228 3939 FAX 503 226 0259

OTHER OFFICES
beijing, china
new york, new york
seattle, washington
washington, d.c.
GSBLAW.COM

GARVEY SCHUBERT PART

LEATHERY TEL 503 228 3939 FAX 503 226 0259

Please reply to JENNIFER BRAGAR
jbragar@gsblaw.com
Telephone 503 553 3208

June 3, 2014

VIA EMAIL AND U.S. MAIL

Chair Cochran and Tumalo Irrigation District
Board Members
Tumalo Irrigation District
64697 Cook Ave.
Bend, Oregon 97701

Re: Bishop Comments about Contemplated Water Storage Right Transfer to KC Development Group, LLC

Dear Chair Cochran and Board Members:

Our office represents Thomas and Dorbina Bishop, who live at 63382 Fawn Lane, Bend, Oregon, within the Tumalo Irrigation District ("TID") boundaries, and hold water irrigation rights from the District. This letter is in regards to Item 9 on the TID Board's May 13, 2014 agenda that is anticipated to be continued for discussion by the Board on June 10, 2014 – the proposed transfer of water storage rights from TID to KC Development Group, LLC ("KCDG"). Mr. and Mrs. Bishop request, that if this item is on the Board's June 10, 2014 agenda, the Board make no decision because the public has not had adequate notice or time to review and comment on public records related to this matter and TID has not complied with public contracting requirements or its Bylaws and other governing documents with respect to the contemplated irrigation contract. See Attachment 1 for a copy of the draft irrigation contract that has most recently been provided.

I. Public records have not been provided in response to requests for such documents.

On May 9, 2014, Mr. and Mrs. Bishop submitted a public records request to TID. See Attachment 2. TID promptly provided a response on May 12, 2014 and based on review of those documents, Mr. and Mrs. Bishop determined that certain relevant and important documents were omitted from the response. Further, review of the documents resulted in Mr. and Mrs. Bishop's supplemental request for additional relevant documents outside the scope of the May 9, 2014 request. Therefore, on May 23, 2014, Mr. and Mrs. Bishop submitted a supplemental request for omitted and additional public records. See Attachment 3.



TID provided a response on May 30, 2014 with a description that some of the items requested are available and the estimated cost to provide such documents.¹ Mr. and Mrs. Bishop are reviewing the response to determine which items to have copied and will not have adequate time to analyze the documents to make informed comments at the TID meeting on June 10, 2014. Therefore, Mr. and Mrs. Bishop request that the Board table the contemplated transfer of water storage rights between TID and KCDG until these public records are available and ample time for review of the information is provided. If the Board moves forward without allowing adequate time for review of and comment on the public records, Mr. and Mrs. Bishop's due process rights will be violated and their property, including their water rights, will be adversely impacted if the water storage transfer is approved.

II. The contemplated transfer of water storage rights from TID to KCDG violates public contracting law.

In order to ensure that local and state governments obtain competitive offers for provision of services and to ensure a fair process for all interested parties, Oregon's public contracting statutes create a process for public entities to enter into procurement contracts. We have concerns over two public contracting issues in connection with the contemplated transfer of water storage rights from TID to KCDG – 1) construction of a public improvement without compliance with public contracting law; and 2) procurement of water storage services without compliance with public contracting law.

A. KCDG's construction of the lake to store the water is a public improvement subject to public contracting requirements.

TID is subject to the public contracting laws under ORS 279A and 279B. Based on review of documents provided to Mr. and Mrs. Bishop in response to their May 9, 2014 public records request, the contemplated transfer includes the construction of two lakes by KCDG constituting a public improvement as defined under ORS 279A.010(1)(cc). TID has not followed the public contracting rules for the project and a transfer of the water storage right into the public improvement would violate those requirements.

B. The provision of water storage by KCDG is a public service subject to public contract requirements.

The water storage proposed by KCDG constitutes a procurement of services under the public contracting laws, ORS 279B.050 *et. seq.* In Mr. Bishop's previous written and verbal testimony related to Item 9 of the May 13, 2014 TID agenda, he specifically commented upon the Board's lack of appraisal of the value of the storage right for the uses to which it would be put and whether the service should be valued differently than the blanket amount of \$5,400 that KCDG agreed to pay annually with

¹ Based on instruction from TID in its response, Mr. and Mrs. Bishop were able to access some of the attachments to e-mails that were initially considered as omitted documents. However, Mr. and Mrs. Bishop were only able to review the documents beginning at 3:50 p.m. on May 30, 2014 and have not had enough time to consider and comment on relevant information.



minor annual adjustments. Under the terms of the current draft of the irrigation contract ("draft irrigation contract"), the length of the contract includes at least three years of temporary transfer, placing the value of the contract at a minimum of \$15,000 and quite likely more under the permanent transfer contemplated.²

Based on the foregoing, the transfer of water storage rights between TID and KCDG contemplated under Item 9 of the May 13, 2014 agenda is subject to the Oregon public contracting laws and approval of a contract pertaining to water storage rights at the June 10, 2014 meeting would violate public contracting requirements.

III. The contemplated transfer of water storage rights from TID to KCDG violates TID's Bylaws.

The draft irrigation contract is also a conveyance of property and subject to TID's notice requirements. The TID Bylaws provide in Paragraph D.3 that:

No property, real or otherwise, belonging to the District may be disposed of, leased, or encumbered in any way without the approval of a majority of the Board. The District may sell, lease or dispose of lands, property, or any part thereof, either at private or public sale. Items valued over \$1,000 shall be advertised in the District office, and in a local newspaper on two occasions at least 10 days prior to sale. (Emphasis added.)

The payment agreed to by KCDG demonstrates that the value of the conveyance at issue is at least \$5,400 a year. TID has not complied with the notice requirements and should not move forward with the irrigation contract.

IV. The TID Board's contemplated transfer of water storage rights to KCDG violates TID's Resolution No. 2014-02.

On April 8, 2014, the TID Board adopted Resolution No. 2014-02, a policy outlining the Board's duties and responsibilities. Several provisions in that Resolution have been and will be violated if the Board acts on June 10, 2014 to approve a water storage rights transfer to KCDG, including, but not limited to:

- act as representatives of the citizens of the district;
- keep the water users informed on all district matters;
- make decisions based on the wishes and needs of the water users;
- remember that the water users are the true "owners" of the District; and
- ensure the fiscal integrity of the organization.

² Further, the present value of \$5,400 over the course of the contract term would also lead to the applicability of the state procurement laws.



This contemplated transfer is for the benefit of one water user – KCDG – to allow a private benefit from a public water storage right and is to the detriment of all other water users to the extent it limits, impedes or denies their access to or use of such water without justification or fair compensation. Such transfer will enable private development of recreation-focused luxury housing and enormous profit for KCDG. Moreover, just as Resolution No. 2014-02 directs the Board to spend the district's money with prudence and trust, the same standard of care also applies to handling and disposing of TID property. The bargain basement price that KCDG has agreed to pay has not been evaluated against a competitive bidding process, and if TID accepts such a low figure, it will be clear proof that the Board is taking action that will compromise the fiscal integrity of the organization.

V. Conclusion.

Based on the foregoing information, the TID Board should not move forward with any irrigation contract in favor of KCDG until TID complies with all state laws, and district rules, including, but not limited to, public records laws, public contracting laws, TID's Bylaws and its Board Duties and Responsibilities Policy. Mr. and Mrs. Bishop have put the TID Board on notice that it is out of compliance with these laws and governing documents, and will consider all legal remedies should the Board move forward with an irrigation contract or transfer of water storage rights from TID in favor of KCDG.

Sincerely,

GARVEY SCHUBERT BARER

By

Jennifer Bragar

JB:dw

Attachments

cc: Kenneth Rieck
Client

PDX_DOCS:518164.2

After Recording, Return To:
KC Development Group, LLC
63560 Johnson Rd
Bend, OR 97701

No Changes to Tax Statements.

IRRIGATION CONTRACT

(WATER STORAGE EASEMENT AGREEMENT)

Tumalo Irrigation District, hereinafter referred to as "TID," is an Oregon Irrigation District established under ORS Chapter 545 Oregon Revised Statutes. KC Development Group, LLC, hereinafter referred to as "KCDG" is an Oregon limited liability company and the owner of real property described in "Exhibit A," attached hereto, and incorporated herein by this reference. Together, they are "Parties" to this Agreement.

RECITALS

WHEREAS, TID holds a valid water right pursuant to Oregon Water Resources Department Certificate Number 7684 ("Certificate") to store 1100 acre feet of surface water at what is commonly known as Upper Tumalo Reservoir in Deschutes County, Oregon; and

WHEREAS, KCDG desires to assist in storing 108 acre feet of the water (the "Stored Water") currently stored at upper Tumalo Reservoir, on its property described herein in "Exhibit A" (Subject Property); and

WHEREAS TID is willing to allow KCDG to hold the Stored Water authorized to be stored under the Certificate in exchange for payment to TID;

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

AGREEMENT

1. The above recitals are incorporated herein.
2. TID will permit KCDG to store 108 acre feet of water in the ponds located on the Subject Property described in "Exhibit A," particularly in the ponds (the "Ponds") described in "Exhibit B," attached hereto and by this reference incorporated herein. (TID shall also deliver surface irrigation water to Subject Property, which water shall pass through the Ponds but shall not be stored on the Subject Property or in the Ponds, and such additional delivered water shall be used for irrigation in accordance with other irrigation rights held by KCDG, and not the subject of this Agreement.)

3. KCDG agrees to pay to TID certain consideration to hold the Stored Water on KCDG's Subject Property. Said consideration shall be made by payment of \$50.00 per acre foot of water right, per year, payable by check or other form of payment to TID on or before March 1st of each year, commencing on May 13th 2014 for the first year, and to be paid by March 1st in each subsequent year for the following irrigation season. The initial charge of \$50.00 per acre foot shall be adjusted annually by the same percentage change made by TID in the total annual assessment and other account charges for each acre of land on TID's Certificate and entitled to irrigation pursuant to ORS 545.484, or by subsequent statute as that may be changed by Oregon's Legislature in the future. Payment is based on one acre feet of storage allowed under the storage right. Failure to make payment following 30 days written notice to KCDG is a default under this Agreement.

4. The obligations represented in this Agreement are contingent upon the Oregon Department of Water Resources ("OWRD") approval of the transfer of the desired portion of the storage rights under the Certificate to the Exhibit B" ponds. The approval of and a new certificate issued by the OWRD) shall have the final proof submitted to OWRD by March 1, 2018. In the event OWRD does not approve the transfer of storage rights to the Ponds, this Agreement shall become null and void and of no further affect.

5. As further consideration for the transfer of the storage rights from Upper Tumalo Reservoir to the Ponds, KCDG shall pay all filing fees, engineering fees, reimburse TID for reasonable legal fees expended, staff time expended by TID personnel and any other costs or fees incurred by TID for the purpose of making the subject transfer or attempted transfer of storage rights from the certificate to the Ponds. Reimbursement to TID shall be made within 30 days of submission of the bill by TID to KCDG. Failure to make payment within 30 days of written notice is a default by KCDG under this Agreement. In the event OWRD does not approve said transfer, KCDG shall not be entitled to any refund of fees and costs paid to TID.

6. Upon execution of this Agreement and thereafter, and subject to approval of the transfer described in Paragraph 4, above, KCDG grants TID a perpetual Non-Exclusive Easement across the Subject Property and the Ponds for the purpose of examining the Ponds to assure itself of compliance by KCDG to this Agreement. KCDG agrees to maintain the Ponds in acceptable condition to store the water allowed under the storage right. Maintenance of the Ponds, water conveyance lines, and any other construction necessary to accomplish the intent of this Agreement are to be borne by KCDG. Any repairs, adjustments or other construction deemed necessary by TID to comply with this agreement shall be performed by KCDG, or at KCDG's expense.

7. In the event KCDG fails to perform or is otherwise in default under this Agreement, upon 30 days written notice from TID or such longer period as is reasonably necessary to perform, TID shall be entitled to apply to OWRD to transfer the storage rights from the newly created certificate back to Upper Tumalo Reservoir, and KCDG hereby appoints TID its Attorney in Fact to consummate said transfer back to Upper Tumalo Reservoir.

To effectuate this transfer, TID shall use a District temporary transfer under ORS 540.570. This temporary transfer will be good for a period of one year. If an additional year is necessary for KCDG to prove up and accomplish all items required for the transfer of the stored water to the Ponds, such additional one year temporary transfer as needed will be filed. In order to qualify for a permanent transfer, KCDG shall be required to:

A. Fill the ponds with 108 acre feet of water, and in the event the ponds will not hold at least said amount, the permanent transfers shall be reduced to the amount of acre feet of water actually held by the Ponds.

B. KCDG will transfer the surface irrigation water rights currently appurtenant to the Subject Property area of the Ponds, and will transfer the rights to another irrigable area. The irrigation rights, when transferred, shall be proven up and are a further condition that must be completed before TID is required to apply for a permanent transfer of the stored water.

8. TID will renew the temporary transfers on a yearly basis as long as KCDG is proceeding in good faith to complete the preceding items A. and B. Once items A. and B. are completed, then TID agrees to consent to the permanent transfer. If water is available and KCDG fails to store the acre feet of water authorized for storage pursuant to the new storage water right certificate given by OWRD for a period of 5 irrigation seasons, fails to beneficially apply water to land with water rights to be serviced by said Ponds for a period of 5 years, fails to maintain the Ponds in a proper, safe condition, complying with applicable all Federal, State and Local Laws, Rules and Ordinances, or to comply with the By-Laws, Rules, Regulations or other requirements of Tumalo Irrigation District then TID may proceed under ORS chapter 540 to have the water storage rights moved to another location.

9. This Agreement is binding upon the parties, their heirs, successors, and devisees.

10. The parties understand that the law firm of Carl W. Hopp, Jr., Attorney at Law, LLC, has served as legal counsel to Tumalo Irrigation District in the negotiation of the terms of this Agreement, and does not represent KCDG in connection with this Agreement. KCDG acknowledges that they have consulted with their own legal counsel or have knowingly waived the right to do so.

11. The rule of construction that a written instrument is construed against the party preparing or drafting such written instrument shall specifically not be applicable to the interpretation of this Agreement, and any documents executed and delivered pursuant to, or in connection with this Agreement.

12. If any arbitration, mediation, or other proceeding is brought in lieu of litigation, or if suit or action is instituted to enforce or interpret any of the terms of this Contract, or if suit or action is instituted in a Bankruptcy Court for a United States District Court to enforce or interpret any of the terms of this Contract, to seek relief from an automatic stay, to obtain adequate protection, or to otherwise assert the interest of Seller in a bankruptcy proceeding, the party not prevailing shall pay the prevailing party's costs and disbursements, the fees and expenses or expert witnesses in determining reasonable attorney fees pursuant to ORCP 68, the actual cost of a litigation or foreclosure report, and such sums as the court may determine to be reasonable for the prevailing party's attorney fees connected with the trial and any appeal and by petition for review thereof.

Dated this 13th day of ~~April~~^{May}, 2014

TUMALO IRRIGATION DISTRICT

KC Development Group, LLC

By _____

By  _____

Ken Reick, Manager

Eric Cadwell, Managing Member

ATTACHMENT "A"

Subject Property located on the following lots

17-11-13-NE/NW-00819

17-11-13-NW/NE-00819

17-11-13-NW/NE-00820

17-11-13-NW/NE-00821

17-11-13-NW/NW-00822

17-11-13-NE/NW-00822

17-11-13-NE/NW-00823

17-11-13-NW/NE-00823

17-11-13-NW/SW-00823

17-11-13-SE/NW-00823

17-11-13-SW/NW-00823

17-11-13-NW/SW-00824

17-11-13-SE/NW-00824

17-11-13-SW/NW-00824

17-11-13-SW/NW-00828

17-11-13-NE/NW-00829

17-11-13-NW/NW-00829

ATTACHMENT B

The Ponds located on the following tax lots

All are 17-11-13

Pond #1

NE/NW 00828

NW/NE 00828

Pond #2

NW/SW 00824 & 00828

SE/NW 00824 & 00828

SW/NW 00824 & 00828



June 6, 2014

Doug Woodcock
Director of Field Operations Division
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271

Dwight French
Water Rights Administrator
Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301-1271

Re: KC Development Group use of Tumalo Irrigation District Water

Dear Mr. Woodcock and Mr. French,

It has come to our attention that KC Development Group (KCDG) is seeking water from Tumalo Irrigation District (TID) to store water in two new reservoirs. As we understand it, KCGD is planning on entering a contract with TID to seek a temporary transfer of TID's Upper Tumalo reservoir right (cert. 76684) for the larger reservoir (104 AF) and are relying on the "Bulge in System" concept for the smaller reservoir. The smaller reservoir will serve as an aesthetic feature for some luxury homes, the larger is to serve as a water skiing reservoir.

It has also come to our attention that the project is well underway, and that the smaller of the reservoirs has already received water from TID. We understand that TID is preparing to submit a temporary irrigation district transfer application for the larger reservoir to the WRD in the very near future.

WaterWatch has a number of concerns regarding the legality of the proposed ponds/reservoirs. These concerns include but are not limited to:

- Bulges in the system are not allowed by law: There is no statutory authority for the concept of "bulges in the system". Under Oregon law all new ponds and reservoirs must have a permit. Oregon law allows for one very limited exception, but this only applies to reservoirs that store less than 9.2 af or have a dam height of less than 10 feet that were built before 1995 and registered with the WRD before 1997. ORS 537.405. If pond owners did not register by 1997, their ponds are illegal. Regardless, all reservoirs/ponds built after 1995 require a reservoir permit.

- Even if “bulges” were legal, the KCDG “bulge” doesn’t meet the WRD enforcement guidelines: Despite the fact that there is no statutory authority for the concept of “bulges” in the system, the OWRD has “contemplated” these in their enforcement manual as uses that “may” not need a permit. According to the state, these bulges must be (1) temporary, (2) store natural flow (under a surface water water right) that might not be there at a later date, (3) hold water as part of an irrigation or other water delivery system, (4) for periods of not to exceed 10 days for agricultural purposes or more than 72 hours for non-agricultural purposes, and (5) must be completely drained at the end of the season. WaterWatch does not believe “bulges” in the system are legal as there is no statutory authority for this concept, however, regardless, the use of water as contemplated by KCDG clearly does not fall within the sideboards considered by OWRD. This is permanent pond to serve year-round aesthetic purposes; it is not temporary by any stretch of the imagination. The water is coming from Tumalo Reservoir, not a live flow right held by KCDG. It is unlikely, given the use, that the water will be held for less than 72 hours and/or 10 days depending on the ultimate use of the water (if any). And, finally, it is unlikely that KCDG plans to drain the reservoir outside the irrigation season. KCDG’s reservoir needs a reservoir permit.
- KC Development does not have a reservoir right for either reservoir: Regardless of the source of water that will fill the new ponds, the construction of a reservoir or pond of any size needs a reservoir permit issued by the OWRD. Depending on the size of the impoundment, KC Development needs to procure permits under the regular permitting statutes (ORS 537.400) or the alternative reservoir statutes (ORS 537.405). The OWRD’s Water Right Information System shows no record of a storage application submitted by either KCDG or TID for these new ponds/reservoirs. We believe KCDG must go through the regular water right process, not a transfer process.
- Measurement and Reporting: By statute, irrigation districts must measure and report their water use under each water right on an annual basis. ORS 573.098, OAR 690-085-0010. We could find no reports in the WRD’s system for TID’s Upper Tumalo Reservoir Storage Certificate 76684. To ensure that any action taken by TID with regard to supplying water to KC Development does not cause injury and/or enlargement, the WRD should ensure that TID is reporting as required by statute. Oregon operates under the “one fill” doctrine, meaning TID cannot store more than a total of 1100 AF per year in Upper Tumalo Reservoir, regardless of leakage issues, transfers, secondary storage rights in excess of storage capacity, etc.
- Injury Issues: The OWRD cannot approve a transfer application that will cause injury to another existing water right. By rule, injury to an existing water right means a proposed transfer would result in another, existing water right not receiving previously available water to which it is legally entitled. OAR 690-380-0100(3). It is unclear at this time what measures the TID would undertake to ensure that there is no enlargement of the original right. At the very least, if the WRD were to allow a transfer, strict measurement and reporting should be required of the both TID’s Upper Tumalo Reservoir and KCDG’s reservoirs.

- Competing water rights: Upper Tumalo Reservoir is filled by a storage right that is limited to 1100 AF. TID already has two secondary water rights to this stored water whose total is in excess of this amount.¹ Moreover, the right that allows for broad use of this stored water is limited to “supplement all uses and lands served by Tumalo Irrigation District”. We read this as being a “supplemental right”.² Supplemental rights can only be used to make up a deficiency of supply of a primary right. Thus, water under this secondary right can only serve as supplemental to a pond/reservoir that has a primary reservoir right and the source of that pond is insufficient to meet its needs. As noted, KCDG does not have a reservoir right for either pond. It is unclear at this time how KCDG’s request will interact with these other water rights.

WaterWatch anticipates reviewing the transfer application once it is noticed in the public notice. However, we wanted to submit our concerns to you in advance as the issues raised by the proposal are broader than those that will be addressed in any transfer and/or permit decision. We believe that the WRD should require KCDG to apply for two reservoir permits for their project. Moreover, KCDG should not be able to store water until they have valid permits in place. The WRD should also require that TID submit annual measurements reports to the WRD on all of their water rights, including Upper Tumalo Reservoir, regardless of the outcome of the KCDG issue.

Sincerely,



Kimberley Priestley
Sr. Policy Analyst

cc: Jeremy Giffin, District 11 Watermaster

¹ It is unclear how this was achieved as WRD cannot issue secondary rights for stored water that exceed the amount allowed to be stored under the original reservoir right. See Certificates 88894 (1100 af of supplement use, originally irrigation expanded to multiple uses) and 76106 (mix of live flow and storage for irrigation)

² The original permit for this water was for irrigation. It is unclear how the WRD was able to approve a transfer from irrigation to the multiple uses of irrigation, pond, industrial, domestic, supplemental irrigation etc. without running afoul of injury/enlargement prohibitions.

A Blueprint for Building a Private Ski Site

Source: <http://www.waterskimag.com/features/2002/04/01/a-blueprint-for-building-a-private-ski-site/>

Hickman
2002-04-01

A Tale of Two Ski Lakes

PART 1:

Imagine this scene: You're on a perfectly glassy lake, ready to take what is sure to be your personal best slalom ride. You stretch, hop on the swim step, push your feet into your bindings, slither into the unbelievably smooth water, and give the signal that everything is all clear. Wait. Here comes Joe I/O cruising exactly perpendicular to the slalom course between you and the end gates. He waves as she goes by because he knows he has been an outstanding boater by refraining from actually going through the course. Nice rollers. Sound familiar? Public lakes, private lakes. What's the difference? If there is more than one boat operating at a time on any lake, there is the potential for bitterness. Why not direct that anger and negative energy into something more positive? Like building a private ski lake!

If you're ready to take the plunge into this twisted form of land development, you need to know this is not something you will be able to do in a month or even a year. It will take money, time, dedication and, above all, an understanding boss. It will cost more than twice as much money and take more than twice the time you can possibly estimate. You will make enemies. People will think you're going to ruin their lives and kill their children. Your phone bills will skyrocket and your money will evaporate. Your friends will give you advice or convince you to give up, and the government will tell you what to do. You will get very muddy.

I am an electrical engineer and my partner, Randy Hocking, is a CPA. So why should you listen to us? In our quest for the ultimate ski site, we acquired some wisdom we would like to share. We spent countless hours researching and

preparing plans, permits, and contracts, and made presentations to town councils and county commissioners. We learned to use computers in ways Hewlett and Packard never intended and put up barbed wire fences wearing suits and ties. Does one go to school to learn how to seek out and create perfect water ski lakes? Not usually. By telling you some of the highlights of our project, from finding the site and getting the permits to its design and construction, you will surely see how these different aspects could apply to your own site-should you be obsessed and/or possessed enough to build one.

Our project, called "Laku Landing" (pronounced Lock-oo) is finished with the permitting and design phase, and is now under construction. The property is located 40 minutes north of Denver in Windsor, Colorado, and will consist of two tournaments ski lakes, six home sites, and a Christmas tree farm. Laku, we think, is from the Latin word lacu, meaning lake. To this day we are not completely sure how we came up with "Laku Landing" in one of your late-night planning sessions, but we are sure there were many late-night planning sessions.

Finding A Perfect Site And Striking A Deal

What is perfect? In building your ski lake, the obvious first step is finding the site. There are many factors that will indicate if you have found it or if you should keep looking. How much can you spend? What will the water source be? Are the size and shape adequate for the lakes and other development? Where is it located? How will you dig it? All these things are interrelated. The farther you are from an urban center, the less expensive the land may be, but remember that a piece of land 20 minutes from downtown Los Angeles might cost \$1 million an acre, while property 20 minutes from Denver may cost \$1,000 an acre.

One of the first things we did when studying a potential site was to buy aerial photos from the county courthouse. These photos were then digitized into a computer and different lake designs were super imposed on them. From this we could tell the size and shape of the lake(s) we could build. If you don't have a

computer with adequate software, lakes can be cut out to scale on paper and placed on the aerial photos.

Dollars vs. Partners

How much land can you afford? What is the down payment? How will it be financed? How many partners do you want? The more partners you have, the more property you will probably be able to afford. In addition, the amount of work ahead is staggering, so you will probably want some help. On the other hand, imagine getting anything done with eight partners who all think they're in charge-but don't really do any work.

Remember, you probably want to ski together once the site is finished. Just Add Water; Depending on the location, your water can come from the ground water table through seepage or a well, an irrigation ditch, a river, rain water drainage, or any other legal water source available. It is not likely you will use a garden hose hooked to city water because you will be needing millions of gallons, not only to fill the lake, but also to replace any loss caused by evaporation.

Our Property is adjacent to the Cache la Poudre River, right next to the Rocky Mountains of Northern Colorado. This means we can expect a good year-round water flow and hence a high water table; although in Colorado, there is a law that states we must pay for the evaporation caused by exposing ground water to the atmosphere. You need to be aware of similar laws in your area.

How Big Should It Be?

Laku Landing is 133 acres, but not all of that is needed for the ski lakes. In determining the required property size keep in mind you will need about 15 water-surface acres for a comfortable three-event lake that's 2,200 by 300 feet. Because nobody wants the shores of their lake to be coincident with their property line, you should have a minimum of 75 feet of solid ground surrounding

the lake. This will allow for spectators, RV parking, and camping. Therefore, you can figure the minimum size chunk of ground you will need is no less than about 23 acres.

Be aware that 23 acres is useless if it is not the right shape. Limit your search to property that's nearly a half-mile long, so it can accommodate a lake at least 2,150 feet in length. It's possible to have a shorter lake, but then the set-ups will be tight, but then the set-ups will be tight, rollers will not dissipate before the next pass, and you'll be sorry.

Let's Make a Deal

Up until this point, you have been trying to make a decision as to whether or not a certain site is right for your project. If everything appears to be suitable, it's time you may want to consider hiring an attorney.

The cost of legal advice sometimes clouds a person's decision to retain it. Usually, a good lawyer can recognize a potential problem in your deal and easily save you the amount of his or her fees should the problem go unnoticed.

Our recommendation is to get an attorney involved early in the project so he or she can be familiar with the deal, but do all the leg work yourself and let the lawyer look over the final product before anything is signed. That way, when you have a question, the attorney will not need to spend a great deal of time becoming familiar with your entire project and will be able to study only the question at hand. If the attorney does everything from drafting the contract to presenting the seller with the offer, you will rack up substantial legal fees. In contrast, if you get a few hours of legal advice at different times during contract negotiations, the cost will be tolerable and potential problems may be avoided.

Real estate offers are usually initiated by the buyer and use a standardized, fill-in-the-blank contract you can buy from most stationery stores. The terms of the offer will spell out the price, financing, down payment, earnest money, closing date, and other details pertaining to what you will actually be purchasing.

Although the terms are important, it is crucial you build enough contingencies into the contract. This will enable you to get out the deal if something goes wrong, even if you happen to find a better piece of land. The contingencies you'll need will depend mostly on the land you're purchasing, but some example contingencies that should render your contract null and void are:

- Procurement of the necessary permits needed to implement your project
- Indication of sufficient water to maintain a certain lake depth
- Satisfactory completion of a soil/geological survey
- Usable access to the property

The first contingency listed above will work for most anything if you simply don't apply for the permits by the closing date. A competent real estate attorney will help you with any other contingencies you will need, so make sure you retain one.

Getting the Permits and Dealing with Your Enemies

We have heard stories of two sites not getting the required permits where the owners just went ahead with their project. Once discovered, the lakes had to be drained and all activities shut down while the owners went through the correct process. If they hadn't been able to get their permits, they would have been stuck with the land anyway. Never buy any land unless you already have the permits to implement your project. If you have the land under contract with a contingency for getting all necessary permits, you are covered.

What Permits Will You Need?

Do your research by going to the planning department of the county or city that has jurisdiction over the property in question. Be prepared to jump through hoops, but most of all get to be friends with the planner, because he or she can make your life miserable or wonderful.

The permits needed will vary from region to region, but the overall theme of most permits is to make sure you (a) don't ruin your neighbors' lives; (b) have thought out and documented every aspect of your project; and (c) let the public have a chance to complain. Here are the permits we needed to obtain:

- Special Use Permit. This is needed because our use goes beyond the uses allowed by right (i.e., ski tournaments).
- Construction Dewatering Permit. This allows us to pump water out of the lake area so we can drive excavation machinery in and drive it out again.
- Evaporative Augmentation Plan. In Colorado, the Water Court (a court that makes rulings on water rights) determines how much evaporation we are causing by exposing underground water to the atmosphere. We must pay for this.
- Dust Control Permit. The health department uses this permit to ensure reasonable dust levels are maintained during construction.
- Mined Lake Reclamation Permit. A sufficient bond must be posted to guarantee that if we don't complete the project, the land will be returned to its initial condition.
- Building Permits. Every structure to be built onsite, including our entrance sign, needs a building permit.
- Flood Hazard Permit. We had a study performed showing we would not adversely affect the flood plain.
- A waiver stating we would not sue the Department of Wildlife for any damage caused by reindeer to our Christmas tree farm. We think this was a joke.

Application For Permits

Of all the described permits, the Special Use Permit was the most important. It was the cornerstone of the whole permitting process from which all other permits were based. It required a detailed textual and graphic description of the project, two planning commission public hearings, and a final public hearing before the county commissioners.

All of the other permits used data generated from the special Use Permit. The key to success for any "use permit" such as this is to prepare and present your plan with lots of graphics and easy- to-understand concepts. For example, a key theme to ours was the lack of suitable ski sites in the area for national-level competitive training. Another point we tried to stress is the contrast between competitive skiing and recreational boating and how these two legitimate activities cannot exist on common bodies of water.

There are two extremes when preparing permits: Do everything yourself or pay somebody to do it for you. The textual description of your project is something you should do yourself, while the graphic descriptions can be done by an engineering consulting or graphics arts firm, but the cost can be high. We did it ourselves, but we had access to good computers and powerful software. Hand-drawn sketches will not do the job unless they are done carefully and to scale. The more professional your presentation looks, the better chance you have of convincing people you know what you're doing.

After submitting your complete proposal, our planner distributed the proposal to all the governmental agencies she thought appropriate: the Army Corps of Engineers, EPA, Department of Wildlife, Soil Conservation Service, Fire Protection District, Health Department, and many more. Every agency that could possibly object to any part of the project, "Gravel Mine," and the dates of our public hearings were sent to the adjacent property owners.

They're Building a Toxic Waste Dump

We might as well have. Word spread like wildfire of developers who were going to rape the land, flood the countryside, and quadruple the mosquito population. A few negative letters to the editor in Windsor newspaper defined what the enemy hated about our project. The issues expressed included noise, gravel truck traffic, and the "what is this going to do for me" syndrome. As it turned out,

there were five people who were strongly opposed to ur project. Once they distributed leaflets, almost 100 people showed up at our first public hearing with the word "lynch" written on their faces.

This hearing lasted for two hours with concerns and complaints getting repeated again and again. Our patience wore thin, and it was difficult to answer people's accusations with a smile and a "yes, sir no, ma'am." But we kept our composure.

When the barrage of grunts and moans finally subsided, it was the planning commissioners' turn to state their concerns. We were prepared for the worst, but we never could have anticipated what followed. Instead of the commissioners accusing us of pillage, they attacked the audience: How can you treat these gentlemen this way after all the time and professionalism they put into this presentation? If any other developers were treated the way you have treated these men tonight, there wouldn't be any development anywhere. How can you ask what this project will do for you? When you build a barbecue pit in your backyard, do you invite me? We were loving it. This was the beginning of the end for our rivals. And it was all because we were prepared and never argued with the enemy. It was important to make them appear they had lost control of themselves, while we had a level headed answer for everything, even if it was "I don't know."

By a complete coincidence, another item on that evening's agenda was the announcement of the construction of a multimillion-dollar sewage treatment facility on the Jacoby Farm. The Jacoby Farm was a previous candidate for Laku Landing before that deal fell through. Perhaps it made people wonder if the qualities desirable for a ski lake might also be desirable for a sewage treatment plant. This could have been an interesting defense to any opposition, although we didn't use it.

At the next two hearings, fewer and fewer people presented opposing arguments. We had heard their negative remarks repeated so many times, we were too well prepared for them to do any damage. If you let the opposition know about your project early, you can find out what they're upset about and project early, you can find out what they're upset about and proceed to appease them, or classify them as non-threatening.

A perfect example of this was the amount of noise (in our hearings we always used the word "sound") the enemy expected from a tournament ski site. I researched the laws on the topic of legal sound levels and performed and published an extensive analysis of the sound levels generated by lake construction and tournament towboats. This made the opposition sound stupid when they made their complaints because we had proven we would easily be within legal noise limits.

At the final hearing, we received unanimous approval of our project. The time and effort we put into our documentation and presentation made the difference between approval and denial. Remember, it pays to do your homework.

A Tale of Two Ski Lakes

PART 2:

Specialty Ski Lake Design, Dimensions, And Construction

When we left off with the first part of this article last issue, we had received all the permits necessary for the construction and use of two world-class tournament lakes situated just outside of Denver, Colorado, a project we named Laku Landing. We were on top of the world, but if there was ever an analogy in were skiing comparable to the mountain climber's "false summit," we were there. The only thing standing between us and the ultimate ski site was about 500,000 cubic yards of dirt, clay, sand, and gravel. We were at the costliest, most difficult, and by far the most crucial stage in our project. A poorly designed lake is pretty tough to change once it's finished-if it ever gets finished.

If you pay someone to do it for you, a tournament-quality ski lake can be dug in about 30 to 45 days. Granted, you could be skiing in less than two months, but the price of a private contractor can be astronomical.

Cost is also the reason many man-made ski sites are so shallow, running anywhere from ankle-to waist-deep. For example, in the deserts of California, most of the lakes are about four feet deep in the middle, with the bottoms tapering up gently all the way toward the shore. This saves on excavation costs, and you'll use less electricity pumping water into the lakes than you would if they were deeper.

A reasonable charge to move one cubic yard of material is about \$1, although this figure varies depending on many factors especially the distance it must be moved and the current price of fuel. For a comfortably sized lake that is 15 acres wide (43,560 square feet to an acre) and four feet deep (minimum), you have 2,613,600 cubic feet (or 96,800 cubic yards) of material to dig. Therefore, the cost would be about \$96,800 to have that 15-acre lake dug for you. Ouch.

In the case of Lake Landing, we rely on the groundwater table for our water supply, and it fluctuates between zero and five feet below ground level. Clearly, a lake four feet deep was unacceptable in our situation, so we decided to dig a minimum of 10 feet down. Suddenly the cost is up to almost \$250,000 per lake—a whopping half a million dollars for the two lakes. There are people out there who can afford this, but why spend it if there are alternatives?

For example, you can dig the lake yourself. You can rent heavy equipment to get the job done, and if you plan to have a ski club at your new site, the members can be a good source of labor. The equipment you need depends on the type of soil to be removed, but a loader, excavator, and dump truck can work together as a good team. The excavator breaks up the ground and the loader puts it in the

dump truck to be carried away. Digging a 96,800-cubic-yard lake with a five-cubic-yard loader takes 19,360 scoops. Obviously, digging a lake in 30 days would require many teams. If the ground is relatively dry, earthmovers or scrapers are more efficient, but they get stuck easily.

If you decide to do it yourself-beware. Consider what happened the last time you thought you could do something cheaper than the experts. If it actually turned out to be cheaper, it probably looked it, too.

Another option is to find contractor who wants the material enough to dig the lake for free or maybe even pay you. The key is to find the correct market. Our property is rich with gravel, and there are many companies that use considerable amounts of gravel for contracted jobs. Unfortunately, the distance from the site to the job where the material is needed will significantly affect the demand for your free material. This is because the cost of trucking is usually greater than the cost of the material itself.

Specialty Lake Design

The design of a tournament ski lake is dictated by the type of skiing for which it will be used. If it is used for all events, compromises must be made because the needs of some events conflict with the needs of others.

So what constitutes the perfect four-event lake (slalom, tricks, jumping, and barefooting)? The dimensions chart shows minimum, nominal, and luxury dimensions needed for each event. A minimum dimension means minimum acceptable safety and convenience levels can be met. Nominal is a more comfortable dimension that requires fewer special driving techniques to provide good water to the skier. A luxury dimension is not completely necessary, but if you can get away with it, you will be happy every pass down the lake. Our table

merely sets guidelines-some skiers might have different reasons for using different dimensions. Any comments with regard to lake dimensions are welcomed so information can be passed on to other readers.

The Slalom Lake

Barefoot Lake in Fort Collins, Colorado, is what can be described as a minimum-length ski lake for an 850-foot, six-buoy slalom course. It has 1,600 usable feet, which leaves only 375 feet at either end for the turnaround and setup. This situation usually forces the skier to drop at each end and wait about 15seconds for the rollers to clear from the previous pass. A 2,150-foot lake will have 650-foot setups at either end. This is a good amount, although the driver must swing little to the right as the skier leaves the course so there are no rollers on the setup for the next pass.

These problems vanish when the lake 2,400 feet long. If it is any longer, a big disadvantage is the amount of gas and time that is wasted traveling the extra distance each time the boat makes another pass.

When considering the width needed for a slalom lake, there are a couple of conflicting elements: wind protection and safety. The prime motivation for building narrow ski lakes is to prevent waves from forming in strong winds. The shorter the reach, or the surface the wind is blowing across, the better. A 175-foot-wide lake will have 50 feet of water between the buoy and the shoreline. Anything less than this and the skier runs the risk of tumbling onto shore after going out the front. At a 225-footwidth, there are 75 feet of margin, which is more than adequate. Any wider than this, and the reach is greater for waves to form from the wind.

The Jump Lake

Of all the dimensions needed for a jump lake, perhaps the most critical is to have about 125 feet of water between the jump and the adjacent shoreline. Assuming the boat travels a maximum of 75 feet from the far edge of the jump, and the skier travels a maximum of 75 feet away from the boat before the final cut to jump, the minimum width of the lake at the jump is nearly 275 feet. A typical jump lake will be about 300 feet wide at the jump to allow for some spaced between the skier and the shoreline during the pre-jump cuts. Because of the desire to have the narrowest lake possible for wind concerns and lower excavation costs, it's common for lakes to flair out near the location of the jump.

There are a few options when figuring the length of a jump lake. The jump course itself is about 920 feet long, and after taking into account the distance used for the setup before and the ride-out after the course, 2,000 feet is the absolute minimum needed. Those who jump shorter distances will be able to get away with a shorter lake, but for a world-record pop, the jumper will use every inch available.

The basic problem with a short jump lake is that the jump will be located between the four and five ball of the slalom course, so the lake will need to be wider there. This can cause rough-water problems for the slalomers. If the lake is longer than 2,150 feet, the jump can be adjacent to or even beyond the entrance gates, leaving the slalom-course portion of the lake as narrow as possible.

Figure 1 shows three such configurations graphically. In all of these scenarios, the slalom and jump courses overlap, so three to five buoys may need to be removed from the slalom course when jumping. Depending on the buoy anchor system, it can be relatively simple to either submerge or remove the conflicting buoys.

The Trick Lake

A trick lake has the fewest constraints, since the boat speeds are so much slower than in the other events. For example, if a skier is tricking at a speed of 18 mph,

the distance traversed during a 20-second pass is 528 feet. Even though room is needed at each end for the turnaround and warm-up before the start of the trick course, a 1,200-foot-long lake is quite adequate for any level tricker. Most of the time when working on a new trick, many attempts will be made before you get it. (How many times does it take to learn a hand-to-hand wake O without sliding it?) This scenario illustrates when it's nice to have a longer lake.

The width basically doesn't matter as long as it is greater than 100 feet. Most trickers use ropes shorter than 50 feet, and a tricker hardly ever pulls wider than 15 feet from the wake. At 100 feet wide, the daredevil stunt tricker who gets as wide of the boat as possible, explodes toward the wake, launches into the air, performs a tucked front flip, and lands on his head 20 feet beyond the wake will still have a little room to spare. These dimensions are also appropriate for kneeboarders.

The Barefoot Lake

My limited barefooting ability further accentuates the footer's need for glassy water. The smoother the water, the less the likelihood of catching a toe. Using the reasoning given earlier, this means the lake should be as narrow as possible. Also, if the lake is oriented so that the prevailing winds are blowing across the lake instead of down it, the water will be smoother.

The barefooters who ski at Barefoot Lake do their thing over only 1,600 feet of water. This seems a little ridiculous, but they are happy with the situation. Assuming a lake will be used for barefooting as well as slalom, 2,150 feet is a reasonable dimension to consider. A 2,600-foot lake, however, will help give the footer more time-especially as the boat speed approaches 40mph.

A Bird's Eye View

Figure 2 shows the designs of the lakes at Laku Landing, excluding the turn islands. Although the reasons behind the dimensions we chose are described above, be aware there are many right answers to the question, "What are the perfect lake dimensions?" and an infinite number of wrong answers. Our lakes appear to be wider than the dimensions given above because we have accounted for fluctuation in water level. The sloped shorelines will cause the lakes to narrow as the water level drops.

Depth, Shorelines, and Turn Islands

The deeper a lake is, the cleaner it will be, because the sun will not be able to penetrate to the bottom, and plant life will not grow as rapidly. This is why shallow lakes can have a disgusting seaweed and/or algae problem. There are some shallow lakes with very rocky bottoms that do not exhibit this condition because vegetation cannot grow through the rocks very easily.

If the shorelines of the lake are too steep, the boat wakes will reflect off of them, creating backwash. This is a terrible problem because the boat must stop every few passes and let the water settle out. If the shorelines are gradually sloped, the boat wakes will dissipate as they hit them, and no reflections will occur. If the slope is too gentle, the water will be very shallow extending away from the lake edge, and it may not be safe for skiing. Also, there will be a greater vegetation problem near the lake edge since sunlight can penetrate to the bottom.

Figure 3 illustrates our shoreline design. The slope of the bottom at the point where it intersects water surface is about 10:1. This means for every 10 feet you travel away from the lake edge, the water gets one foot deeper. After a certain distance we increase to a steeper slope of 3:1. Any sharp edge caused by a slope change will be smoothed out in time erosion.

The purpose of a turn island is to create a convergence point for the boat wake as the boat makes a turn at the end of a lake. Otherwise, a nice big roller can be sent

back down the course. Many tournament lakes get by just fine without turn islands, but there is less room for error in the driver's technique.

The big question in the design of turn islands is what you build them with. If you dig your lake and just leave the islands at each end, be aware of the potential for them to erode away. Some lakes have the channel between the islands and the lake edge dredged out every few yards, with the material piled right back on top of the islands. The islands can also be made of logs, railroad ties, old tires, or anything that is cheap and in abundance, provided it is a workable design. In any case, the islands must be a minimum of 40 feet in diameter and their shorelines must meet the requirements described above to eliminate backwash.

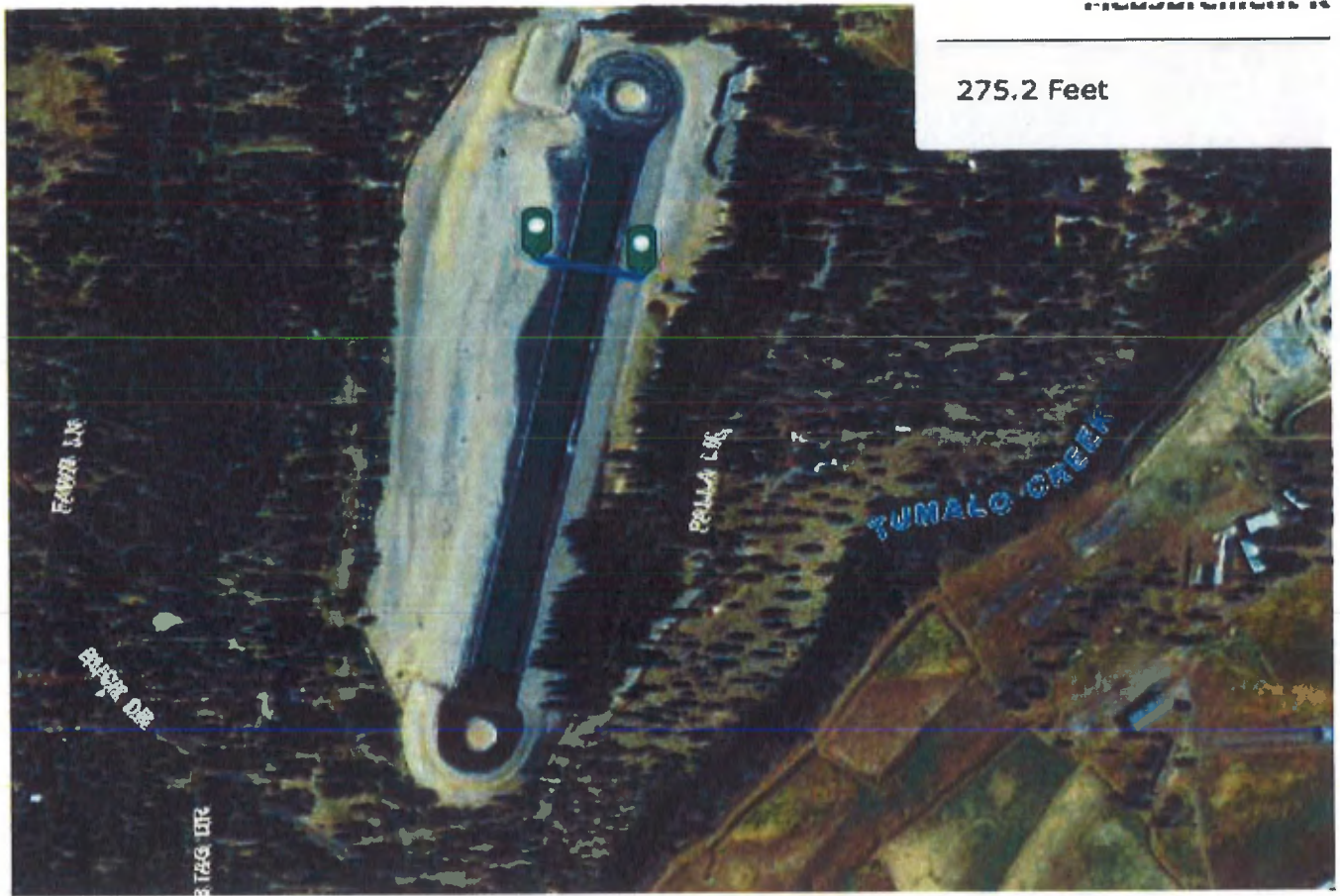
Now What?

If you are serious about building a ski lake, remember that all sites are different, and what may work perfectly well for one may not work for another. In these two articles, we have looked at finding the site, striking a deal with the appropriate terms, designing the lakes, and building them. The breadth and depth of a project like this could easily fill a book, and these articles only attempt to cover the basics.

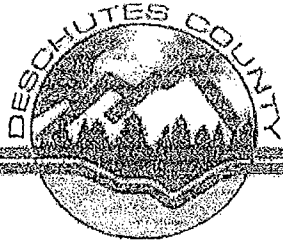
Perhaps the most important information to be learned here is that there are many man-made lakes in existence, and nobody should attempt a feat of these proportions without studying what other people have done. Maybe someday people in everyday life will use the phrase, "Let's try not to reinvent the ski lake."



2,000.7 Feet



275.2 Feet



Legal Counsel

1300 NW WALL STREET, SUITE 205 • BEND, OREGON 97701-1960
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July 25, 2014

Elizabeth A Dickson
Hurley Re PC
747 SW Mill View Way
Bend OR 97702

Please Refer To
File No. 4/1-054

Re: KC Development Group LLC

Dear Liz:

As I have emphasized before, to the extent KC Development Group LLC has expended, or intends to expend, resources to create reservoirs, install footings for a dock or boathouse, or otherwise perform work on the subject property that does not require County approval, it does so at its own risk and without any guarantee that future County permits or approvals – including, without limitation, land-use approval for construction of a cluster development or recreational lake, or building division approval for construction of a boat house or dock – will be granted.

The County has encouraged KC Development Group LLC and its principals to apply for necessary land use approvals first -- before devoting significant resources to improving the property -- so as to avoid the risk of commencing projects it will ultimately be unable to complete. Your client has chosen to disregard this advice.

Please inform your client (again) that Deschutes County will review any future land-use or building permit application on its own merits, and the County's decision on such application will be governed solely by consideration of appropriate criteria. Your client's decision to expend resources on improvements prior to obtaining necessary County approval for his intended development project will not be given undue weight or consideration in this process.

Sincerely,

John E. Laherty
Deschutes County Assistant Legal Counsel

JEL/cs

Quality Services Performed with Pride

Exhibit 2
Page 1 of 1



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08/27/2014 10:33:46 AM

D-AG Cnt=1 Stn=4 SRB
\$40.00 \$11.00 \$21.00 \$10.00 \$8.00

After Recording, Return to:
KC Development Group, LLC

63560 Johnson Rd
Bend OR 97701

No Changes to Tax Statements.

IRRIGATION CONTRACT

(WATER STORAGE EASEMENT AGREEMENT)

Tumalo Irrigation District, hereinafter referred to as "TID," is an Oregon Irrigation District established under ORS Chapter 545 Oregon Revised Statutes. KC Development Group, LLC, hereinafter referred to as "KCDG" is an Oregon limited liability company and the owner of real property described in "Exhibit A," attached hereto, and incorporated herein by this reference. Together, they are "Parties" to this Agreement.

RECITALS

WHEREAS, TID holds a valid water right pursuant to Oregon Water Resources Department Certificate Number 76684 ("Certificate") to store 1100 acre feet of surface water at what is commonly known as Upper Tumalo Reservoir in Deschutes County, Oregon; and

WHEREAS, KCDG desires to assist in storing 108 acre feet of water (the "Stored Water") currently stored at upper Tumalo Reservoir, on its property described herein in "Exhibit A" (Subject Property); and

WHEREAS TID is willing to allow KCDG to hold the Stored Water authorized to be stored under the Certificate in exchange for payment to TID;

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

AGREEMENT

1. The above recitals are incorporated herein.
2. TID will permit KCDG to store 108 acre feet of water in the ponds located on the Subject Property described in "Exhibit A," particularly in the ponds (the "Ponds") described in "Exhibit B," attached hereto and by this reference incorporated herein. (TID shall also deliver surface irrigation water to Subject Property, which water shall pass through the Ponds but shall not be stored on the Subject Property or in the Ponds, and such additional delivered water shall be used for irrigation in accordance with other irrigation rights held by KCDG, and not the subject of this Agreement.)

3. KCDG agrees to pay to TID certain consideration to hold the Stored Water on KCDG's Subject Property. Said consideration shall be made by payment of \$50.00 per acre foot of water right, per year, payable by check or other form of payment to TID on or before March 1st of each year, commencing on JUNE 10, 2014 for the first year, and to be paid by March 1st in each subsequent year for the following irrigation season. The initial charge of \$50.00 per acre foot shall be adjusted annually by the same percentage change made by TID in the total annual assessment and other account charges for each acre of land on TID's Certificate and entitled to irrigation pursuant to ORS 545.484, or by subsequent statute as that may be changed by Oregon's Legislature in the future. Payment is based on one acre feet of storage allowed under the storage right. Failure to make payment following 30 days written notice to KCDG is a default under this Agreement.

4. The obligations represented in this Agreement are contingent upon the Oregon Department of Water Resources ("OWRD") approval of the transfer of the desired portion of the storage rights under the Certificate to the Exhibit "B" ponds. The approval of and a new certificate issued by the OWRD) shall have the final proof submitted to OWRD by March 1, 2018. In the event OWRD does not approve the transfer of storage rights to the Ponds, this Agreement shall become null and void and of no further affect.

5. As further consideration for the transfer of the storage rights from Upper Tumalo Reservoir to the Ponds, KCDG shall pay all filing fees, engineering fees, reimburse TID for reasonable legal fees expended, staff time expended by TID personnel and any other costs or fees incurred by TID for the purpose of making the subject transfer or attempted transfer of storage rights from the certificate to the Ponds. Reimbursement to TID shall be made within 30 days of submission of the bill by TID to KCDG. Failure to make payment within 30 days of written notice is a default by KCDG under this Agreement. In the event OWRD does not approve said transfer, KCDG shall not be entitled to any refund of fees and costs paid to TID.

6. Upon execution of this Agreement and thereafter, and subject to approval of the transfer described in Paragraph 4, above, KCDG grants TID a perpetual Non-Exclusive Easement across the Subject Property and the Ponds for the purpose of examining the Ponds to assure itself of compliance by KCDG to this Agreement.

KCDG agrees to maintain the Ponds in acceptable condition to store the water allowed under the storage right. Maintenance of the Ponds, water conveyance lines, and any other construction necessary to accomplish the intent of this Agreement are to be borne by KCDG. Any repairs, adjustments or other construction deemed necessary by TID to comply with this agreement shall be performed by KCDG, or at KCDG's expense.

7. In the event KCDG fails to perform or is otherwise in default under this Agreement, upon 30 days written notice from TID or such longer period as it reasonably necessary to perform, TID shall be entitled to apply to OWRD to transfer the storage rights from the newly created certificate back to Upper Tumalo Reservoir, and KCDG hereby appoints TID its Attorney in Fact to consummate said transfer back to Upper Tumalo Reservoir.

To effectuate this transfer, TID shall use a District temporary transfer under ORS 540.570. This temporary transfer will be good for a period of one year. If an additional year is necessary for KCDG to prove up and accomplish all items required for the transfer of the stored water to the Ponds, such additional one year temporary transfer as needed will be filed. In order to qualify for a permanent transfer, KCDG shall be required to:

A. Fill the ponds with 108 acre feet of water, and in the event the ponds will not hold at least said amount, the permanent transfers shall be reduced to the amount of acre feet of water actually held by the Ponds.

B. KCDG will transfer the surface irrigation water rights currently appurtenant to the Subject Property area of the Ponds, and will transfer the rights to another irrigable area. The irrigation rights, when transferred, shall be proven up and are a further condition that must be completed before TID is required to apply for a permanent transfer of the stored water.

8. TID will renew the temporary transfers on a yearly basis as long as KCDG is proceeding in good faith to complete the preceding items A. and B. Once items A. and B. are completed, then TID agrees to consent to the permanent transfer. If water is available and KCDG fails to store the acre feet of water authorized for storage pursuant to the new storage water right certificate given by OWRD for a period of 5 irrigation seasons, fails to beneficially apply water to land with the water rights to be serviced by said Ponds for a period of 5 years, fails to maintain the Ponds in a proper, safe condition, complying with all applicable Federal, State and Local Laws, Rules and Ordinances, or to comply with the By-Laws, Rules, Regulations or other requirements of Tumalo Irrigation District then TID may proceed under ORS chapter 540 to have the water storage rights removed to another location.

9. This Agreement is binding upon the parties, their heirs, successors, and devisees.

10. The parties understand that the law firm of Carl W. Hopp, Jr., Attorney at Law, LLC, has served as legal counsel to Tumalo Irrigation District in the negotiation of the terms of this Agreement, and does not represent KCDG in connection with this Agreement.

11. The rule of construction that a written instrument is construed against the party preparing or drafting such written instrument shall specifically not be applicable to the interpretation of this Agreement, and any documents executed and delivered pursuant to, or in connection with this Agreement.

If any arbitration, mediation, or other proceeding is brought in lieu of litigation, or if suit or action is instituted to enforce or interpret any of the terms of this Contract, or if suit or action is instituted in a Bankruptcy Court for a United States District Court to enforce or interpret any of the terms of this Contract, to seek relief from an automatic stay, to obtain adequate protection, or to otherwise assert the interest of Seller in a bankruptcy proceeding, the party not prevailing shall pay the prevailing party's costs and

disbursements, the fees and expenses or expert witnesses in determining reasonable attorney fees pursuant to ORCP 68, the actual cost of a litigation or foreclosure report, and such sum as the court may determine to be reasonable for the prevailing party's attorney fees connect3ed with the trial and any appeal and by petition for review thereof.

12. KCDG shall indemnify, defend, and hold harmless TID and its directors, officers, employees, agents and contractors for, from and against any and all losses, claims, actions, damages, liabilities, penalties, fines or expense, of whatsoever nature, arising from, related to, or in any way connected to this Agreement, including, without limitation, reasonable attorneys' fees and costs on account of mechanics' lien claims, injury to persons, the death of any person, or damages to property arising from the use of the Subject Property, the Ponds, or adjoining areas, or from any activities contemplated by this Agreement, in each case undertaken by KCDG or any other person claiming by, through, or under KCDG. In the event litigation or proceedings brought against TID arising out of or in any way connected with any of the above events or claims, against which KCDG agrees to defend TID, KCDG will, on notice from TID, vigorously resist and defend such actions or proceedings in consultation with TID through legal counsel reasonably satisfactory to TID. The indemnity set forth in this paragraph shall be effective without regard to compliance or non-compliance with this Agreement by KCDG or TID.

13. TID reserves the right, in the event of drought or other emergencies, to pump out the Stored Water in the Ponds on KCDG's Subject Property for use by TID for as long as the drought or other emergency remains in effect.

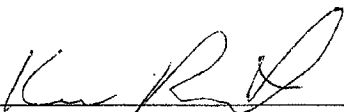
14. TID makes no representation that storage water will be available. Fees under this Agreement are due TID whether or not water is available. TID is not liable for any loss, damage, or claim which may be made for failure to supply storage water or the withdrawal of storage water.

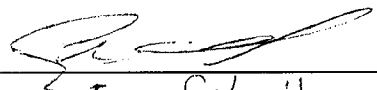
15. KCDG and its successors shall require the purchasers/lessees at the time of purchase or lease of residential lots in the development to sign and record a document acknowledging that the purchaser/lessee has read and accepted this Contract.

DATED this 10th day of June, 2014.

TUMALO IRRIGATION DISTRICT

KC DEVELOPMENT GROUP, LLC

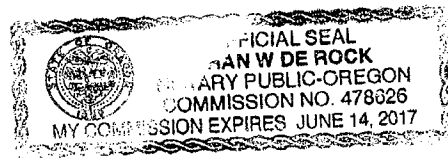
By 
Ken Reick, Manager

By 
Eric Caldwell
Its managing member

STATE OF OREGON)
) ss.
County of Deschutes)

This instrument was acknowledged before me on June 10, 2014 by Kenneth B. Rieck as
Manager and Secretary to the Board of Tumalo Irrigation District.

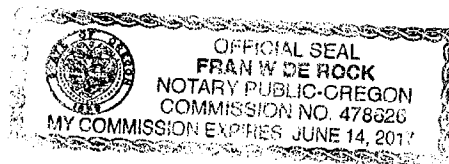
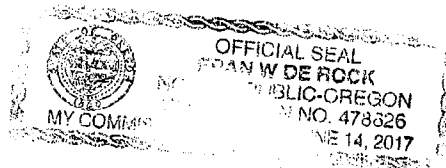
Fran W. DeRock
NOTARY PUBLIC FOR OREGON



STATE OF OREGON)
) ss.
County of Deschutes)

This instrument was acknowledged before me on June 10, 2014 by
ERIC CADWELL, of KC Development Group,
LLC.

Fran W. DeRock
NOTARY PUBLIC FOR OREGON



ATTACHMENT "A"

Subject Property located on the following lots

17-11-13-NE/NW-00819
17-11-13-NW/NE-00819
17-11-13-NW/NE-00820
17-11-13-NW/NE-00821
17-11-13-NW/NW-00822
17-11-13-NE/NW-00822
17-11-13-NE/NW-00823
17-11-13-NW/NE-00823
17-11-13-NW/SW-00823
17-11-13-SE/NW-00823
17-11-13-SW/NW-00823
17-11-13-NW/SW-00824
17-11-13-SE/NW-00824
17-11-13-SW/NW-00824
17-11-13-SW/NW-00828
17-11-13-NE/NW-00829
17-11-13-NW/NW-00829

The above tax lots are further described in the following books and pages:

Tax lots 171114 11401, 171114 11600, 171113 828, 171113 829, and 171113 823 are described in bk/pg 2014-00896, deed to KC Development Group Tax lot 171113 824 is described in bk/pg 2013-44753, deed to KC Development Group Tax lots 171113 825 and 171113 827 are described in bk/pg 2013-44609, deed to KC Development Group Tax lot 171113 826 is described in bk/pg 2013-44754, deed to KC Development Group Tax lot 171113 820 is described in bk/pg 2013-48433, deed to KC Development Group Tax lot 171113 819 is described in bk/pg 2013-48434, deed to Eric and Brianna Cadwell Tax lot 171113 822 is described in bk/pg 2013-48435, deed to Harris and Nancy Kimble

ATTACHMENT B

The Ponds located on the following tax lots

All are 17-11-13

Pond #1

NE/NW 00828

NW/NE 00828

Pond #2

NW/SW 00824 & 00828

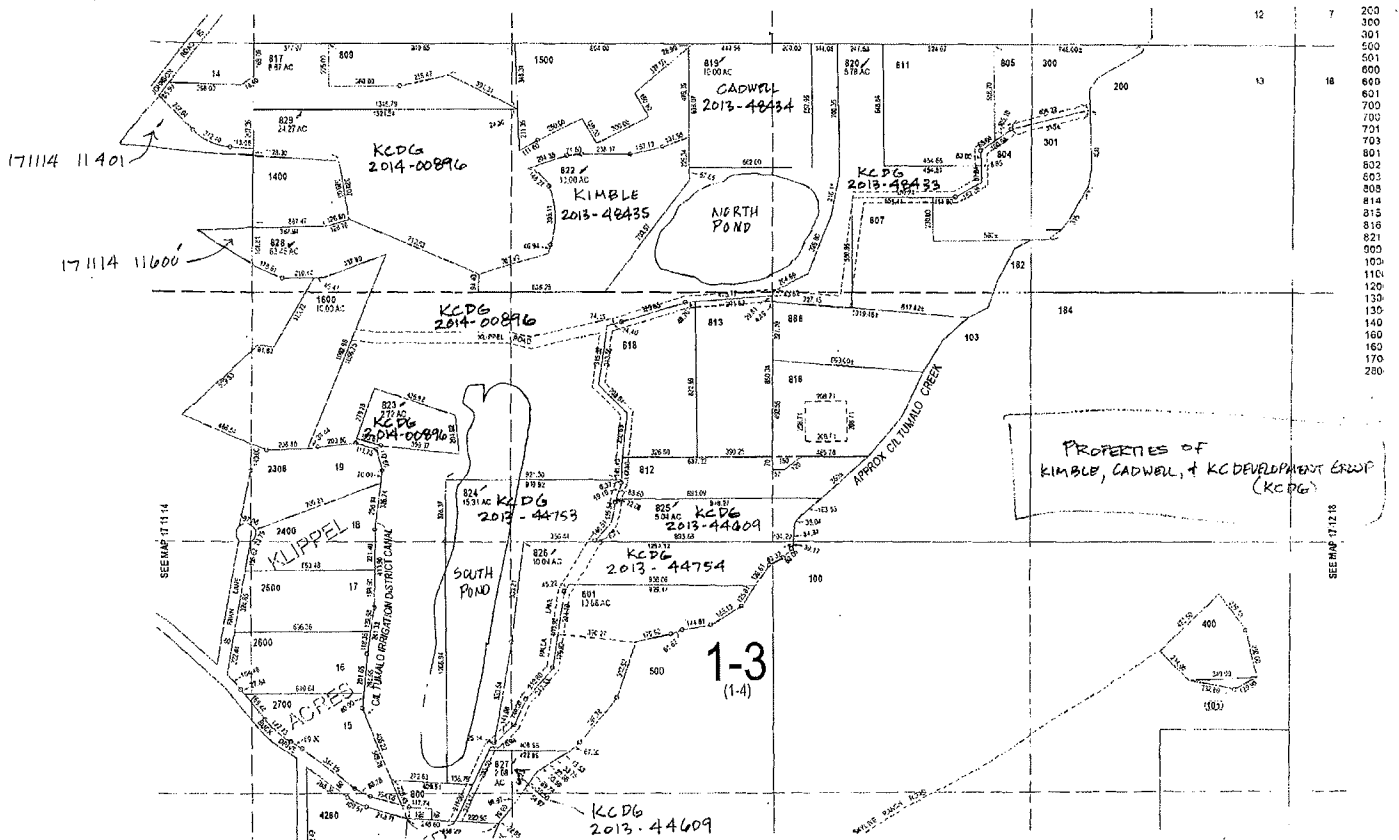
SE/NW 00824 & 00828

SW/NW 00824 & 00828

NE/SW 00824

The above tax lots are further described in the following books and pages:

The north pond is situated entirely on Tax lot 171113 828, which is described in 2014-00896 The south pond is situated on tax lot 171113 828, described in 2014-00896, and tax lot 171113 824, described in 2013-44753, both being KC Development Group.



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After Recording, Return to:
KC Development Group, LLC
63560 Johnson Rd.
Bend, OR 97701

IRRIGATION CONTRACT

(AMENDED WATER STORAGE EASEMENT AGREEMENT)

This document amends and replaces the Irrigation Contract executed June 10, 2014, and recorded August 27, 2014 as instrument number 2014-28241 in Deschutes County Official Records. The June 10, 2014 Irrigation Contract was executed to allow the filing of the Temporary Water Storage Transfer. The testing and mapping anticipated in that agreement has been performed and the exact amount of water storage to be transferred has been determined. This Amendment is for purposes of filing for a Permanent Water Storage Transfer.

Tumalo Irrigation District, hereinafter referred to as "TID," is an Oregon Irrigation District established under ORS Chapter 545 Oregon Revised Statutes. KC Development Group, LLC, hereinafter referred to as "KCDG" is an Oregon limited liability company and the owner of real property described in "Exhibit A," attached hereto, and incorporated herein by this reference. Together, they are the "Parties" to this Irrigation Contract, the "Agreement."

RECITALS

WHEREAS, TID holds a valid water right pursuant to Oregon Water Resources Department Certificate Number 76684 ("Certificate") to store 1100 acre feet of surface water at what is commonly known as Upper Tumalo Reservoir in Deschutes County, Oregon; and

WHEREAS, TID uses said stored water for reregulation purposes to adjust water deliveries to its patrons throughout its system; and

WHEREAS, TID's current use of the Upper Tumalo Reservoir precludes use for reregulation to a significant portion of TID's delivery system due to location; and

WHEREAS, TID's current use of the Upper Tumalo Reservoir is challenged by its porous surfaces which require additional supplement to accommodate seepage; and

WHEREAS, TID's reliance on Tumalo Creek as a reregulation source hampers its ability to accommodate fish habitat needs; and

WHEREAS, KCDG desires to assist with TID's operational challenges noted above by providing a new storage location for part of the stored water that is better placed at the head of its system and with a lined surface to significantly reduce seepage, providing TID the ability to store and reregulate approximately 125 acre feet of water (the "Stored Water") currently stored at Upper Tumalo Reservoir, by transferring said storage to KCDG property described herein in "Exhibit A" ("Subject Property"); and

RECEIVED

OCT 17 2014

GARVE SCHUBERT
CLERK

WHEREAS, TID desires to transfer the Stored Water to the Subject Property owned by KCDG in exchange for KCDG payment to TID, KCDG grant of easement to TID, and retaining TID's access to Stored Water for operations and maintenance, including reregulation, of TID's irrigation system;

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

AGREEMENT

1. The above provisions are incorporated as if stated herein.
2. KCDG grants to TID an easement for TID to deliver to, store, and redistribute into TID's canal approximately 125 acre feet of its certificated water rights in the reservoir ponds ("Reservoir Ponds") located on the Subject Property described in "Exhibit A."
3. TID shall also deliver surface irrigation water ("Irrigation Water") to the Subject Property and surrounding areas, which shall pass through the Reservoir Ponds, but not be included as part of the 125 acre feet of Stored Water under Certificate Number 76684, or a subsequent certificate number as it may be assigned by OWRD. The Irrigation Water shall be used for irrigation in accordance with irrigation rights appurtenant to properties owned by KCDG, and is not the subject of this Agreement.
4. KCDG agrees to pay to TID certain consideration to locate the Stored Water on KCDG's Subject Property, subject to the Easement referenced herein. Said consideration shall be made by payment of \$50.00 per acre foot of water stored per year, payable by check or other form of payment to TID on or before March 1st of each year, commencing on MARCH 1st 2014, for the first year, and to be paid by March 1st in each subsequent year for the following irrigation season. The initial charge of \$50.00 per acre foot shall be adjusted annually by the same percentage change made by TID in the total annual assessment and other account charges for each acre of land on TID's Certificate and entitled to irrigation pursuant to ORS 545.484, or by subsequent statute as that may be changed by Oregon's Legislature in the future. Payment is based on a per acre-foot basis of stored water on the Subject Property, pursuant to TID's Certificate. Any new certificate that may be issued to TID for stored water by the Oregon Water Resources Department ("OWRD") shall use the same payment metrics. Failure to make payment following 30 days written notice to KCDG is default under this Agreement.
5. This Agreement does not purport to transfer, convey, or sell any additional water storage rights to KCDG. The Stored Water shall remain the property of TID and be held, distributed, and used in accordance with TID's current Certificate. If TID chooses, it may apply for changes to certificated storage rights, such as a permanent transfer of the storage location and submit same to OWRD for a new certificate for the Stored Water. The new certificate shall be the property of TID, and shall be subject to this Agreement.
6. The obligations represented in this Agreement are binding on the parties from date of execution, pending OWRD's final approval of the transfers referenced herein or as may be subsequently deemed necessary to effect the stated intent of the Parties contained in this Agreement. Upon OWRD final approval of said transfers, this Agreement shall be perpetual, unless and until such time as both Parties agree in writing to terminate this Agreement. At any time, this Agreement shall be terminated if performance is impossible due to factors beyond the control of the Parties.
7. KCDG shall pay all filing fees, engineering fees, and reimburse TID for reasonable legal fees expended, staff time expended by TID personnel, and any other costs or fees incurred by TID for the purpose of making the subject transfer or attempted transfer of storage right location to the Reservoir Ponds. Reimbursement to TID shall be made within 30 days of submission of the bill by TID to KCDG. Failure to make payment within 30 days of written notice is a default by KCDG under this Agreement. In

the event OWRD does not approve said transfer, KCDG shall not be entitled to any refund of fees or costs paid to TID.

8. Upon execution of this Agreement and thereafter, and subject to and following approval of the transfers described herein, KCDG's grant to TID of said perpetual, Non-Exclusive Easement across the Subject Property and the Reservoir Ponds is for the purpose of delivering the water to the Reservoir Ponds as well as storing said water and redistributing it back into the TID canal for reregulation purposes or other purposes as TID sees fit, with TID retaining sole authority over operations and maintenance for said water delivery, storage, and redistribution.

KCDG agrees to maintain the Reservoir Ponds in acceptable condition to receive, store, and redistribute the water subject to TID's storage right. Maintenance of the Reservoir Ponds, water conveyance lines, and any other construction necessary to accomplish the intent of this Agreement on the Subject Property are to be borne by KCDG. Any repairs, adjustments or other construction deemed necessary by TID to comply with this agreement on the Subject Property shall be performed by KCDG, or at KCDG's expense.

KCDG agrees to allow TID to deliver, store, and redistribute the Stored Water at all times, including during irrigation off-season (October 15-April 15). This includes allowing TID to perform stock runs in the off-season using the Stored Water if TID deems such redistribution to be appropriate, in accordance with TID's authority over its certificate water rights.

TID is aware and understands that the liners used to seal the new Reservoir Ponds should not be exposed to open air for long periods of time. As such, TID will make a reasonable effort to replace water used by TID as soon as possible during the irrigation season, providing that the water is available.

9. In the event KCDG fails to perform or is otherwise in default under this Agreement, upon 30 days written notice from TID or such longer period as it is reasonably necessary to perform, TID shall be entitled to cure at KCDG's expense or to apply to OWRD to transfer its storage rights from the Reservoir Ponds to any other location of its choosing. KCDG hereby appoints TID its Attorney in Fact to consummate any said transfer.

10. KCDG shall cooperate fully with any acts TID requires to effectuate OWRD approval of the transfer of stored water right contemplated herein. TID has filed a District temporary transfer under ORS 540.570, and shall follow same with a District permanent transfer to OWRD to effect permanent transfer of the subject water rights under TID's certificate. In order to qualify for a permanent transfer, the following tests must be performed successfully:

A. Fill the ponds from the TID canal with approximately 125 acre feet of water, and hold same in the Reservoir Ponds with reduced seepage and evaporation, compared to the Upper Tumalo Reservoir.

B. Pull water from the Reservoir Ponds and deliver into the TID canal for reregulation.

In addition, OWRD must make final approval of the KCDG transfer of surface irrigation water rights currently appurtenant to the Subject Property area of the Reservoir Ponds, and approve transfer of the rights to another irrigable area.

11. TID and KCDG shall make best efforts to complete the above referenced transfer processes and obtain final OWRD approval.

They seem to think they can fill over+over up to UTR 1100 af

No tx for allowed.

If TID makes said water available and KCDG fails to store the acre feet of water authorized for storage pursuant to the new storage water right certificate granted by OWRD for a period of five irrigation seasons, or fails to beneficially apply water to land with the water rights to be serviced by said Reservoir Ponds for a period of 5 years, or fails to maintain the Reservoir Ponds in a proper, safe condition, complying with all applicable Federal, State and Local Laws, Rules and Ordinances, or to comply with the By-Laws, Rules, Regulations or other requirements of TID, then TID may proceed under ORS Chapter 540 to have the water storage right removed to another location.

12. This Agreement is binding upon the Parties, their heirs, successors, and devisees.

13. The Parties understand that the law firm of Carl W. Hopp Jr., Attorney at Law, LLC, has served as legal counsel to Tumalo Irrigation District in the negotiation of the terms of this Agreement, and does not represent KCDG in connection with this Agreement.

14. The rule of construction that a written instrument is construed against the party preparing or drafting such written instrument shall specifically not be applicable to the interpretation of this Agreement, and any documents executed and delivered pursuant to, or in connection with this Agreement.

If any arbitration, mediation, or other proceeding is brought in lieu of litigation, or if suit or action is instituted to enforce or interpret any of the terms of this Agreement, or if suit or action is instituted in a Bankruptcy Court for a United States District Court to enforce or interpret any of the terms of this Contract, to seek relief from an automatic stay, to obtain adequate protection, or to otherwise assert the interest of Parties in a bankruptcy proceeding, the party not prevailing shall pay the prevailing party's costs and disbursements, the fees and expenses or expert witnesses in determining reasonable attorney fees pursuant to ORCP 68, the actual cost of a litigation or foreclosure report, and such sum as the court may determine to be reasonable for the prevailing party's attorney fees connected with the trial and any appeal and by petition for review thereof.

15. KCDG shall indemnify, defend, and hold harmless TID and its directors, officers, employees, agents and contractors for, from and against any and all losses, claims, actions, damages, liabilities, penalties, fines or expense, of whatsoever nature, arising from, related to, or in any way connected to this Agreement, including, without limitation, reasonable attorneys' fees and costs on account of mechanics' lien claims, injury to persons, the death of any person, or damages to property arising from the use of the Subject Property, the Reservoir Ponds, or adjoining areas, or from any activities contemplated by this Agreement, in each case undertaken by KCDG or any other person claiming by, through, or under KCDG. In the event of litigation or proceedings brought against TID arising out of or in any way connected with any of the above events or claims, against which KCDG agrees to defend TID, KCDG will, on notice from TID, vigorously resist and defend such actions or proceedings in consultation with TID through legal counsel reasonably satisfactory to TID. The indemnity set forth in this paragraph shall be effective without regard to compliance or non-compliance with this Agreement by KCDG or TID.

16. TID may use the Stored Water in the Reservoir Ponds as an integral part of the operations and maintenance of its irrigation system. In addition to usual operations and maintenance, TID reserves the right, in the event of need or emergencies, to pump out the Stored Water in the Reservoir Ponds on KCDG's Subject Property for use by TID or other emergency service providers for so long as the need or other emergency remains in effect.

17. TID makes no representation that storage water will be available. Fees under this Agreement are due to TID whether or not water is available. TID is not liable for any loss, damage, or claim which may be made for failure to supply storage water or the withdrawal of storage water.

EXHIBIT "A", PAGE 1

IRRIGATION EASEMENT

A parcel of land located in Section 13, Township 17 South, Range 11 East, Willamette Meridian, Deschutes County, Oregon, being more particularly described as follows:

Commencing at the northeast corner of those lands described in Lot Line Adjustment Deed recorded in Volume 2013, Page 48433, Deschutes County Records, from which the South Quarter corner of said Section 13 bears North 89°47'50" West a distance of 344.08 feet; thence along the easterly line of said lands, South 00°03'04" East a distance of 700.35 feet to the True Point of Beginning of this description; thence continuing along said easterly line the following two (2) courses:

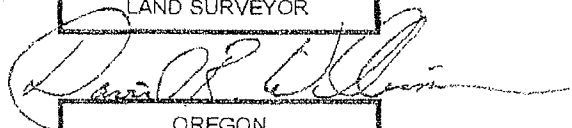
South 11°21'24" West a distance of 218.11 feet;
South 21°54'44" West a distance of 297.52 feet;

thence leaving said easterly line, South 69°58'58" West a distance of 228.07 feet; thence North 88°06'44" West a distance of 377.60 feet; thence South 30°02'08" West a distance of 69.60 feet; thence South 71°24'37" West a distance of 363.53 feet; thence South 79°53'28" West a distance of 487.90 feet; thence South 09°57'50" West a distance of 285.89 feet; thence South 80°02'10" East a distance of 139.09 feet; thence South 20°29'40" East a distance of 136.29 feet; thence South 12°56'00" West a distance of 1962.61 feet; thence North 76°07'14" West a distance of 291.31 feet; thence North 13°24'22" East a distance of 761.72 feet; thence North 03°46'12" East a distance of 155.95 feet; thence North 05°30'21" East a distance of 282.59 feet; thence North 23°08'07" East a distance of 235.19 feet; thence North 02°12'22" East a distance of 167.80 feet; thence North 08°49'36" West a distance of 283.64 feet; thence North 19°56'30" East a distance of 211.78 feet; thence South 80°02'10" East a distance of 180.91 feet; thence North 09°57'50" East a distance of 287.94 feet; thence North 79°53'28" East a distance of 500.41 feet; thence North 71°24'37" East a distance of 354.50 feet; thence North 30°02'08" East a distance of 51.34 feet; thence North 88°06'44" West a distance of 83.07 feet; thence North 11°49'02" West a distance of 343.38 feet; thence North 40°57'16" East a distance of 198.24 feet; thence North 71°23'43" East a distance of 345.18 feet to the south line of those lands described in Warranty Deed recorded in Volume 2013, Page 48434, Deschutes County Records; thence along said south line, South 89°48'56" East a distance of 318.92 feet; thence leaving said south line, South 73°35'31" East a distance of 151.87 feet to the True Point of Beginning, the terminus of this description.

Subject to: All easements, restrictions and right-of-ways of record and those common and apparent on the land.

See drawing marked Exhibit "B" and hereby made a part of this description.

REGISTERED
PROFESSIONAL
LAND SURVEYOR



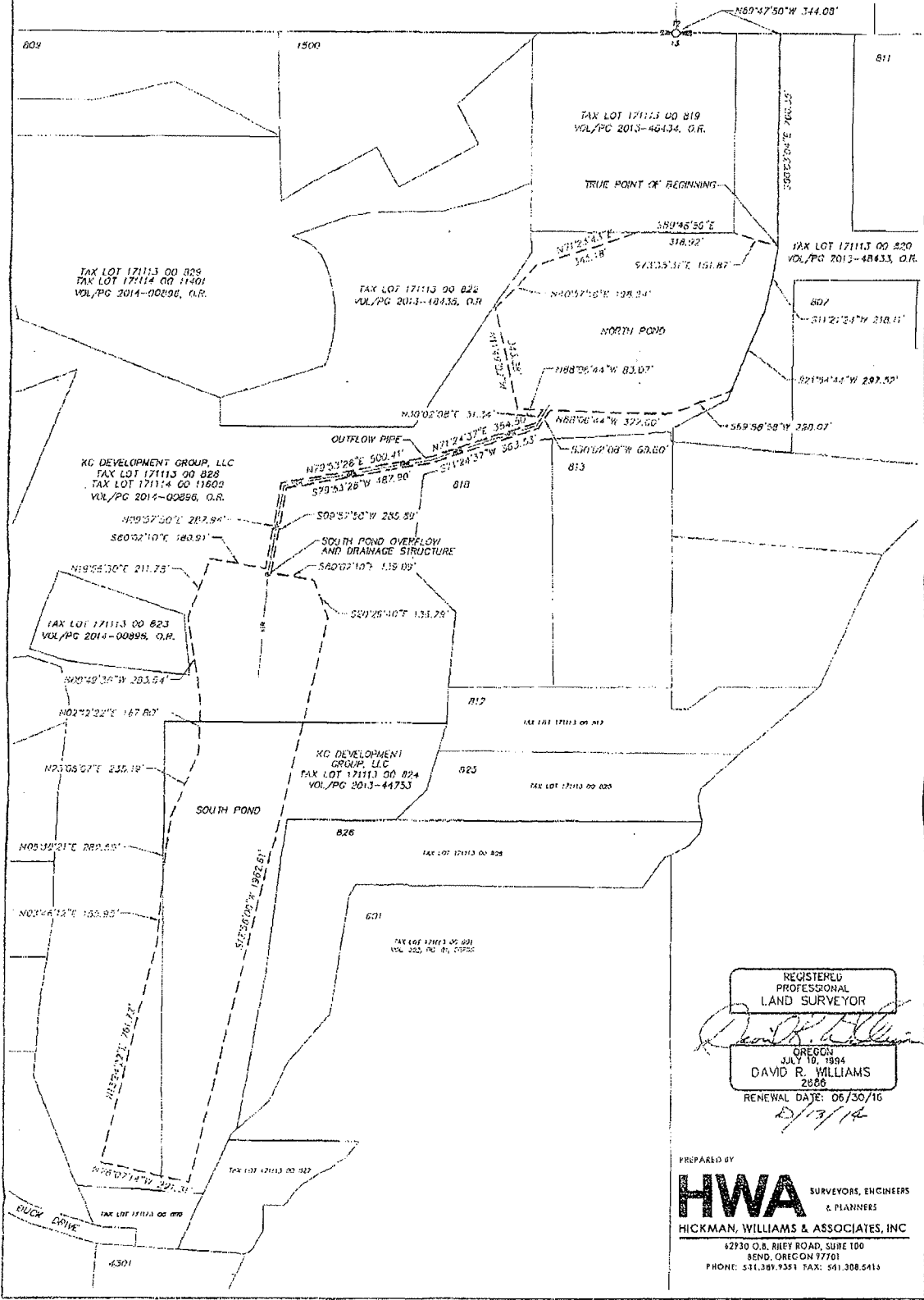
OREGON
JULY 19, 1994
DAVID R. WILLIAMS
2686

RENEWAL DATE: 06/30/16

10/13/14

EXHIBIT "A", PAGE 2
IRRIGATION EASEMENT

LOCATED IN SECTION 13, TOWNSHIP 17 SOUTH, RANGE 11 EAST, W.M.
DESCHUTES COUNTY, OREGON
SCALE: 1"=300'



REGISTERED
PROFESSIONAL
LAND SURVEYOR
David R. Williams
OREGON
JULY 10, 1994
DAVID R. WILLIAMS
2886
RENEWAL DATE: 06/30/16
2/13/14

PREPARED BY
HWA SURVEYORS, ENGINEERS
& PLANNERS
HICKMAN, WILLIAMS & ASSOCIATES, INC
62730 O.B. RILEY ROAD, SUITE 100
BEND, OREGON 97701
PHONE: 531.389.9351 FAX: 541.308.5413

HURELY RE, PC
OPERATING ACCOUNT
747 SW MILL VIEW WAY
BEND, OR 97702

1341
96-602/1232 1


10/15/14
Date

Pay to the
Order of

Deschutes County Clerk

\$ 67.00

Sixty seven dollars 00/100

Dollars 

 BANK OF THE
CASCADES
www.botc.com 877-617-3400

For KCDGI LLC 21538.000

Christina Arpfield

⑆ 123206024⑆ 14 02864 6⑈ 134⑆

DESCHUTES COUNTY RECORDING
www.deschutes.org/clerk

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10/15/2014 10:25:33 AM
HURLEY RE PC

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YES	11.00
AH Fee	
YES	21.00
Non-Standard Fee	
NO	
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HURLEY RE PC	
Official Record Number	
2014-34412	
Recording Date and Time	
10/15/2014 10:21:55 AM	
Total	\$67.00
CHECK 1341	67.00
Amount Due	0.00

Thank You
Please retain this receipt.

including assertions that the transfer was not consistent with law and would injure existing water rights.

3. 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: 108 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.

4. The primary storage water right (Certificate 76684) is the source of water for the following secondary certificates and their specified uses:

74146	74147	76106	74149	76520
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5. Transfer Application T-11833 proposes to change the 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.

6. A Land Use Information Form did not accompany TID's application.

7. On July 18, 2014 the Department requested TID to provide a Land Use Information Form containing a Land Use Compatibility Statement (LUCS) from Deschutes County specifying whether the proposed action is consistent with applicable land use laws.

8. On August 18, 2014, the Department received a LUCS that contained TID's characterization of the transfer as follows:

This is an intra-district transfer in place of use of 108 a.f. of Tumalo Creek water. TID to TID (Storage water). The transfer of this storage water is necessary for the operations and maintenance of our irrigation system, and allowed as an outright use in the RR-10 zone. The current site was built in the 1920's and no longer serves TID's needs. The new site is a significant upgrade that will enable TID to reduce dependence on Tumalo Creek for natural flow, provide emergency water supplies for the District and Emergency Services responders and provide increased efficiency in the operations and maintenance of the TID system overall.

The LUCS was signed by Nick Lelack, Deschutes County Community Development Director, who determined that the "[l]and uses to be served by the proposed water uses (including proposed construction) are allowed outright or are not regulated by your comprehensive plan" and referred to an attached land use decision that found among other things that the "transferring in-district storage from the Tumalo Reservoir upstream to the Klippel Acres Mining Pit in order to improve the operations of TID's existing irrigation system is a use permitted outright in the zone."

9. On December 16, 2014, the Department received a final decision of the Deschutes County Hearings Officer dated December 15, 2014. The final decision was a result of a challenge to the LUCS submitted to the Department by the TID. The final decision from a Deschutes County Hearing Officer found that the county incorrectly categorized TID's proposed use on the Department's LUCS as a use allowed without review and that the county erred in issuing a LUCS decision finding that the TID's proposed use was allowed without a review. The order reversed and remanded the LUCS to the county to reissue the Department's LUCS form and the LUCS decision to categorize TID's proposed use as one involving discretionary land use approvals that have not yet been obtained. Specifically, the Hearing Officer found that discretionary approvals would need to be obtained including "the conditional use of surface mining for reservoirs in conjunction with operation and maintenance of irrigations systems under Section 18.60.020(W), and/or a recreation-oriented facility requiring large acreage under Section 18.60.030(G)."

10. The 2014 irrigation season ended on October 31, 2014.

Conclusions of Law

1. The temporary transfer is expired and all uses of water must revert to the terms and conditions of Certificate R-76684. ORS 540.570(1).
2. The Department's actions to approve the District's temporary transfer must be compatible with acknowledged comprehensive plans. ORS 197.180; OAR 690-005-0025(3); OAR 690-005-0035.
3. The Department may not conditionally approve the temporary transfer because the proposed action is not authorized by ORS 540.570. OAR 690-005-0035(4).
4. The temporary transfer of a primary reservoir right is not authorized under ORS 540.570.

Opinion

A. The Temporary Transfer is Expired

ORS 540.570(1) specifies that a district with a manager may, "for one irrigation season" temporarily transfer the place of use of water appurtenant to any land. In this case, an application for temporary transfer was made for the 2014 irrigation season which ended on October 31, 2014. Upon expiration of the temporary transfer period, "all uses of water for which a temporary transfer is allowed * * * shall revert automatically" to the terms and conditions of the original water right certificate. Because the 2014 irrigation season is ended, all water subject to transfer as described in the temporary transfer application must revert to the terms and conditions of Certificate 76684.

B. Land Use Approval is Necessary and has not Been Obtained

Pursuant to ORS 540.570, the Department must issue an order approving a petition for a temporary transfer if, among other things "[a]ny other applicable requirement for district [temporary] water right transfers are met." OAR 690-385-3500(4). Other provisions of law, namely OAR Chapter 690 division 05 (OWRC rules governing land use compatibility) provide "applicable requirements" that in this case, may not be met.

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 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's proposed transfer does not qualify as a transfer that is exempt from the Department's land use program. The transfer involves the placement of or modification of "impoundment" facilities because the reservoirs have been modified or created to hold the impounded water the TID seeks to move from the existing Upper Tumalo Reservoir to the two new reservoirs it has created on tax lots 824 and 828. Because the proposed transfer is a land use program, the Department's actions must be consistent with the process in OAR 690-005-0035(4).

OAR 690-005-0035(4) states that land use information must be submitted with requests "prior to the department taking action on the water use approval." OAR 690-005-0035(4). The information must be sufficient to assess compatibility as specified on the Department's land use forms as provided in the SAC. *Id.* The Department may only approve the proposed water use if: the land use served by the proposed water use is allowed outright or does not require discretionary land use approvals under the applicable comprehensive plan or if the applicant has already received necessary land use approvals for the land use served by the proposed water use.

The Department may not approve the temporary transfer because necessary land use approvals have not been received. Although on August 13, 2014, the Deschutes County planner found that the TID's proposed transfer was "allowed outright" this decision was over-turned by the Hearing Officer on December 15, 2014. It is not clear at this point whether the proposed land use approval is being appealed to the Land Use Board of Appeals or whether the land use approval may be deemed denied. If the land use approval is being appealed it may at best, be considered as "pending" but not yet obtained. *Skrepetos v. OWRD*, 172 Or App 9, 12 (2001)(a land use decision is pending before a county until it reaches the state of final disposition or is withdrawn or dispositively rejected at an earlier stage).

Where a land use decision is pending the Department may place conditions on the approval to preclude water use until the applicant obtains all required land use approvals. The Department may only conditionally approve a water use, however, if all requirements of the statutes governing the Department's actions are met. OAR 690-005-0035(4)(c); OAR 690-005-0035(4)(b)(A). In this case, the Department may not conditionally approve the temporary transfer because it is expired and because, as discussed below, the water use is not consistent with ORS 540.570.

Where a land use decision is pending the Department may also withhold issuance of the water use approval until the applicant obtains all required land use approvals. OAR 690-005-0035(4)(c). Here, withholding approval until land use approvals are obtained is not an option because the temporary transfer may not be allowed at all.

In sum, notwithstanding that land use approval may be pending, the Department may not approve the temporary transfer because the 2014 irrigation season is ended and because movement of stored water is not authorized by ORS 540.570.

C. ORS 540.570 Does Not Authorize Movement of Stored Water

The TID has requested the Department to transfer water stored under reservoir right Certificate 76684 to the two reservoirs in tax lots 824 and 828. That is, the TID requests to move water impounded in Upper Tumalo Reservoir to two other reservoirs so that it may be stored in a different location. ORS 540.570 does not authorize this change.

ORS 540.570 governs temporary transfers of water by irrigation districts with a manager. ORS 540.570(1) specifies the type of temporary transfers that may occur:

(1) Provided that the proposed transfer complies with all of the provisions of this subsection and will not result in injury to any existing water right, a district with a manager may, for one irrigation season, temporarily transfer the place of use of water appurtenant to any land within the legal boundaries of the district to an equal acreage elsewhere within the legal boundaries of that district or temporarily transfer the type of use identified in a right to store water. A temporary transfer of the place of use may occur if:

(a) The rate and duty, and the *total number of acres to which water will be applied under the transfer*, do not exceed existing limits on the water use subject to transfer;

(b) The type of use authorized under the water use subject to transfer remains the same; and

(c) The *land from which the water use is being transferred* does not receive any water under the right being transferred during the irrigation season in which the change is made.

(Emphasis added.)

The text of ORS 540.570(1) authorizes a district to temporarily transfer "the place of use of water appurtenant to any land" within the district "to an equal acreage elsewhere" within the district. A temporary transfer of a place of use may only occur if, among other things, the total number of acres to which water "will be applied" under the temporary transfer does not exceed the limits on the water use subject to transfer and if the "land from which the water use is being transferred" does not receive any water under the right being transferred during the irrigation season in which the change is made. That is, the text of the statute only authorizes the transfer of water that is applied to appurtenant lands and requires that the "from" lands be dried up before the "to" lands may receive the transferred water.

Conversely, the TID seeks to move water stored pursuant to primary (reservoir) right Certificate 76684 to another location where it will be impounded in two different reservoirs. Movement of stored water from one location to another is not authorized by ORS 540.570 because, while the water is held in the reservoir, it is water that is impounded rather than applied to lands. TID's right (Certificate 76684) to store water is not in and of itself a right to apply water to lands, it is a right to impound water for multiple purposes as may be allowed pursuant to other authorizations. ORS 537.400. The authorization to use or apply the stored water to lands is contained in TID's secondary water rights that enumerate the acres to which the stored water

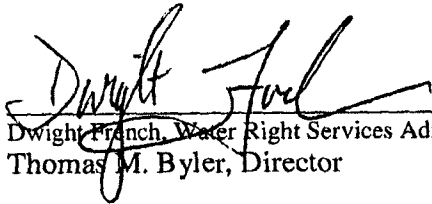
may be applied. Because ORS 540.570 does not authorize changing the location of stored water, the temporary transfer is denied.

ORDER

Now, therefore, it is ORDERED:

Transfer Application T-11833 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

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

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

Authority

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

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

Applicant

Sent Certified Mail 04/30/2015

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Attorneys

Sent Certified Mail 04/30/2015

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Other

Deschutes County
Planning Division
Attn: Community Development
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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).

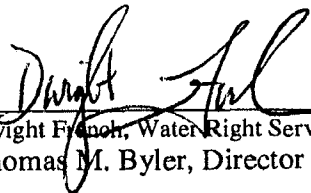
Land use information must be submitted with requests "prior to the department taking action on the water use approval." OAR 690-005-0035(4). TID has not sent any land use information with its application, and the Department is unable to determine the compatibility of the proposed action with acknowledged 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 BJA

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

In the Matter of the Tumalo Irrigation)
District.) ENFORCEMENT ORDER AND
) LIMITED LICENSE IN CONJUNCTION
) WITH ENFORCEMENT ORDER

Appeal Rights

This is a final order in other than a contested case. This order is subject to judicial review under ORS 183.484. Any petition for judicial review must be filed within the 60-day time period specified by ORS 183.484(2). Pursuant to ORS 536.075 and OAR 137-004-0080 you may either petition for judicial review or petition the Director for reconsideration of this order. A petition for reconsideration may be granted or denied by the Director, and if no action is taken within 60 days following the date, the petition was filed, the petition shall be deemed denied.

Authorities

Enforcement Authority

No person may appropriate water for beneficial use without first obtaining a permit from the Oregon Water Resources Department. ORS 537.130 *et seq.*; ORS 540.720. The Water Resources Director acting through watermasters, regulates distribution of water from streams, lakes, or other sources in accordance with the priority dates of the various rights. ORS 540.010 – 270. Unauthorized use of water may be regulated off by the watermaster who may take control of works in order to execute the water laws of this state. *Id.* Distribution of water within an irrigation district shall be under the exclusive control of the directors of the irrigation district unless the watermaster has been requested by the district to distribute the water. ORS 540.270. Notwithstanding, the watermaster may control irrigation works outside of an irrigation district that are appropriating public waters and may issue enforcement orders requiring unauthorized use of water to cease.

Limited License in Conjunction with Enforcement Order

The Water Resources Director may issue a limited license in conjunction with an enforcement order to address an illegal water use, including irrigation use or a use specifically prohibited by a basin program. The director may issue a limited license for such a use upon a finding that:

- (a) The person did not knowingly violate state laws regarding a water use permit;
- (b) The immediate termination of the illegal use would cause serious and undue hardship to the water user that could be ameliorated by providing a period of time in which to achieve compliance with the law; and
- (c) The continued use under a limited license outweighs the public benefits of termination, including deterrence of illegal uses and protection of the water source. ORS 537.143(4).

FINDINGS OF FACT

Unauthorized Use of Water

1. On or about the morning of June 3, 2015, and after obtaining consent to enter KC Development Group (KCDG) property, Watermaster Jeremy Giffin and Region Manager Kyle Gorman entered property owned by KCDG and observed water being delivered and stored in two large ponds (excavated and without dams) on property located in the NWSW section 13, Township 17 South, Range 11 East. Both ponds are located within the boundaries of the Tumalo Irrigation District (TID).
2. The ponds are commonly referred to as the "South Pond" and the "North Pond". Water from the South Pond is passed through an outlet at the north end of the South Pond and into the North Pond. This is the only means of delivering water into the North Pond. Up to 14.4 acre feet of water may be lawfully used as a bulge for irrigation in the North Pond pursuant to water right certificates 74146 and 74147.
3. On June 3, 2015, Giffin and Gorman observed that both the North Pond and the South Pond were nearly full. When filled, the North Pond contains approximately 57 acre feet of water, and the South Pond contains approximately 68 acre feet of water.
4. The water observed being delivered to the South Pond on June 3 was water diverted through TID diversions located on Tumalo Creek. The source of the water diverted was either Tumalo Creek or the Deschutes River where it intersects the Tumalo Feed Canal. The water in the South Pond was being stored without any authorization from the Water Resources Department. The water in the North Pond contained approximately 35 more acre feet than is authorized as a bulge to irrigate 55 acres of land within the TID. (Note: This is figured with a near-full observation of roughly 50 acre feet minus 14.4 acre feet of water allowed as a bulge equaling a difference of roughly 35.6 acre feet.)
5. On June 9, 2015 at about 0800, Watermaster Giffin, after obtaining permission from TID to observe the South Pond from TID property observed and measured 0.73 cfs of water flowing into the South Pond. Watermaster Giffin did not observe the North Pond.
6. Between June 3 and June 9 the TID unlawfully diverted water from Tumalo Creek to fill the South Pond.

Limited License in Conjunction with Enforcement Order

7. On June 11, 2014, the TID filed a temporary district transfer application pursuant to ORS 540.570 proposing a change to a portion of Certificate 76684. The Department assigned the application number T-11833. The TID proposed to temporarily transfer 108 acre feet of water stored under Certificate 76684 from the Upper Tumalo Reservoir and change the place of use to the North Pond and the South Pond. This application was denied by the Department on April 29, 2015.

8. On September 25, 2014, TID filed a notice of intent pursuant to ORS 540.580 to permanently transfer a portion of water stored under Certificate 76684 to the North and South ponds. Subsequently, the TID filled the North Pond and the South Pond with water that would otherwise have been stored in Upper Tumalo Reservoir.
9. 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. The TID proposed to permanently transfer 124.79 acre feet of water stored under Certificate 76684 from the Upper Tumalo Reservoir and change the place of use to the North Pond and the South Pond. This application was denied by the Department on April 29, 2015.
10. The TID believed it was authorized to transfer water from the Upper Tumalo Reservoir to the North Pond and the South Pond when it filled the ponds under ORS 540.580.
11. The North Pond and the South Pond are lined with a polyethylene liner which is protected by the water stored in the ponds. According to the TID, draining the ponds and thus subjecting the liner to exposure to the sun, wind, and large animals that may tread upon the liner, could result in severe damage to the liner. Replacement cost of the liner has been estimated at approximately 1.9 million dollars. Prolonged exposure to sun may cause the liner to have to be replaced sooner than originally planned. A high wind event may cause the seams of the liner to separate allowing air bubbles to develop underneath the liner. If the ponds were to be refilled over the top of air bubbles, the resulting downward pressure on the liner and air bubbles could cause the liner to burst. If the ponds are not maintained in a full or near full condition, the exposed liner could be cut or punctured by large animals such as elk or deer who frequent the area, especially in the winter months, and are drawn to nearby water sources. If the water were to be drained from the ponds, it is likely that rain events would cause standing water in the bottom of the ponds that could attract elk and deer.
12. A limited license that assures that no additional water shall be diverted as a result of the limited license authorization protects the water source because no additional water will be appropriated. Illegal water use is deterred by requiring compliance consistent with the terms of this order.

CONCLUSION OF LAW

1. Storage of water in the South Pond is unauthorized and storage of water in the North Pond beyond that amount needed to serve as a bulge for irrigation of 55 acres pursuant to water right 74146 and 74147 is unauthorized.
2. TID did not knowingly violate state laws regarding a water use permit when it filled the North Pond and South Pond prior to receiving denials of its district transfer applications.

3. Causing the TID to evacuate or to not keep the North Pond and the South Pond full of water would cause undue hardship to the water user.
4. The continued use of water under a limited license outweighs the public benefit of terminating the water use because continued diversion shall be mitigated according to the conditions of this order.
5. A limited license in conjunction with an enforcement order may be issued.

ORDER

Enforcement Order

The TID must obtain authorization for storage of water in the North and South ponds by December 15, 2015. This date may be extended if the TID demonstrates to the satisfaction of the Department that it is actively taking steps to legalize the storage and maintenance of water in the North and South ponds and more time is needed to secure authorization.

Limited License in Conjunction with Enforcement Order

Continued diversion of water for storage and maintenance of the two ponds from Tumalo Creek is unlawful unless diverted consistent with the following limited license terms:

1. Up to 0.5 cubic foot per second (CFS) of water is authorized to be diverted from Tumalo Creek into the South Pond for maintenance and storage of water in the South and North ponds.
2. The following table describes the location of the two ponds.

Twp	Rng	Mer	Sec	Q-Q	Tax lot
17 S	11 E	WM	13	NE NW	828
17 S	11 E	WM	13	NW NE	828
17 S	11 E	WM	13	NW SW	828
17 S	11 E	WM	13	NW SW	824
17 S	11 E	WM	13	SE NW	828
17 S	11 E	WM	13	SE NW	824
17 S	11 E	WM	13	SW NW	828
17 S	11 E	WM	13	SW NW	824
17 S	11 E	WM	13	NE SW	824

3. The authorization to use water under this limited license shall expire on December 15, 2015 unless the Department issues an order to cancel the limited license on an earlier date or unless an extension of this limited license is allowed.
4. The Department may extend the expiration of this limited license if the TID demonstrates to the satisfaction of the Department that it is actively taking steps to legalize the storage and maintenance of water in the North and South ponds and more time is needed to secure authorization.

5. The TID and water users are encouraged to take steps to protect the liner from damage in the event that the reservoir cannot be maintained in a full status for any length of time.
6. To insure that the diversion of water for maintenance of the two ponds is not having a detrimental effect on downstream water rights, TID is required to not divert any additional water, beyond what is currently authorized by existing water rights, into the Tumalo Feed Canal. Within 14 days of this order, TID shall demonstrate to the Department that they are not diverting more water than they would otherwise be entitled to if the two ponds did not exist.
7. This limited license may be cancelled if the watermaster is refused access onto TID property for the purposes of inspection and enforcement. The Department will provide reasonable notice before entering TID property.
8. TID will assist the Department to gain access to the property where the ponds are located.

DATED this 16th day of June, 2015.



THOMAS M. BYLER, Director
Oregon Water Resources Department

RECEIVED

NOV 30 2015

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

TONKON TORP LLP

In the Matter of the Tumalo Irrigation District.

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ORDER ON RECONSIDERATION

APPEAL RIGHTS

This is a final order in other than a contested case. This order is subject to judicial review under ORS 183.484. Any petition for judicial review must be filed within the 60-day time period specified in ORS 183.484(2). Pursuant to ORS 536.075 and OAR 137-004-0080 you may either petition for judicial review or petition the Director for reconsideration of this order. A petition for reconsideration may be granted or denied by the Director, and if no action is taken within 60 days following the date, the petition was filed, the petition shall be deemed denied.

DISPOSITION

This order on reconsideration affirms the Oregon Water Resources Department's Enforcement Order of June 16, 2015 finding that the Tumalo Irrigation District (TID) lacks authorization to store water in the North and South ponds. The order finds that after April 30, 2015, the TID knew or should have known that it did not have authority to fill the ponds pursuant to either T-11833 or T-11951. Therefore, the Department may not find that the TID did not knowingly violate state laws regarding a water use permit. This order reverses the Department's decision to allow a Limited License in Conjunction with Enforcement Order and cancels the Limited License in Conjunction with Enforcement Order.

AUTHORITY

Enforcement Authority

No person may appropriate water for beneficial use without first obtaining a permit from the Oregon Water Resources Department (Department). ORS 537.130 et seq.; ORS 540.720. The Water Resources Director acting through watermasters, regulates distribution of water from streams, lakes, or other sources in accordance with the priority dates of the various water rights of record. ORS 540.010 – 270. Unauthorized use of water may be regulated off by the watermaster who may take control of works in order to execute the water laws of this state. Id. Distribution of water within an irrigation district shall be under the exclusive control of the directors of the irrigation district unless the watermaster has been requested by the district to distribute the water. ORS 540.270. Notwithstanding, the watermaster may control district points of diversion and irrigation works outside of an irrigation district, that are appropriating public waters and may issue enforcement orders requiring unauthorized use of water to cease.

Docket
Return to *Jeranita*
C/M # *39351*

Limited License in Conjunction with Enforcement Order

The Water Resources Director may issue a limited license in conjunction with an enforcement order to address an illegal water use, including irrigation use or a use specifically prohibited by a basin program. The director may issue a limited license for such a use upon a finding that:

- (a) The person did not knowingly violate state laws regarding a water use permit;
- (b) The immediate termination of the illegal use would cause serious and undue hardship to the water user that could be ameliorated by providing a period of time in which to achieve compliance with the law; and
- (c) The continued use under a limited license outweighs the public benefits of termination, including deterrence of illegal uses and protection of the water source. ORS 537.143(4)

FINDINGS OF FACT

1. Two ponds are located within the Tumalo Irrigation District (TID) on property owned by the KC Development Group (KCDG). The KCDG property is located in Section 13 Township 17 South, Range 11 East. The ponds are excavated and without dams and are commonly referred to as the "South Pond" and the "North Pond". The South Pond is filled by diverting water from Tumalo Creek or the Deschutes River into the South Pond. Water from the South Pond is passed through an outlet at the north end of the South Pond and is the sole means of filling the North Pond with water. Up to 14.4 acre feet of water may be lawfully used as a bulge for irrigation in the North Pond pursuant to water right certificates 74146 and 74147.
2. On June 11, 2014, the TID filed a Temporary Transfer Within District application pursuant to ORS 540.570 proposing to change the place of use of a portion of Certificate 76684. The Department assigned the application number T-11833. The TID proposed to temporarily transfer 108 acre feet of water stored under Certificate 76684 in the Upper Tumalo Reservoir to change the location of water stored to the North Pond and the South Pond. This application was denied by the Department in a final order dated April 29, 2015. This order was served on TID on April 30, 2015.
3. On September 25, 2014, TID filed with the Department a notice of intent pursuant to ORS 540.580 to permanently transfer a portion of water stored under Certificate 76684 to the North and South ponds. Subsequently, the TID filled the North Pond and the South Pond with water that would otherwise have been stored in Upper Tumalo Reservoir.
4. On December 22, 2014, TID filed an application for a District Permanent Water Right Transfer for a Change in Place of Use. The Department assigned the application number T-11951. The TID proposed to permanently transfer 124.79 acre feet of water stored under Certificate 76684 in the Upper Tumalo Reservoir to change the location of water stored to the North Pond and the South Pond. The application was denied by the Department in a final order dated April 29, 2015. This order was served on TID on April 30, 2015.

5. The TID believed it was authorized to transfer water from the Upper Tumalo Reservoir to the North pond and the South Pond when it filled the ponds under ORS 540.580. However, after April 30, 2015, the TID knew or should have known that it did not have authority to fill the ponds pursuant to either T-11833 or T-11951.

6. On the morning of June 3, 2015, and after obtaining consent to enter KC Development Property, Watermaster Jeremy Giffin and Region Manager Kyle Gorman entered property owned by KCDG and observed water being diverted through TID diversions located on Tumalo Creek into the South Pond. The source of water diverted was either Tumalo Creek or the Deschutes River where it intersects the Tumalo Feed Canal. The water in the South Pond was being stored without any authorization from the Water Resources Department. On June 3, 2015, Gorman and Giffin observed that the water in the North Pond contained approximately 35 more acre feet than is authorized as a bulge to irrigate 55 acres of land within the TID. This conclusion was arrived at by calculating the approximate number of acre feet being stored in the North Pond (50 acre feet) and subtracting 14.4 acre feet of water allowed as a bulge. The difference between the estimated amount of water stored in the North Pond minus that allowed as a bulge equaled approximately 35.6 acre feet.

7. On June 9, 2015 at about 0800, Giffin, after obtaining permission from TID to observe the South Pond from TID property observed and measured 0.73 cubic feet per second (CFS) of water flowing into the South Pond from the TID diversion on Tumalo Creek. Giffin did not observe the North Pond on June 9, 2015.

ULTIMATE FINDINGS OF FACT

1. Between June 3, 2015 and June 9, 2015, TID unlawfully diverted water from Tumalo Creek to fill the South Pond.
2. After April 30, 2015, the TID knew or should have known that it did not have authorization to fill the South Pond or the North Pond pursuant to either T-11833 or T-11951 and therefore had no authority to divert water into the South Pond from the TID diversion on Tumalo Creek.

CONCLUSIONS OF LAW

1. The diversion of water for storage in the South Pond is unauthorized and storage of water in the North Pond beyond that amount needed to serve as a bulge for irrigation of 55 acres pursuant to water right 74146 and 74147 is unauthorized.
2. A limited license in conjunction with enforcement order is not permitted. ORS 537.143(4)(a).

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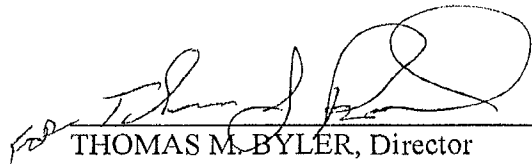
ORDER

Water is not lawfully stored in the South Pond. Water is only lawfully stored in the North Pond as that water is used for stock water purposes or as a bulge during the irrigation season.

The TID may not divert any water from its diversions on Tumalo Creek or the Deschutes River to fill and store water in the South Pond or the North Pond, except that the TID may divert water for stock water purposes. During the irrigation season TID may divert water for use in the North Pond as a bulge for up to 14.4 acre feet to irrigate 55 acres of land within the TID.

The Limited License in Conjunction with Enforcement Order is canceled and is of no further force and effect.

DATED this 23rd day of November, 2015.


THOMAS M. BYLER, Director
Oregon Water Resources Department

CERTIFICATE OF SERVICE

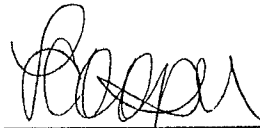
I certify that on November 23, 2015, I served a true and correct copy of the ORDER ON RECONSIDERATION on the following persons by first class mail postage prepaid:

Martha Pagel
Schwabe Williamson & Wyatt
Equitable Center
530 Center St., NE, Ste. 400
Salem, OR 97301

Carl Hopp, Jr.
Attorney at Law, LLC
168 N.W. Greenwood
Bend, OR 97701

Elizabeth A. Dickson
Hurley Re PC
747 SW Mill View Way
Bend, OR 97702

Janet E. Neuman
Tonkon Torp LLP
1600 Pioneer Tower
888 SW Fifth Ave.
Portland, OR 97204



Lorri Cooper
Oregon Department of Water Resources

RECEIVED

NOV 30 2015

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

TONKON TORP LLP

In the Matter of the Tumalo Irrigation)
District.)

ORDER ON RECONSIDERATION

APPEAL RIGHTS

This is a final order in other than a contested case. This order is subject to judicial review under ORS 183.484. Any petition for judicial review must be filed within the 60-day time period specified in ORS 183.484(2). Pursuant to ORS 536.075 and OAR 137-004-0080 you may either petition for judicial review or petition the Director for reconsideration of this order. A petition for reconsideration may be granted or denied by the Director, and if no action is taken within 60 days following the date, the petition was filed, the petition shall be deemed denied.

DISPOSITION

This order on reconsideration affirms the Oregon Water Resources Department's Enforcement Order of June 16, 2015 finding that the Tumalo Irrigation District (TID) lacks authorization to store water in the North and South ponds. The order finds that after April 30, 2015, the TID knew or should have known that it did not have authority to fill the ponds pursuant to either T-11833 or T-11951. Therefore, the Department may not find that the TID did not knowingly violate state laws regarding a water use permit. This order reverses the Department's decision to allow a Limited License in Conjunction with Enforcement Order and cancels the Limited License in Conjunction with Enforcement Order.

AUTHORITY

Enforcement Authority

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Docket
Return to *Jeranita*
C/M # *373511*

Limited License in Conjunction with Enforcement Order

The Water Resources Director may issue a limited license in conjunction with an enforcement order to address an illegal water use, including irrigation use or a use specifically prohibited by a basin program. The director may issue a limited license for such a use upon a finding that:

- (a) The person did not knowingly violate state laws regarding a water use permit;
- (b) The immediate termination of the illegal use would cause serious and undue hardship to the water user that could be ameliorated by providing a period of time in which to achieve compliance with the law; and
- (c) The continued use under a limited license outweighs the public benefits of termination, including deterrence of illegal uses and protection of the water source. ORS 537.143(4)

FINDINGS OF FACT

1. Two ponds are located within the Tumalo Irrigation District (TID) on property owned by the KC Development Group (KCDG). The KCDG property is located in Section 13 Township 17 South, Range 11 East. The ponds are excavated and without dams and are commonly referred to as the "South Pond" and the "North Pond". The South Pond is filled by diverting water from Tumalo Creek or the Deschutes River into the South Pond. Water from the South Pond is passed through an outlet at the north end of the South Pond and is the sole means of filling the North Pond with water. Up to 14.4 acre feet of water may be lawfully used as a bulge for irrigation in the North Pond pursuant to water right certificates 74146 and 74147.
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5. The TID believed it was authorized to transfer water from the Upper Tumalo Reservoir to the North pond and the South Pond when it filled the ponds under ORS 540.580. However, after April 30, 2015, the TID knew or should have known that it did not have authority to fill the ponds pursuant to either T-11833 or T-11951.

6. On the morning of June 3, 2015, and after obtaining consent to enter KC Development Property, Watermaster Jeremy Giffin and Region Manager Kyle Gorman entered property owned by KCDG and observed water being diverted through TID diversions located on Tumalo Creek into the South Pond. The source of water diverted was either Tumalo Creek or the Deschutes River where it intersects the Tumalo Feed Canal. The water in the South Pond was being stored without any authorization from the Water Resources Department. On June 3, 2015, Gorman and Giffin observed that the water in the North Pond contained approximately 35 more acre feet than is authorized as a bulge to irrigate 55 acres of land within the TID. This conclusion was arrived at by calculating the approximate number of acre feet being stored in the North Pond (50 acre feet) and subtracting 14.4 acre feet of water allowed as a bulge. The difference between the estimated amount of water stored in the North Pond minus that allowed as a bulge equaled approximately 35.6 acre feet.

7. On June 9, 2015 at about 0800, Giffin, after obtaining permission from TID to observe the South Pond from TID property observed and measured 0.73 cubic feet per second (CFS) of water flowing into the South Pond from the TID diversion on Tumalo Creek. Giffin did not observe the North Pond on June 9, 2015.

ULTIMATE FINDINGS OF FACT

1. Between June 3, 2015 and June 9, 2015, TID unlawfully diverted water from Tumalo Creek to fill the South Pond.

2. After April 30, 2015, the TID knew or should have known that it did not have authorization to fill the South Pond or the North Pond pursuant to either T-11833 or T-11951 and therefore had no authority to divert water into the South Pond from the TID diversion on Tumalo Creek.

CONCLUSIONS OF LAW

1. The diversion of water for storage in the South Pond is unauthorized and storage of water in the North Pond beyond that amount needed to serve as a bulge for irrigation of 55 acres pursuant to water right 74146 and 74147 is unauthorized.

2. A limited license in conjunction with enforcement order is not permitted. ORS 537.143(4)(a).

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ORDER

Water is not lawfully stored in the South Pond. Water is only lawfully stored in the North Pond as that water is used for stock water purposes or as a bulge during the irrigation season.

The TID may not divert any water from its diversions on Tumalo Creek or the Deschutes River to fill and store water in the South Pond or the North Pond, except that the TID may divert water for stock water purposes. During the irrigation season TID may divert water for use in the North Pond as a bulge for up to 14.4 acre feet to irrigate 55 acres of land within the TID.

The Limited License in Conjunction with Enforcement Order is canceled and is of no further force and effect.

DATED this 23rd day of November, 2015.



THOMAS M. BYLER, Director
Oregon Water Resources Department

CERTIFICATE OF SERVICE

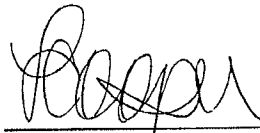
I certify that on November 23, 2015, I served a true and correct copy of the ORDER ON RECONSIDERATION on the following persons by first class mail postage prepaid:

Martha Pagel
Schwabe Williamson & Wyatt
Equitable Center
530 Center St., NE, Ste. 400
Salem, OR 97301

Carl Hopp, Jr.
Attorney at Law, LLC
168 N.W. Greenwood
Bend, OR 97701

Elizabeth A. Dickson
Hurley Re PC
747 SW Mill View Way
Bend, OR 97702

Janet E. Neuman
Tonkon Torp LLP
1600 Pioneer Tower
888 SW Fifth Ave.
Portland, OR 97204



Lorri Cooper
Oregon Department of Water Resources

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF DESCHUTES

TUMALO IRRIGATION DISTRICT,

Petitioner,

vs.

OREGON WATER RESOURCES
DEPARTMENT,

Respondent.

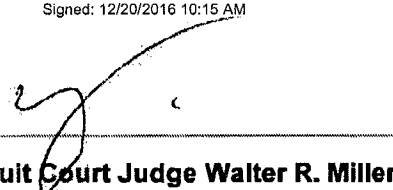
No. 15CV28751

GENERAL JUDGMENT OF DISMISSAL

Based upon ORCP 54 A(1), it is hereby

ORDERED AND ADJUDGED that all claims against defendant Oregon Water
Resources Department are hereby dismissed without prejudice and without attorney fees,
prevailing party fees, or costs to any of the parties.

Signed: 12/20/2016 10:15 AM



Circuit Court Judge Walter R. Miller

SUBMITTED BY:

SCHWABE, WILLIAMSON & WYATT, P.C.



By Elizabeth E. Howard, OSB 012951
Email: ehoward@schwabe.com
Of Attorneys for Plaintiff

**CERTIFICATE OF READINESS
(UTCRC 5.100(2))**

I hereby certify that the foregoing proposed judgment is ready for judicial signature because:

I. Each opposing party affected by this order or judgment has stipulated to the order or judgment, as shown by each opposing party's signature on the document being submitted.

II. Each opposing party affected by this order or judgment has approved the order or judgment, as shown by signature on the document being submitted or by written confirmation of approval sent to me.

III. I have served a copy of this order or judgment on all parties entitled to service and:

A. No objection has been served on me.

B. I received objections that I could not resolve with the opposing party despite reasonable efforts to do so. I have filed a copy of the objections I received and indicated which objections remain unresolved.

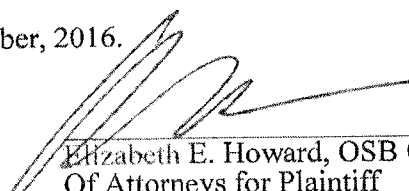
C. After conferring about objections, [role and name of opposing party] agreed to independently file any remaining objection.

IV. The relief sought is against an opposing party who has been found in default.

V. An order of default is being requested with this proposed judgment.

VI. Service is not required pursuant to subsection (3) of this rule, or by statute, rule, or otherwise.

DATED this 16th day of December, 2016.


Elizabeth E. Howard, OSB 012951
Of Attorneys for Plaintiff

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF DESCHUTES

TUMALO IRRIGATION DISTRICT,

Petitioner,

vs.

OREGON WATER RESOURCES
DEPARTMENT,

Respondent.

No. 15CV28751

PETITIONER'S RESPONSE TO STATE'S
MOTION TO DISMISS

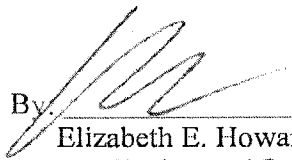
Hearing – Motion
January 10, 2017 at 3 p.m.

Oregon Water Resources Department's (OWRD's) Motion to Dismiss should be denied on the grounds that it is moot. Petitioner has filed a Notice of Voluntary Dismissal, requesting a general judgment without prejudice in this matter, and proposed General Judgment of Dismissal, to which OWRD had no objection. Upon issuance of the general judgment, the case against OWRD will be dismissed. For these reasons, Petitioner requests denial of the Department's motion on the grounds that it is now moot.

For the reasons set forth above, oral argument on OWRD's motion is no longer necessary. Petitioner therefore requests that the oral argument currently scheduled for January 19, 2017, be cancelled.

DATED this 16th day of December, 2016.

SCHWABE WILLIAMSON & WYATT, P.C.

By: 

Elizabeth E. Howard, OSB 012951
Email: ehoward@schwabe.com
Of Attorneys for Petitioner

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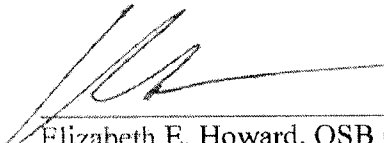
CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of December, 2016, I caused to be served the foregoing PETITIONER’S RESPONSE TO STATE’S MOTION TO DISMISS on the following party at the following address:

Darsee Staley
Department of Justice
100 SW Market Street
Portland, OR 97201
darsee.staley@doj.state.or.us

by:

- U.S. Postal Service, ordinary first class mail
- U.S. Postal Service, certified or registered mail, return receipt requested
- hand delivery
- facsimile
- electronic service
- other (specify) _____



Elizabeth E. Howard, OSB 012951

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF DESCHUTES

TUMALO IRRIGATION DISTRICT,
Petitioner,
vs.
OREGON WATER RESOURCES
DEPARTMENT,
Respondent.

No. 16CV01703
PETITIONER'S MOTION AND
MEMORANDUM IN SUPPORT OF MOTION
FOR PRETRIAL SETTLEMENT
CONFERENCE

MOTION

Petitioner Tumalo Irrigation District ("Petitioner") moves this Court for an order setting a judicial pretrial settlement conference at its earliest convenience. This motion is made pursuant to Deschutes County Circuit Court Supplement Local Rule 6.012, and is supported by the Affidavit of Elizabeth E. Howard ("Howard Affd.") and the following memorandum.

MEMORANDUM

Standard of Review

If a party requests a pretrial settlement conference, "a mandatory settlement conference shall be held," unless the opposing party demonstrates good cause as to why the settlement conference should not be held. Deschutes County Circuit Court's Supplementary Local Rule 6.012 (eff. Feb. 1, 2016).

Statement of the Case

Petitioner is an irrigation district, duly organized under the Oregon law. Petition for Judicial Review ("Petition"), ¶ 3. On January 21, 2016, Petitioner filed a Petition for Judicial

1 Review of Respondent Oregon Water Resources Department's ("Respondent") November 23,
2 2015 Order on Reconsideration. *See generally* Petition. This Order is a complete about-face by
3 Respondent and has a significant practical and legal effect on Petitioner and its patrons.

4 In early 2014, Petitioner met with Respondent's staff to obtain their direction as to how
5 Petitioner should go about getting Respondent's authorization to store water in the South Pond
6 and North Pond (the "ponds"). Howard Affid., ¶ 5. These ponds are located on property owned
7 by the KC Development Group LLC and within Petitioner's boundaries. Petition, ¶ 6. Acting on
8 Respondent's direction and advice, Petitioner filed applications (referred to as notices of intent)
9 for two in-district transfers to store water in the ponds. *Id.*, ¶s 9-10; Howard Affid., ¶ 5. Under
10 Oregon law, Petitioner may proceed to implement an in-district transfer after filing the
11 applications and before Respondent takes action on the applications. *Id.*, ¶s 9-10. Under this
12 authority, and consistent with Respondent's direction, Petitioner filled the ponds with water.

13 On April 29, 2015, and much to Petitioner's surprise, Respondent denied Petitioner's in-
14 district transfer applications. *Id.* ¶s 9-10. Seemingly in recognition that Petitioner had acted on
15 Respondent's advice and therefore "believed it was authorized to transfer water...to the North
16 Pond and South Pond when it filled the ponds," Respondent issued a Limited License
17 Enforcement Order ("LLEO") authorizing Petitioner to continue storing water in the ponds.
18 Howard Affid., Ex. 2, p. 3. In the LLEO, and as a condition of the LLEO's issuance,
19 Respondent also concluded that "[Petitioner] did not knowingly violate state laws regarding a
20 water use permit when it filled the North Pond and South Pond...." *Id.*

21 On October 13, 2015, Respondent abruptly withdrew the LLEO. It then issued the Order
22 on Reconsideration on November 23, 2015. The Order found—in direct contravention of
23 Respondent's prior findings—that Petitioner had "knowingly violated state laws regarding a
24 water use permit," and cancelled the LLEO. Howard Affid., Ex. 1, pp. 1, 3; Petition, ¶s 19, 22.

25 ///

26

1 Argument

2 Pursuant to Local Rule 6.012(a), Petitioner requests this Court order a mandatory
3 settlement conference so that the parties may complete the settlement negotiations currently
4 underway in this matter. Petitioner has worked diligently to resolve this case through informal
5 settlement negotiations for approximately seven months. Howard Affid., ¶ 3(i). To date, those
6 efforts have been unsuccessful—not because the parties have been unable to come to agreement
7 on the terms of settlement, but because of Respondent’s delays in responding to Petitioner’s
8 settlement communications. *Id.*, ¶ 3(i). At present, Petitioner is waiting for a response to a
9 settlement communication sent to Respondent’s counsel four weeks ago. *Id.*, ¶ 3(i). This is not
10 unusual, Petitioner previously waited more than three months for a response, despite regular
11 communications to Respondent seeking a reply. *Id.*, ¶ 3(i). Petitioner is unaware of any reason
12 why Respondent would object to this Motion, but Respondent has refused to voluntarily engage
13 in a judicial settlement conference as explained in the conferral certification below. Petitioner
14 seeks this Court’s order of a mandatory judicial settlement conference so that the parties may,
15 much more expeditiously and efficiently than they have to date, determine whether this matter
16 may be resolved through a settlement agreement.

17 Petitioner’s request for a mandatory judicial settlement conference is supported by the
18 following information, as required by Local Rule 6.012(a):

- 19 (a) This case was filed on January 21, 2016. Respondent was served on February 11,
20 2016.
- 21 (b) n/a.
- 22 (c) No court dates are scheduled.
- 23 (d) Petitioner anticipates 2-3 days for trial.
- 24 (e) No prior trial dates have been set in this case.
- 25 (f) To date, the Petition for Judicial Review and this Motion for Settlement
26 Conference are the only pleadings filed. The case is not yet at issue.

1 (g) Petitioners are in the process of serving Requests for Production on Respondents.
2 This will initiate the formal discovery process.

3 (h) No motions, other than this Motion for Settlement Conference, must be heard
4 prior to the settlement conference.

5 (i) During the past seven months, Petitioner's attorneys have persistently sought to
6 resolve this case with Respondent. Those efforts have been met with lengthy delays, without an
7 acknowledgement of receipt of the requested communications for weeks or more, in some cases.
8 As explained in the Howard Affidavit, Petitioner's attorney Martha Pagel first met with
9 Respondent's attorneys Darsee Staley and Renee Moulun on June 21, 2016, to outline concepts
10 for a potential settlement agreement and to request a meeting with Respondent to discuss the
11 concepts in further detail. By July 20, 2016, Ms. Pagel had received no response. She sent
12 another email to Ms. Staley and Ms. Moulun requesting confirmation of whether Respondent
13 was willing to meet and when such a meeting might be scheduled. Ms. Moulun responded
14 stating Respondent had not yet decided whether to meet and that she would let Ms. Pagel know
15 as soon as possible. Finally, on July 22, 2016, Ms. Staley sent an email to Ms. Pagel stating
16 Respondent was unwilling to consider one of the several terms contained in Ms. Pagel's initial
17 outline of settlement concepts, but taking no position on any of the other settlement concepts.

18 In the same communication, Ms. Staley shared her view that a meeting between the
19 parties and their attorneys would not be an effective use of time, but she suggested a meeting
20 between the attorneys to discuss how to resolve the litigation. Ms. Pagel responded that same day
21 stating Petitioner's willingness to "adhere to whatever ground rules you would like" so as to
22 continue discussions regarding resolution of the litigation issues as well as resolution of the
23 other, indirectly related, on-going water issues between Petitioner and Respondent. From July
24 22 through October, 2016, Ms. Pagel continued to exchange emails with Ms. Staley and Ms.
25 Moulun, but with no progress as to a meeting or settlement of the pending litigation or a meeting
26 with Respondent as to the other matter. Finally, on November 14, 2016, Ms. Staley responded to

1 Ms. Pagel, but in doing so, Ms. Staley abruptly changed course, stating that Respondent would
2 not agree to any form of settlement of the litigation because Respondent expected Petitioner to
3 dismiss the litigation promptly based on Ms. Staley's (inaccurate) understanding that Petitioner
4 had instructed Ms. Pagel to dismiss the case at a board meeting on October 13, 2016. On
5 November 28, 2016, Ms. Pagel sent a letter to Ms. Staley explaining that she had a different
6 understanding, an understanding that she confirmed at Petitioner's next board meeting on
7 December 13, 2016 and communicated to Ms. Staley on December 14, 2016.

8 Also on December 14, 2016, Ms. Pagel conveyed Petitioner's ongoing interest in
9 resolving the case through settlement. Due to the many delays up to that date, Ms. Pagel
10 suggested the parties continue their settlement negotiations through a judicial settlement
11 conference. On December 28, 2016, Ms. Staley declined Respondent's suggestion of engaging in
12 a settlement conference and proposed specific settlement terms for discussion.

13 On January 6, 2016, Petitioner's trial attorney, Elizabeth Howard, responded to the
14 specific settlement terms outlined in Ms. Staley's December 28, 2016 email, reiterated
15 Petitioner's view that a settlement conference would assist the parties with a more expedient
16 resolution of the case, and requested that Respondent reconsider its decision against voluntary
17 participation in such an effort. To date, Respondent has provided no response.

18 (j) As a result of Respondent's delays, the parties have not yet arrived at an
19 agreement on the matters at issue in this litigation. Outstanding issues include: 1) resolving
20 Respondent's unfounded determination that Petitioner knowingly violated the law, leading to
21 Respondent's Order on Reconsideration; 2) whether Petitioner must wastefully dump the stored
22 water within the ponds; and 3) if the water is to be dumped, whether Petitioner may continue to
23 store water in the ponds until its patrons, KC Development Group, have new water rights in
24 place to refill the ponds so as to avoid the costs to replace the pond liners, a cost estimated at
25 \$1.9 million.

26 (k) Petitioner favors a judicial settlement conference. Respondent does not, but has

1 not provided reasons for its opposition to Petitioner.

2 (l) Non-judicial settlement options are likely available. However, they have not
3 proven effective or efficient because of Respondent's long delays in responding to Petitioner.

4 (m) Petitioner's view is that this case is more likely to be resolved with the aid of this
5 Court and in a judicial settlement conference because of Respondent's delayed responses.
6 Petitioner anticipates further delays by Respondent without the Court's intervention. Further,
7 because Respondent is a State agency, Petitioner believes that efforts to resolve this case will be
8 more fruitful under the oversight of a sitting State court judge. Petitioner also anticipates that
9 Respondent will be resistant to the costs associated with a private mediator given its budgetary
10 constraints.

11 In sum, the parties have been in settlement discussions, but these negotiations have made
12 little progress over the course of seven months due to Respondent's delayed responses. The
13 Court's assistance is necessary to bring the parties together to complete the settlement
14 negotiation currently underway in an expeditious and efficient manner. Petitioner therefore asks
15 that the Court order the parties to participate in a mandatory judicial settlement conference as
16 expeditiously as possible.

17 **UTCR 5.010 Certificate of Conferral**

18 Counsel for Petitioner conferred with Respondent's lawyer regarding participating in a
19 judicial settlement conference. Respondent was unwilling to voluntarily participate in the
20 conference. Respondent's counsel did not provide a reason in support of its position.

21 DATED this 2nd day of February, 2017.

22

SCHWABE, WILLIAMSON & WYATT, P.C.

23

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By 

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Elizabeth E. Howard, OSB 012951

Email: ehoward@schwabe.com

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Of Attorneys for Petitioner

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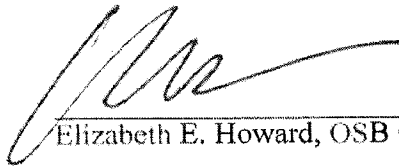
CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of February, 2017, I caused to be served the foregoing PETITIONER'S MOTION AND MEMORANDUM IN SUPPORT OF MOTION FOR PRETRIAL SETTLEMENT CONFERENCE on the following party at the following address:

Darsee Staley
Oregon Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
Email: darsee.staley@doj.state.or.us

by:

U.S. Postal Service, ordinary first class mail
U.S. Postal Service, certified or registered mail,
return receipt requested
hand delivery
facsimile
electronic service
other (specify) _____



Elizabeth E. Howard, OSB 012951

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IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF DESCHUTES

SCOTT W. WATERS, RODNEY LEE
CAMPUZANO and JUDY CAMPUZANO,
ANDREW J. NIEDZWIECKE AND JUDITH
D. NIEDZWIECKE, CADWELL FAMILY
TRUST, and KC DEVELOPMENT GROUP
LLC, an Oregon limited liability company,

Plaintiffs,

v.

KLIPPEL WATER, INC., an Oregon domestic
non-profit corporation,

Defendant.

Case No.: 16CV03207

**ORDER REGARDING
DEFENDANT'S MOTIONS
AGAINST PLAINTIFFS' SECOND
AMENDED COMPLAINT**

PETERKIN & ASSOCIATES
222 NW Irving Avenue
Bend, OR 97703
(541) 389-2572

This matter came before the court on Defendants' Motions against Plaintiffs' Second Amended Complaint. A hearing was held on December 21, 2016 before the Honorable Beth M. Bagley. Plaintiffs were represented by Peter C. Richter and Shannon McCabe. Defendants were represented by Megan K. Burgess. The Court reviewed and considered the pleadings, heard oral argument from counsel, and being otherwise fully informed, ruled by memorandum opinion dated February 24, 2017. A true and correct copy of Judge Bagley's Memorandum Opinion is attached hereto as "Exhibit 1," and is incorporated herein as if fully set forth. The Court's rulings are memorialized herein.

///

///

NOW THEREFORE, IT IS HEREBY ORDERED:

1. Defendant Klippel Water Inc.'s Motion to Dismiss with prejudice pursuant to ORCP 21A(8) as to all of Plaintiffs' claims for an easement by implication over Lot 800.

a. Plaintiff Scott Waters (Lot 812). Defendant's Motion to Dismiss Waters' claim of implied easement is granted;

b. Plaintiffs Niedzwiecke (Lot 810). Defendant's Motion to Dismiss Niedzwieckes' claim of implied easement is granted;

c. Plaintiff Cadwell Family Trust (Lot 819). Defendant's Motion to Dismiss Cadwell Family Trust's claim of implied easement is granted;

d. Plaintiffs Campuzano (Lot 13000). Defendant's Motion to Dismiss Campuzanos' claim of implied easement is granted; and

e. Plaintiff KC Development Group (Lots 602, 817, 820, 822-829). Defendant's Motion to Dismiss KCDG's claim of implied easement is granted.

f. For the reasons detailed in Judge Bagley's Opinion (Ex 1), all of plaintiffs' claims for an implied easement are dismissed with prejudice.

2. Defendant Klippel Water Inc.'s Motion to Dismiss with prejudice pursuant to ORCP 21A(8) as to all of Plaintiffs' claims for an easement by prescription over Lot 800.

a. Plaintiff Scott Waters (Lot 812). Defendant's Motion to Dismiss Waters' claim of prescriptive easement is granted.

b. Plaintiffs Niedzwiecke (Lot 810). Defendant's Motion to Dismiss Niedzwieckes' claim of prescriptive easement is granted;

c. Plaintiff Cadwell Family Trust (Lot 819). Defendant's Motion to Dismiss Cadwell Family Trust's claim of prescriptive easement is granted;

d. Plaintiffs Campuzano (Lot 13000). Defendant's Motion to Dismiss Campuzanos' claim of prescriptive easement is granted; and

1 e. Plaintiff KC Development Group (Lots 602, 817, 820, 822-829).
2 Defendant's Motion to Dismiss KCDG's claim of prescriptive easement is
3 granted.

4 f. For the reasons detailed in Judge Bagley's Opinion (Ex 1), all of plaintiffs'
5 claims for an easement by prescription are dismissed with prejudice.

6 **3. Attorney Fees and Costs.**

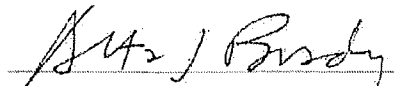
7 a. As detailed in Judge Bagley's Memorandum Opinion (Ex 1), the Court
8 found all Plaintiffs' claim for an easement by implication were not
9 objectively reasonable.

10 b. As detailed in Judge Bagley's Memorandum Opinion (Ex 1), the Court
11 further found there was no objectively reasonable basis for the claims for an
12 easement by prescription asserted by Plaintiffs Waters, Cadwell Family Trust
13 and KC Development Group.

14 c. Defendant's motion for attorney fees and costs is granted in part. The
15 Court will order reasonable attorney fees and costs to Defendant incurred in
16 connection with all claims asserted in the Second Amended Complaint
17 except for the prescriptive easement claims made by Niedzwicke and
18 Campuzano.

19 d. Defendant's attorney is directed to file an ORCP 68 Statement of attorney
20 fees and costs consistent with Judge Bagley's Memorandum Opinion (Ex 1).

Signed: 3/13/2017 11:58 AM

21 
22 Circuit Court Judge Alta J. Brady

23 **Submitted by:**

24 /s/ Megan K. Burgess

25 MEGAN K. BURGESS

26 OSB #042526

mburgess@peterkinpc.com

Of Attorneys for Defendant

A. MICHAEL ADLER *Judge*
WELLS B. ASHBY, *Judge*
STEPHEN P. FORTE, *Judge*
BETHANY P. FLINT *Judge*

CIRCUIT COURT OF OREGON
ELEVENTH JUDICIAL DISTRICT
DESCHUTES COUNTY JUSTICE BUILDING
1100 NW BOND STREET
BEND, OREGON 97703
(541) 388-5300

WALTER R. MILLER, JR., *Judge*
BETH M. BAGLEY, *Judge*
ALTA J BRADY *Presiding Judge*

2016 MAY 25 PM 3:34

DESCHUTES CO -
OREGON

Verified Correct Copy of Original 5/26/2016

May 24, 2016

J Rion Bourgeois
PO Box 1264
Canby OR 97013

Christopher D Hatfield
Hurley Re PC
747 SW Mill View Way
Bend OR 97702

Re. States Credit Holdings II, LLC v Kimble and Kimble, Deschutes County Case No.
15CV0382

Counsel

This matter came before the court on the Defendants' Objection to Garnishment pursuant to ORS 18 395(2) as to the amount of \$50,000 for a co-debtor homestead exemption. The Court currently holds \$50,466.43 of the Defendant's cash pending the outcome of the challenge. The Court being fully apprised in the premises, and having taken testimony heard oral argument at the hearing held on May 18, 2016, the Court makes the following determinations:

1. The issue as to whether the Kimbles intend to reinvest the \$50,000 in a new home is not properly before the Court IF the Court finds that the Kimbles do, in deed, have a \$50,000 homestead exemption in the 'proceeds' from the 'sale' of 63570 Johnson Road, Bend, OR, 97703 ("LR1"), then they have a one year from the date of 'sale' to reinvest it in a new primary home. There is no authority for the Court to hold the money for the balance of the one year to determine if such reinvestment is made, and so the Court declines to do so
2. Accordingly, the only issue properly before the court is whether the Kimbles truly sold LR1'. If they did, then the Kimbles have a \$50,000 homestead exemption under ORS 18.395(2) in the \$50,000 cash that was garnished from their bank account. The homestead exemption turns on whether the \$50,000 cash is truly proceeds from a sale of LR1 OR whether the \$50,000 cash in the Kimbles' bank account is there as a result of a complicated financial arrangement orchestrated to look like a sale of LR1 to one of the Kimbles' business partners.

Plaintiff essentially presented evidence at the evidentiary hearing as if this were a fraudulent transfer claim under ORS 95.230. Clearly that is not what is pending before the Court. However, the factors and analysis under 95 230 are instructive when deciding the factual issue of whether LR1 was truly sold because 95 details creditor's rights and remedies and 18 details exemptions

15CV0382
OPL
Opinion - Letter
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from creditor's rights and remedies upon execution of a judgment Garnishment is an execution of a judgment. ORS 18.005(6)

Moreover, there is no authority requiring that the Court MUST find that LR1 was truly sold simply because there was a deed executed and an escrow company was used.

This action was commenced June 18, 2015. LR1 was unencumbered at the time the suit was commenced and then was rapidly and serially encumbered by 'debts' to insiders – the Kimbles' business partners and the Kimbles' daughters. The property was then 'sold' December 15, 2015 to the Kimbles' main business partner Carlton Cadwell." The underlying Judgment was entered January 28, 2016

The source of the \$50,000 cash, Mr. Cadwell, was not present and did not testify Many of the debt instruments which Mr Kimble produced, which were paid from the 'sale proceeds' and intended to provide credibility to the 'sale,' were not signed and Mr Kimble admitted that many of them were not created contemporaneously with the alleged transactions The 'sale price' of the home at the time of sale was not consistent with Mr Kimble's prior opinion of value

The Kimbles still reside at LR1, retaining possession and control after the transfer, while they purportedly pay rent to Mr. Cadwell. One of the 'debts' owed to Mr. Cadwell and settled for less than what was loaned, was for some type of reverse mortgage on LR1 so that Mr. Cadwell provided monthly income to the Kimbles.

The Kimbles own the surrounding acreage properties jointly with Mr. Cadwell through the KC Development Group LLC and Mr. Kimble expressly stated he would be getting LR1 back at a later date through some other undefined transaction.

The deed and use of an escrow company do not persuade the Court that a true sale occurred. The Court does not find Mr. Kimble to be credible

In summary, the 'sale' appears to have been nothing more than an elaborate orchestration to facilitate the ongoing financial transactions between Mr Kimble and Mr Cadwell and the development of the jointly owned parcels of property. The Court finds that a sale did not occur and that the Kimbles are not entitled to a \$50,000 homestead exemption in the cash garnished from their bank account

Accordingly, the Court orders the release of the \$50,466 43 to Plaintiff immediately. Mr Bourgeois shall prepare the Order.

Best Regards,



Bethany Flint, Deschutes Circuit Court Judge

¹ There is no dispute that LR1 was and is the Kimbles primary place of residence – or abode.
² The Court refers to Carlton Cadwell only, not Carlton and Lynda because it appears to the Court that the wives are only included as a formality. Mr. Kimble could not even identify how much ownership the wives actually have in the LLC and the like. It appears from the record that Mr. Cadwell and Mr Kimble were the primary actors in the transactions

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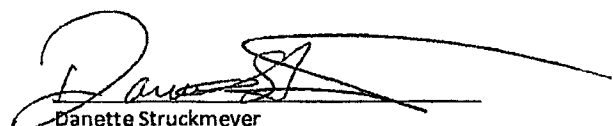
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STATE OF OREGON)
) ss. **CERTIFICATE OF MAILING**
COUNTY OF DESCHUTES)

I, Danette Struckmeyer, Judicial Assistant to Bethany P. Flint, Judge of the Circuit Court, Bend, Oregon, hereby certify that I mailed copies of the foregoing Opinion Letter to the parties herein below named, by placing such copies in an envelope, with postage thereon fully prepaid, addressed to said parties at their respective addresses, and depositing said envelopes in the United States mail or by placing them in a pickup box at the Deschutes County Courthouse in Bend, Oregon, 25 day of May, 2016, said parties being:

- J. Rion Bourgeois
Attorney at Law
PO Box 1264
Canby, Oregon 97013
- Christopher Hatfield
Attorney at Law
747 SW Mill View Way
Bend, Oregon 97702

DATED at Bend, Oregon, this 25 day of, May, 2016.


Danette Struckmeyer
Judicial Assistant to Bethany P. Flint

November 30, 2016

Via hand delivery only

Nick Lelack
Community Development Director
Deschutes County
117 NW Lafayette Avenue
Bend, OR 97703

Re: Land Use Compatibility State Request by KC Development Group, LLC

Dear Mr. Lelack,

I serve as General Counsel for KC Development Group, LLC ("KCDG"). In 2014, KCDG completed a series of lined, connected irrigation ponds on its property at or about 63650 Johnson Road, Bend OR 97703 (the "Property"). The purpose of the ponds was primarily for storage and reregulation purposes for the Tumalo Irrigation District ("TID"), and secondly, the south pond was to be used for motorized boating activities by KCDG. However, after the ponds were completed, new interpretations of the law by Deschutes County Code and the Oregon Water Resources Department ("OWRD") made partnering with TID impossible or highly impractical.

Specifically, Deschutes County determined that TID's use would require a conditional use permit and a comprehensive plan change to enable surface mining for a non-Goal 5 resources, and KCDG's motorized boating use would require a conditional use permit for a recreation-oriented facility. Deschutes County denied those permits and referred the matter to Deschutes County Code Enforcement. Concurrent with Deschutes County's decisions, despite having initially encouraging TID and KCDG, OWRD revoked and/or denied any application for TID's use of the ponds, and has informed us that OWRD will not entertain any discussion of an approval, or even an application, for a water right that included TID's use of the ponds. As a result of those rulings, on May 23, 2016, TID sent a letter to KCDG terminating its use of the ponds.

On June 22, 2016, Tim Ramis, on behalf of KCDG, submitted a letter to Deschutes County that included TID's termination letter for use of the Property and provided that the ponds would be used for aesthetics and fire protection. As you know, the ponds have already proved their value for fire protection in being the main source of water to fight both 2014 Two Bulls Fire and the 2015 Shevlin Park fire. On that basis, Deschutes County agreed to close the Code Enforcement file. It is our understanding, that as far as Deschutes County is concerned, the Property and the ponds are in compliance with local land use regulations because fire protection and landscape aesthetics are not regulated by the Deschutes County Code.

As a result of the termination of its partnership with TID, KCDG must now seek its owner water right through a groundwater permit application ("Application") to OWRD. A requirement of the Application is

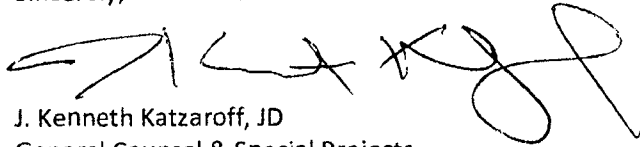
to submit a land use compatibility statement ("LUCS") from Deschutes County that confirms that approval by OWRD of KCDG's Application would be consistent with Deschutes County land use regulations. Therefore, we have attached a proposed LUCS that confirms as such.

We understand that the Property has been subject to significant opposition and scrutiny over the past two and a half years. It is with that in mind that I have been working diligently to achieve full compliance with all regulatory authorities. This LUCS request is in furtherance of that goal and I believe is consistent with the current permitted uses by Deschutes County for the Property and the ponds.

KCDG remains committed to working collaboratively with Deschutes County to ensure all use of the Property is properly permitted and approved. I have enclosed the proposed LUCS and the \$90 fee payable to Deschutes County. If you have any questions regarding the use of the Property or the ponds, or regarding the OWRD Application, please feel free to contact me.

Thank you for your consideration of this request.

Sincerely,

A handwritten signature in black ink, appearing to read 'JK Katzaroff', written over a horizontal line.

J. Kenneth Katzaroff, JD
General Counsel & Special Projects
Three Rivers Advisors
Ken@threeriversadvisors.com
503-453-0873

Land Use Information Form



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

NOTE TO APPLICANTS

In order for your application to be processed by the Water Resources Department (WRD), this Land Use Information Form must be completed by a local government planning official in the jurisdiction(s) where your water right will be used and developed. The planning official may choose to complete the form while you wait, or return the receipt stub to you. Applications received by WRD without the Land Use Form or the receipt stub will be returned to you. Please be aware that your application will not be approved without land use approval.

This form is NOT required if:

- 1) Water is to be diverted, conveyed, and/or used only on federal lands; **OR**
- 2) The application is for a water right transfer, allocation of conserved water, exchange, permit amendment, or ground water registration modification, and **all** of the following apply:
 - a) The existing and proposed water use is located entirely within lands zoned for exclusive farm-use or within an irrigation district;
 - b) The application involves a change in place of use only;
 - c) The change does not involve the placement or modification of structures, including but not limited to water diversion, impoundment, distribution facilities, water wells and well houses, **and**
 - d) The application involves irrigation water uses only.

NOTE TO LOCAL GOVERNMENTS

The person presenting the attached Land Use Information Form is applying for or modifying a water right. The Water Resources Department (WRD) requires its applicants to obtain land-use information to be sure the water rights do not result in land uses that are incompatible with your comprehensive plan. Please complete the form or detach the receipt stub and return it to the applicant for inclusion in their water right application. You will receive notice once the applicant formally submits his or her request to the WRD. The notice will give more information about WRD's water rights process and provide additional comment opportunities. You will have 30 days from the date of the notice to complete the land-use form and return it to the WRD. If no land-use information is received from you within that 30-day period, the WRD may presume the land use associated with the proposed water right is compatible with your comprehensive plan. Your attention to this request for information is greatly appreciated by the Water Resources Department. If you have any questions concerning this form, please contact the WRD's Customer Service Group at 503-986-0801.

Land Use Information Form



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

Applicant: ICC Development Group LLC
First Last

Mailing Address: 63560 Johnson Rd

Bend OR 97703 Daytime Phone: 503 453 0873
City State Zip

A. Land and Location

Please include the following information for all tax lots where water will be diverted (taken from its source), conveyed (transported), and/or used or developed. Applicants for municipal use, or irrigation uses within irrigation districts may substitute existing and proposed service-area boundaries for the tax-lot information requested below.

Township	Range	Section	1/4	Tax Lot #	Plan Designation (e.g., Rural Residential/RR-5)	Water to be:			Proposed Land Use:
17S	11E	13		829, 824, 820	RR-10	<input checked="" type="checkbox"/> Diverted	<input type="checkbox"/> Conveyed	<input checked="" type="checkbox"/> Used	See below
						<input type="checkbox"/> Diverted	<input type="checkbox"/> Conveyed	<input type="checkbox"/> Used	
						<input type="checkbox"/> Diverted	<input type="checkbox"/> Conveyed	<input type="checkbox"/> Used	
						<input type="checkbox"/> Diverted	<input type="checkbox"/> Conveyed	<input type="checkbox"/> Used	

List all counties and cities where water is proposed to be diverted, conveyed, and/or used or developed:

Deschutes County

B. Description of Proposed Use

Type of application to be filed with the Water Resources Department:

- Permit to Use or Store Water
- Limited Water Use License
- Water Right Transfer
- Allocation of Conserved Water
- Permit Amendment or Ground Water Registration Modification
- Exchange of Water

Source of water: Reservoir/Pond Ground Water Surface Water (name) _____

Estimated quantity of water needed: 124.79 cubic feet per second gallons per minute acre-feet

Intended use of water: Irrigation Commercial Industrial Domestic for _____ household(s)
 Municipal Quasi-Municipal Instream Other See below

Briefly describe:

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

Note to applicant: If the Land Use Information Form cannot be completed while you wait, please have a local government representative sign the receipt at the bottom of the next page and include it with the application filed with the Water Resources Department.

See bottom of Page 3. -->

For Local Government Use Only

The following section must be completed by a planning official from each county and city listed unless the project will be located entirely within the city limits. In that case, only the city planning agency must complete this form. This deals only with the local land-use plan. Do not include approval for activities such as building or grading permits.

Please check the appropriate box below and provide the requested information

- Land uses to be served by the proposed water uses (including proposed construction) are allowed outright or are not regulated by your comprehensive plan. Cite applicable ordinance section(s): _____
- Land uses to be served by the proposed water uses (including proposed construction) involve discretionary land-use approvals as listed in the table below. (Please attach documentation of applicable land-use approvals which have already been obtained. Record of Action/land-use decision and accompanying findings are sufficient.) **If approvals have been obtained but all appeal periods have not ended, check "Being pursued."**

Type of Land-Use Approval Needed (e.g., plan amendments, rezones, conditional-use permits, etc.)	Cite Most Significant, Applicable Plan Policies & Ordinance Section References	Land-Use Approval:	
		<input type="checkbox"/> Obtained <input type="checkbox"/> Denied	<input type="checkbox"/> Being Pursued <input type="checkbox"/> Not Being Pursued
		<input type="checkbox"/> Obtained <input type="checkbox"/> Denied	<input type="checkbox"/> Being Pursued <input type="checkbox"/> Not Being Pursued
		<input type="checkbox"/> Obtained <input type="checkbox"/> Denied	<input type="checkbox"/> Being Pursued <input type="checkbox"/> Not Being Pursued
		<input type="checkbox"/> Obtained <input type="checkbox"/> Denied	<input type="checkbox"/> Being Pursued <input type="checkbox"/> Not Being Pursued
		<input type="checkbox"/> Obtained <input type="checkbox"/> Denied	<input type="checkbox"/> Being Pursued <input type="checkbox"/> Not Being Pursued

Local governments are invited to express special land-use concerns or make recommendations to the Water Resources Department regarding this proposed use of water below, or on a separate sheet.

Name: _____ Title: _____

Signature: _____ Phone: _____ Date: _____

Government Entity: _____

Note to local government representative: Please complete this form or sign the receipt below and return it to the applicant. If you sign the receipt, you will have 30 days from the Water Resources Department's notice date to return the completed Land Use Information Form or WRD may presume the land use associated with the proposed use of water is compatible with local comprehensive plans.





www.deschutes.org/cd

Address: 19436 KLIPPEL RD, BEND, OR 97703
Parcel Number: 1711130000820, 1711130000824, 1711130000828

Transaction Receipt

Record Number: 247-16-000748-PS

Receipt Number: 413642

DESCHUTES COUNTY
117 NW Lafayette Avenue
PO Box 6005
Bend, OR 97703
Phone: 541-388-6575

cdd-webmaster@deschutes.org

Receipt Date: 11/30/16

Fee Items Paid

DESCRIPTION	ACCOUNT CODE	AMOUNT PAID
Permit Sign-Off for Other Agency - LUCS sign off	295-3661-341.4301	\$90.00
		\$90.00

Payment Summary

PAYMENT METHOD	PAYER	COMMENTS	AMOUNT PAID
Bend Check- Check Nbr: 1644	Eric Cadwell		\$90.00
			\$90.00

Land Use Information Form



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

NOTE TO APPLICANTS

In order for your application to be processed by the Water Resources Department (WRD), this Land Use Information Form must be completed by a local government planning official in the jurisdiction(s) where your water right will be used and developed. The planning official may choose to complete the form while you wait, or return the receipt stub to you. Applications received by WRD without the Land Use Form or the receipt stub will be returned to you. Please be aware that your application will not be approved without land use approval.

This form is NOT required if:

- 1) Water is to be diverted, conveyed, and/or used only on federal lands; **OR**
- 2) The application is for a water right transfer, allocation of conserved water, exchange, permit amendment, or ground water registration modification, and **all** of the following apply:
 - a) The existing and proposed water use is located entirely within lands zoned for exclusive farm-use or within an irrigation district;
 - b) The application involves a change in place of use only;
 - c) The change does not involve the placement or modification of structures, including but not limited to water diversion, impoundment, distribution facilities, water wells and well houses; **and**
 - d) The application involves irrigation water uses only.

NOTE TO LOCAL GOVERNMENTS

The person presenting the attached Land Use Information Form is applying for or modifying a water right. The Water Resources Department (WRD) requires its applicants to obtain land-use information to be sure the water rights do not result in land uses that are incompatible with your comprehensive plan. Please complete the form or detach the receipt stub and return it to the applicant for inclusion in their water right application. You will receive notice once the applicant formally submits his or her request to the WRD. The notice will give more information about WRD's water rights process and provide additional comment opportunities. You will have 30 days from the date of the notice to complete the land-use form and return it to the WRD. If no land-use information is received from you within that 30-day period, the WRD may presume the land use associated with the proposed water right is compatible with your comprehensive plan. Your attention to this request for information is greatly appreciated by the Water Resources Department. If you have any questions concerning this form, please contact the WRD's Customer Service Group at 503-986-0801.

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DEC 29 2016

SALEM, OR

WR

Revised 3/4/2010
G-18477

Ground Water/8.

Land Use Information Form



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

Applicant: KC Development Group LLC
First Last

Mailing Address: 63560 Johnson Rd
Bend OR 97703 Daytime Phone: 503 453 0873
City State Zip

A. Land and Location

Please include the following information for all tax lots where water will be diverted (taken from its source), conveyed (transported), and/or used or developed. Applicants for municipal use, or irrigation uses within irrigation districts may substitute existing and proposed service-area boundaries for the tax-lot information requested below.

Township	Range	Section	¼	Tax Lot #	Plan Designation (e.g., Rural Residential/RR-5)	Water to be:	Proposed Land Use:
17S	11E	13		828, 824, 820	RR-10	<input checked="" type="checkbox"/> Diverted <input type="checkbox"/> Conveyed <input checked="" type="checkbox"/> Used	See below
						<input type="checkbox"/> Diverted <input type="checkbox"/> Conveyed <input type="checkbox"/> Used	
						<input type="checkbox"/> Diverted <input type="checkbox"/> Conveyed <input type="checkbox"/> Used	
						<input type="checkbox"/> Diverted <input type="checkbox"/> Conveyed <input type="checkbox"/> Used	

List all counties and cities where water is proposed to be diverted, conveyed, and/or used or developed:

Deschutes County

B. Description of Proposed Use

Type of application to be filed with the Water Resources Department:

- Permit to Use or Store Water Water Right Transfer Permit Amendment or Ground Water Registration Modification
 Limited Water Use License Allocation of Conserved Water Exchange of Water

Source of water: Reservoir/Pond Ground Water Surface Water (name) _____

Estimated quantity of water needed: 124.797 cubic feet per second gallons per minute acre-feet

Intended use of water: Irrigation Commercial Industrial Domestic for _____ household(s)
 Municipal Quasi-Municipal Instream Other See below

Briefly describe:

* 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").

Note to applicant: If the Land Use Information Form cannot be completed while you wait, please have a local government representative sign the receipt at the bottom of the next page and include it with the application filed with the Water Resources Department.

See bottom of Page 3. →

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SALEM, OR

G-18422

DEC 29 2016

For Local Government Use Only

SALEM, OR

The following section must be completed by a planning official from each county and city listed unless the project will be located entirely within the city limits. In that case, only the city planning agency must complete this form. This deals only with the local land-use plan. Do not include approval for activities such as building or grading permits.

Please check the appropriate box below and provide the requested information

- Land uses to be served by the proposed water uses (including proposed construction) are allowed outright or are not regulated by your comprehensive plan. Cite applicable ordinance section(s): _____
- Land uses to be served by the proposed water uses (including proposed construction) involve discretionary land-use approvals as listed in the table below. (Please attach documentation of applicable land-use approvals which have already been obtained. Record of Action/land-use decision and accompanying findings are sufficient.) If approvals have been obtained but all appeal periods have not ended, check "Being pursued."

Land Use Approval Needed (e.g., plan amendments, rezones, conditional-use permits, etc.)	Cite Applicable Plan Policies & Ordinance Section References	Land Use Approval	
		<input type="checkbox"/> Obtained <input type="checkbox"/> Denied	<input type="checkbox"/> Being Pursued <input type="checkbox"/> Not Being Pursued
		<input type="checkbox"/> Obtained <input type="checkbox"/> Denied	<input type="checkbox"/> Being Pursued <input type="checkbox"/> Not Being Pursued
		<input type="checkbox"/> Obtained <input type="checkbox"/> Denied	<input type="checkbox"/> Being Pursued <input type="checkbox"/> Not Being Pursued
		<input type="checkbox"/> Obtained <input type="checkbox"/> Denied	<input type="checkbox"/> Being Pursued <input type="checkbox"/> Not Being Pursued
		<input type="checkbox"/> Obtained <input type="checkbox"/> Denied	<input type="checkbox"/> Being Pursued <input type="checkbox"/> Not Being Pursued

Local governments are invited to express special land-use concerns or make recommendations to the Water Resources Department regarding this proposed use of water below, or on a separate sheet.

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.

Name: Anthony Raguire Title: Senior Planner
 Signature: Anthony Raguire Phone: 541-617-4739 Date: 12-14-16
 Government Entity: Deschutes County

Note to local government representative: Please complete this form or sign the receipt below and return it to the applicant. If you sign the receipt, you will have 30 days from the Water Resources Department's notice date to return the completed Land Use Information Form or WRD may presume the land use associated with the proposed use of water is compatible with local comprehensive plans.

Date _____

(For staff use only)



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

WE ARE RETURNING YOUR APPLICATION FOR THE FOLLOWING REASON(S):

- SECTION 1: _____
- SECTION 2: _____
- SECTION 3: _____
- SECTION 4: _____
- SECTION 5: _____
- SECTION 6: _____
- SECTION 7: _____
- SECTION 8: _____
- SECTION 9: _____
- Land Use Information Form _____
- Provide the legal description of: (1) the property from which the water is to be diverted, (2) any property crossed by the proposed ditch, canal or other work, and (3) any property on which the water is to be used as depicted on the map.
- Fees _____

RECEIVED BY OWRD

DEC 29 2016

SALEM, OR

MAP

- Permanent quality and drawn in ink
- Even map scale not less than 4" = 1 mile (example: 1" = 400 ft, 1" = 1320 ft, etc.)
- North Directional Symbol
- Township, Range, Section, Quarter/Quarter, Tax Lots
- Reference corner on map
- Location of each well, and/or dam if applicable, by reference to a recognized public land survey corner (distances north/south and east/west). Each well must be identified by a unique name and/or number.
- Indicate the area of use by Quarter/Quarter and tax lot clearly identified
- Number of acres per Quarter/Quarter and hatching to indicate area of use if for primary irrigation, supplemental irrigation, or nursery
- Location of main canals, ditches, pipelines or flumes (if well is outside of the area of use)
- Other _____

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BEFORE THE LAND USE BOARD OF APPEALS

OF THE STATE OF OREGON

THOMAS BISHOP, DORBINA BISHOP,
and TRUSTEES OF THE BISHOP
FAMILY TRUST,
Petitioners,

and

02/08/17 at 9:18 LUBA

CENTRAL OREGON LANDWATCH,
Intervenor-Petitioner,

vs.

DESCHUTES COUNTY,
Respondent,

and

KC DEVELOPMENT GROUP, LLC
Intervenor-Respondent.

LUBA Nos. 2017-002 and 2017-003

ORDER

MOTIONS TO INTERVENE

Central Oregon Landwatch moves to intervene on the side of petitioners in LUBA Nos. 2017-002 and 2017-003. There is no opposition to the motion and it is allowed.

KC Development Group, LLC (KCDG), moves to intervene on the side of the county in LUBA Nos. 2017-002 and 2017-003. There is no opposition to the motion and it is allowed.

1 **SUSPENSION**

2 On February 1, 2017, the county and KCDG filed a joint motion to
3 dismiss these consolidated appeals. Respondents request that LUBA suspend
4 all other deadlines in this appeal, pending resolution of the motion to dismiss.
5 We agree with respondents that it is appropriate to suspend all other deadlines
6 in this appeal pending resolution of the motion to dismiss.

7 The other parties shall have the time provided in our rules to respond to
8 the motion to dismiss.

9 Dated this 8th day of February, 2017.

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Tod A. Bassham
Board Member

Certificate of Mailing

I hereby certify that I served the foregoing Order for LUBA No. 2017-002/003 on February 8, 2017, by mailing to said parties or their attorney a true copy thereof contained in a sealed envelope with postage prepaid addressed to said parties or their attorney as follows:

Carol E. Macbeth
Staff Attorney
Central Oregon LandWatch
50 SW Bond Street, Suite 4
Bend, OR 97703

David Doyle
Deschutes County Counsel
1300 NW Wall Street, Suite 205
Bend, OR 97701

Jennifer M. Bragar
Tomasi Salyer Martin
121 SW Morrison Suite 1850
Portland, OR 97204-3141

Ken Katzaroff
Attorney at Law
63560 Johnson Road
Bend, OR 97703

Dated this 8th day of February, 2017.

Kelly Burgess
Paralegal


Kristi Seyfried
Executive Support Specialist

Cc: Ken Katzaroff; harriskimble@aol.com
Subject: Re: Incorrect Statements in Bend Bulletin Article

I appreciate yours and Brianna's integrity.
Scott

On 7/14/2016 2:46 AM, Eric Cadwell wrote:

> Hello neighbors,
>
> You should hear this first from me. The article that appears in the
> Bend Bulletin this morning is partially incorrect. We are certainly
> not dropping our plans for water skiing or developing, and we expect
> the county to restore our property rights that were taken
> retroactively. We have, however, been forced to temporarily suspend
> our contract with TID until the county and OWRD can fix their code.
>
> <http://www.bendbulletin.com/localstate/4501150-151/reservoirs-no-longer-slated-for-storage-and-water>
>
>
> The reporter took some very limited information, misinterpreted it,
> and ran with the story before it had fully matured. Unfortunately,
> this false conclusion will now make me appear dishonest as we move
> forward. I will be happy to share the current status with you all in
> person or over the phone, but there are several moving parts that are
> still unresolved. I'm sorry for any confusion.
>
>
> Thanks,
>
> Eric
>
>
>

--
Brianna Cadwell
bricadwell@gmail.com
(541) 639-5639

STATE OF OREGON
WATER SUPPLY WELL REPORT
(as required by ORS 537.765 & OAR 690-205-0210)

DESC 59909
2/26/2014

WELL I.D. LABEL# L112224
START CARD # 1022074
ORIGINAL LOG #

(1) LAND OWNER
Owner Well I.D. _____
First Name HARRIS Last Name KIMBBLE
Company KC DEVELOPMENT GROUP LLC
Address 63560 JOHNSON RD
City BEND State OR Zip 97701

(2) TYPE OF WORK New Well Deepening Conversion
 Alteration (complete 2a & 10) Abandonment (complete 5a)

(2a) PRE-ALTERATION
Dia + From To Gauge Stl Plstc Wld Thrd
Casing: _____
Material From To Amt sacks/lbs
Seal: _____

(3) DRILL METHOD
 Rotary Air Rotary Mud Cable Auger Cable Mud
 Reverse Rotary Other _____

(4) PROPOSED USE Domestic Irrigation Community
 Industrial/ Commercial Livestock Dewatering
 Thermal Injection Other _____

(5) BORE HOLE CONSTRUCTION Special Standard (Attach copy)
Depth of Completed Well 751.00 ft.
BORE HOLE SEAL sacks/lbs
Dia From To Material From To Amt lbs
12 0 78 Cement 0 78 55 S
8 78 751

How was seal placed: Method A B C D E
 Other _____
Backfill placed from _____ ft. to _____ ft. Material _____
Filter pack from _____ ft. to _____ ft. Material _____ Size _____
Explosives used: Yes Type _____ Amount _____

(5a) ABANDONMENT USING UNHYDRATED BENTONITE
Proposed Amount _____ Actual Amount _____

(6) CASING/LINER
Casing Liner Dia + From To Gauge Stl Plstc Wld Thrd
8 1 78 250
6 1 751 188
Shoe Inside Outside Other Location of shoe(s) _____
Temp casing Yes Dia _____ From _____ To _____

(7) PERFORATIONS/SCREENS
Perforations Method MACHINE
Screens Type _____ Material _____
Perf/ Casing/Screen Dia From To Scrn/slot Slot # of Tele/
Screen Liner Dia From To width length slots pipe size
Perf Liner 6 711 751 .125 3 456

(8) WELL TESTS: Minimum testing time is 1 hour
 Pump Bailor Air Flowing Artesian
Yield gal/min Drawdown Drill stem/Pump depth Duration (hr)
50 _____ 750 1
Temperature 53 °F Lab analysis Yes By _____
Water quality concerns? Yes (describe below) TDS amount
From To Description Amount Units

(9) LOCATION OF WELL (legal description)
County DESCHUTES Twp 17.00 S N/S Range 11.00 E E/W WM
Sec 13 SW 1/4 of the NW 1/4 Tax Lot 823
Tax Map Number _____ Lot _____
Lat _____ " or 44.10525000 DMS or DD
Long _____ " or -121.35875000 DMS or DD
 Street address of well Nearest address
KLIPPEL RD

(10) STATIC WATER LEVEL
Date SWL(psi) + SWL(ft)
Existing Well / Pre-Alteration _____
Completed Well 2/24/2014 _____ 533
Flowing Artesian? Dry Hole?
WATER BEARING ZONES Depth water was first found 635.00
SWL Date From To Est Flow SWL(psi) + SWL(ft)
2/7/2014 635 751 50 _____ 533

(11) WELL LOG Ground Elevation 3505.00

Material	From	To
SAND PUMICE	0	1
GRAVELS COBBLES	1	16
PUMICE	16	35
LAVA BROKEN	35	50
CONGLOMERATE BROWN	50	66
LAVA	66	90
SANDSTONE	90	110
BASALT MEDIUM	110	125
BASALT HARD	125	146
SANDSTONE	146	190
BASALT CLAY SEAMS	190	230
CINDERS	230	258
LAVA CINDERS CAVING	258	315
LAVA FRACTURED	315	426
CINDERS	426	440
LAVA GRAY BROKEN FRACTURED LAYERS	440	524
BASALT CLAY SEAMS BROWN	524	528
BASALT FRACTURED LAYERS WITH CLAY SE	528	751

Date Started 2/18/2014 Complete 2/24/2014
(unbonded) Water Well Constructor Certification
I certify that the work I performed on the construction, deepening, alteration, or abandonment of this well is in compliance with Oregon water supply well construction standards. Materials used and information reported above are true to the best of my knowledge and belief.
License Number 758 Date 2/25/2014
Signed THOMAS R PECK (E-filed)

(bonded) Water Well Constructor Certification
I accept responsibility for the construction, deepening, alteration, or abandonment work performed on this well during the construction dates reported above. All work performed during this time is in compliance with Oregon water supply well construction standards. This report is true to the best of my knowledge and belief.
License Number 1720 Date 2/26/2014
Signed JACK ABBAS (E-filed)
Contact Info (optional) _____

GI-18422

STATE OF OREGON
 COUNTY OF DESCHUTES
 CERTIFICATE OF WATER RIGHT

THIS CERTIFICATE ISSUED TO

KLIPPEL WATER INC.
 19185 BUCK DR
 BEND OR 97701

confirms the right to use the waters of TWO WELLS, in the TUMALO CREEK BASIN, for QUASI-MUNICIPAL USE.

This right was perfected under Permit G-13153. The date of priority is APRIL 3, 1996. The amount of water to which this right is entitled is limited to an amount actually used beneficially, and shall not exceed 0.1 CUBIC FOOT PER SECOND (CFS), being 0.05 CFS as measured at each well.

The period of use is year round.

The wells are located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
17 S	11 E	WM	13	SW SW	WELL #2 - 1220 FEET NORTH AND 990 FEET EAST FROM SW CORNER, SECTION 13
17 S	11 E	WM	13	SW SW	WELL #3 - 1260 FEET NORTH AND 880 FEET EAST FROM SW CORNER, SECTION 13

A description of the place of use is as follows:

QUASI-MUNICIPAL					
Twp	Rng	Mer	Sec	Q-Q	
17 S	11 E	WM	13	SW 1/4 NW 1/4	
17 S	11 E	WM	13	W 1/2 SW 1/4	
17 S	11 E	WM	14	E 1/2 NE 1/4	
17 S	11 E	WM	14	E 1/2 SE 1/4	

Measurement, recording and reporting conditions:

- A. The water user shall maintain the meters or other suitable measuring devices in good working order.
- B. The water user shall allow the watermaster access to the meters or measuring devices; provided however, where the meters or measuring devices are located within a private structure, the watermaster shall request access upon reasonable notice.

NOTICE OF RIGHT TO PETITION FOR RECONSIDERATION OR JUDICIAL REVIEW

This is an order in other than a contested case. This order is subject to judicial review under ORS 183.484 and ORS 536.075. Any petition for judicial review must be filed within the 60-day time period specified by ORS 183.484(2). Pursuant to ORS 183.484, ORS 536.075 and OAR 137-004-0080, you may petition for judicial review and petition the Director for reconsideration of this order. A petition for reconsideration may be granted or denied by the Director, and if no action is taken within 60 days following the date the petition was filed, the petition shall be deemed denied. In addition, under ORS 537.260 any person with an application, permit or water right certificate subsequent in priority may jointly or severally contest the issuance of the certificate within three months after issuance of the certificate.

- C. The Director may require the water user to keep and maintain a record of the amount (volume) of water used and may require the water user to report water use on a periodic schedule as established by the Director. In addition, the Director may require the water user to report general water use information, the periods of water use and the place and nature of use of water under the right. The Director may provide an opportunity for the water user to submit alternative reporting procedures for review and approval.

Use of water under authority of this right may be regulated if analysis of data available after the right is issued discloses that the appropriation will measurably reduce the surface water flows necessary to maintain the free-flowing character of a scenic waterway in quantities necessary for recreation, fish and wildlife in effect as of the priority date of the right or as those quantities may be subsequently reduced.

If substantial interference with a senior water right occurs due to withdrawal of water from any wells listed on this right, then use of water from the wells shall be discontinued or reduced and/or the schedule of withdrawal shall be regulated until or unless the Department approves or implements an alternative administrative action to mitigate the interference. The Department encourages junior and senior appropriators to jointly develop plans to mitigate interference.

The works shall be equipped with a usable access port, and may also include an air line and pressure gauge to determine the water level elevation in the well at all times.

The Director may require water level or pump test results every ten years.

Failure to comply with any of the provisions of this right may result in action including, but not limited to, restrictions on the use, civil penalties, or cancellation of the right.

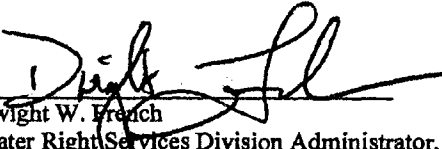
This right is for the beneficial use of water without waste. The water user is advised that new regulations may require the use of best practical technologies or conservation practices to achieve this end.

By law, the land use associated with this water use must be in compliance with statewide land-use goals and any local acknowledged land-use plan.

The use of water shall be limited when it interferes with any prior surface or ground water rights.

The right to the use of the water for the above purpose is restricted to beneficial use on the lands or place of use described; however, water may be applied to lands which are not specifically described above, provided the holder of this right complies with ORS 540.510(3).

Issued JUL 24 2014


Dwight W. French
Water Right Services Division Administrator, for
Director
Oregon Water Resources Department

1" = 1320'



RECEIVED BY OWRD

FEB 12 2013

SALEM, OR

DESCHUTES COUNTY, OREGON

T 17 S, R 11 E, W.M.

SECTION 13 SWNW

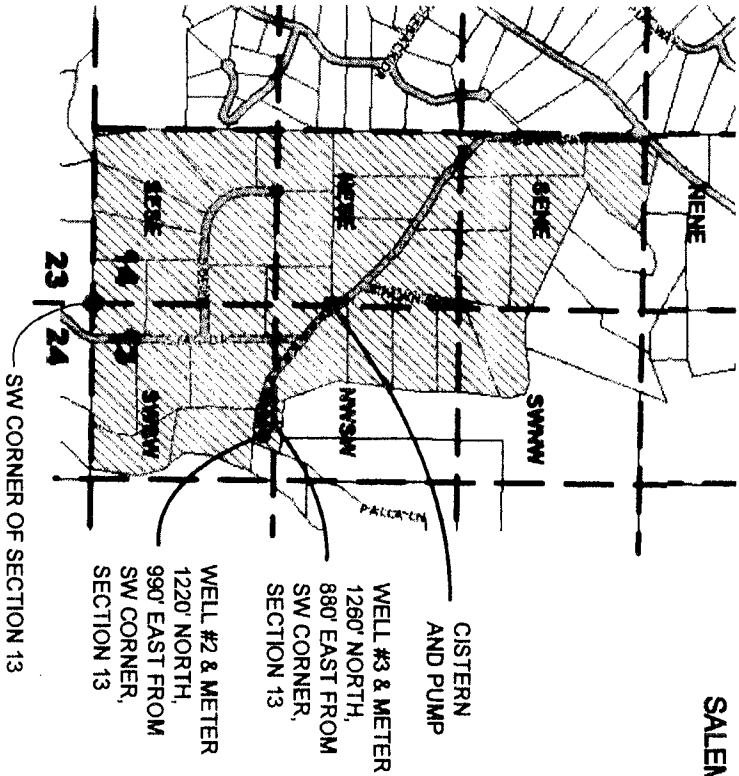
NWNSW
SWSW

SECTION 14 NENE

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APPLICATION G-14288

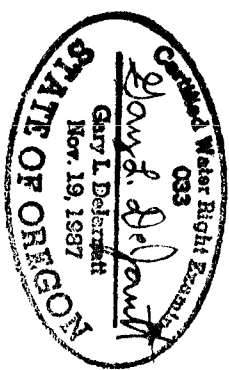
PERMIT G-13153



 POU - QUASI-MUNICIPAL
 QUARTER QUARTER BOUNDARIES
 PIPELINE

NOTE: THIS MAP IS NOT INTENDED TO PROVIDE LEGAL DIMENSIONS OR LOCATIONS OF PROPERTY OWNERSHIP LINES.

RENEWAL DATE: 12-31-2013



TITLE

CLAIM OF BENEFICIAL USE MAP for KLIPPEL WATER, INC.

WATER RIGHT SERVICES, LLC WWW.OREGONWATER.US
 P.O. BOX 1830, BEND OR 97709 (541) 389-2837
 DATE: FEB 1, 2013 JOHNSHORT@USA.COM JOB # 13003

1" = 1320'



RECEIVED BY OWRD

FEB 12 2013


Desc 579989
PC D & well SALEM, OR





DESCHUTES COUNTY, OREGON	
T 17 S, R 11 E, W.M.	
SECTION 13	SWNW NMSW SWSW
SECTION 14	NENE SENE NESE SESE
APPLICATION G-14288	PERMIT G-13153



RENEWAL DATE: 12-31-2013

 POU - QUASI-MUNICIPAL

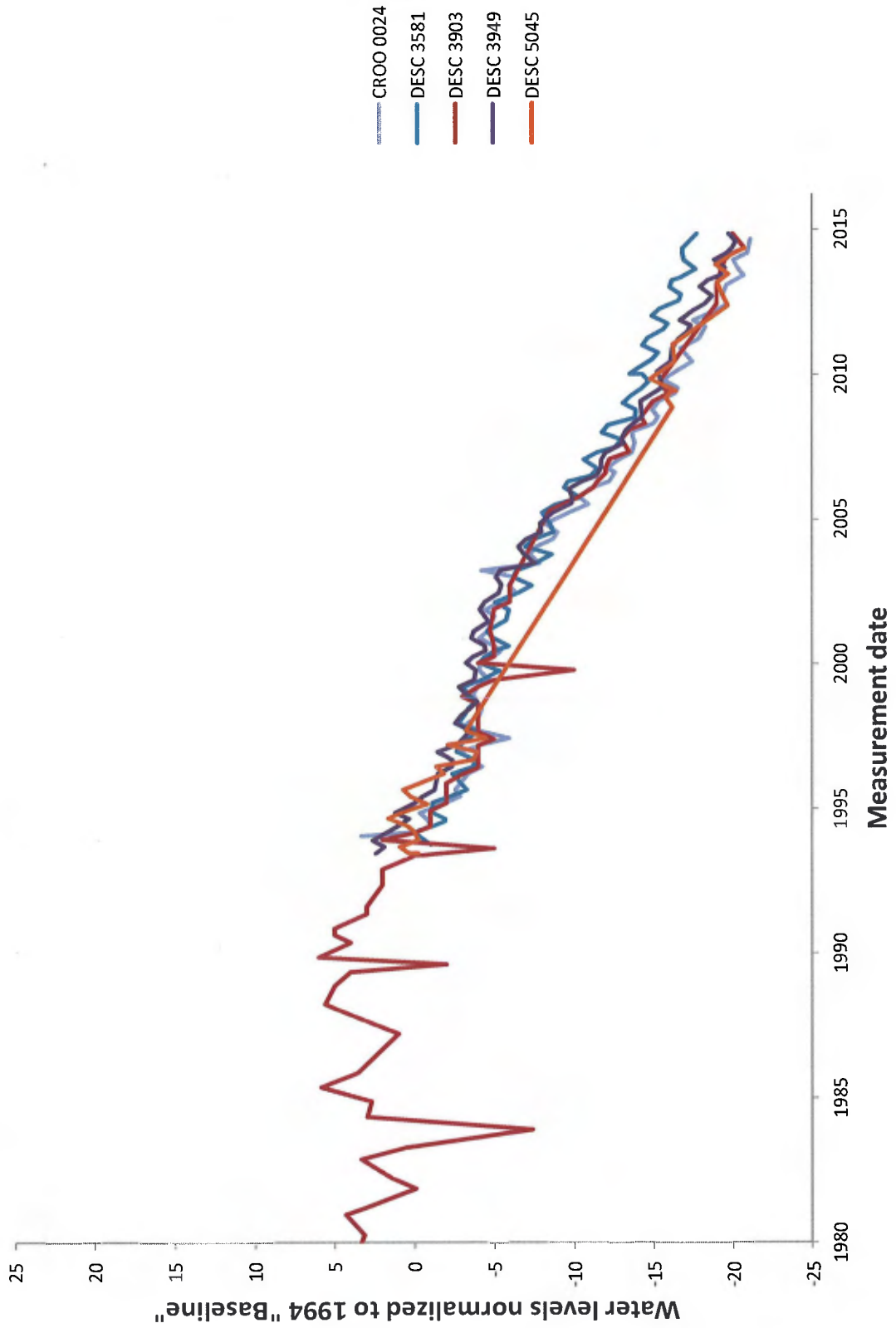
 QUARTER QUARTER BOUNDARIES

 PIPELINE

NOTE: THIS MAP IS NOT INTENDED TO PROVIDE LEGAL DIMENSIONS OR LOCATIONS OF PROPERTY OWNERSHIP LINES.

TITLE	
CLAIM OF BENEFICIAL USE MAP for KLIPPEL WATER, INC.	
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P.O. BOX 1830, BEND OR 97709 (541) 389-2837	
DATE	JOB #
FEB 1, 2013	JOHNSHORT@USA.COM 13003

Select Observation Wells in the Upper Deschutes Basin Central Tri-County Area



PUBLIC INTEREST REVIEW FOR GROUND WATER APPLICATIONS

TO: Water Rights Section Date 4/16/2015
 FROM: Ground Water/Hydrology Section K. Lite
 SUBJECT: Application G- 18028 Reviewer's Name
 Supersedes review of _____ Date of Review(s)

PUBLIC INTEREST PRESUMPTION; GROUNDWATER

OAR 690-310-130 (1) *The Department shall presume that a proposed groundwater use will ensure the preservation of the public welfare, safety and health as described in ORS 537.525. Department staff review ground water applications under OAR 690-310-140 to determine whether the presumption is established. OAR 690-310-140 allows the proposed use be modified or conditioned to meet the presumption criteria. This review is based upon available information and agency policies in place at the time of evaluation.*

A. GENERAL INFORMATION: Applicant's Name: Cascade Academy County: Deschutes

A1. Applicant(s) seek(s) 0.11 cfs from 1 well(s) in the Deschutes Basin,
Deschutes subbasin Quad Map: Tumalo

A2. Proposed use: Commercial and Irrigation Seasonality: Comm: 9/1-6/30; Irr: 4/1-10/31

A3. Well and aquifer data (attach and number logs for existing wells; mark proposed wells as such under logid):

Well	Logid	Applicant's Well #	Proposed Aquifer*	Proposed Rate(cfs)	Location (T/R-S QQ-Q)	Location, metes and bounds, e.g. 2250' N, 1200' E fr NW cor S 36
1	Desc 59549	1	Deschutes Fm	0.11	17S/12E-6ACC	625' N, 620' E fr C1/4 cor S6
2						
3						
4						
5						

* Alluvium, CRB, Bedrock

Well	Well Elev ft msl	First Water ft bls	SWL ft bls	SWL Date	Well Depth (ft)	Seal Interval (ft)	Casing Intervals (ft)	Liner Intervals (ft)	Perforations Or Screens (ft)	Well Yield (gpm)	Draw Down (ft)	Test Type
1	3220	350	510	8/9/2012	676	0-498	+2-498	476-676	636-676	100		A

Use data from application for proposed wells.

A4. **Comments:** Well is constructed into water bearing zones within the Deschutes Fm. Ground water flow is towards the north with the nearest likely discharge area (Deschutes river) about 15.0 miles distance. Water level in the well is below the elevation of the nearest surface water source (also Deschutes river).

A5. **Provisions of the Deschutes** _____ Basin rules relative to the development, classification and/or management of ground water hydraulically connected to surface water **are**, or **are not**, activated by this application. (Not all basin rules contain such provisions.)
 Comments: Within USGS Study Area Boundary.

A6. Well(s) # _____, _____, _____, _____, _____, tap(s) an aquifer limited by an administrative restriction.
 Name of administrative area: _____
 Comments: _____

B. GROUND WATER AVAILABILITY CONSIDERATIONS, OAR 690-310-130, 400-010, 410-0070

B1. Based upon available data, I have determined that ground water* for the proposed use:

- a. is over appropriated, is not over appropriated, or cannot be determined to be over appropriated during any period of the proposed use. * This finding is limited to the ground water portion of the over-appropriation determination as prescribed in OAR 690-310-130;
- b. will not or will likely be available in the amounts requested without injury to prior water rights. * This finding is limited to the ground water portion of the injury determination as prescribed in OAR 690-310-130;
- c. will not or will likely to be available within the capacity of the ground water resource; or
- d. will, if properly conditioned, avoid injury to existing ground water rights or to the ground water resource:
 - i. The permit should contain condition #(s) 7B;
 - ii. The permit should be conditioned as indicated in item 2 below.
 - iii. The permit should contain special condition(s) as indicated in item 3 below;

- B2. a. Condition to allow ground water production from no deeper than _____ ft. below land surface;
- b. Condition to allow ground water production from no shallower than _____ ft. below land surface;
- c. Condition to allow ground water production only from the _____ ground water reservoir between approximately _____ ft. and _____ ft. below land surface;
- d. Well reconstruction is necessary to accomplish one or more of the above conditions. The problems that are likely to occur with this use and without reconstructing are cited below. Without reconstruction, I recommend withholding issuance of the permit until evidence of well reconstruction is filed with the Department and approved by the Ground Water Section.

Describe injury –as related to water availability– that is likely to occur without well reconstruction (interference w/ senior water rights, not within the capacity of the resource, etc): _____

B3. Ground water availability remarks: The nearest state observation well is state obs well 1317 (DESC 3581), about 9.6 miles to the north-northeast. It has been monitored periodically since 1993. State observation well 1317 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.

C. GROUND WATER/SURFACE WATER CONSIDERATIONS, OAR 690-09-040

C1. 690-09-040 (1): Evaluation of aquifer confinement:

Well	Aquifer or Proposed Aquifer	Confined	Unconfined
		<input type="checkbox"/>	<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>

Basis for aquifer confinement evaluation: _____

C2. 690-09-040 (2) (3): Evaluation of distance to, and hydraulic connection with, surface water sources. All wells located a horizontal distance less than ¼ mile from a surface water source that produce water from an unconfined aquifer shall be assumed to be hydraulically connected to the surface water source. Include in this table any streams located beyond one mile that are evaluated for PSI.

Well	SW #	Surface Water Name	GW Elev ft msl	SW Elev ft msl	Distance (ft)	Hydraulically Connected?			Potential for Subst. Interfer. Assumed?	
						YES	NO	ASSUMED	YES	NO
						<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
						<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
						<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
						<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
						<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
						<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
						<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
						<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
						<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Basis for aquifer hydraulic connection evaluation: _____

Water Availability Basin the well(s) are located within: _____

C3a. 690-09-040 (4): Evaluation of stream impacts for each well that has been determined or assumed to be hydraulically connected and less than 1 mile from a surface water source. Limit evaluation to instream rights and minimum stream flows that are pertinent to that surface water source, and not lower SW sources to which the stream under evaluation is tributary. Compare the requested rate against the 1% of 80% natural flow for the pertinent Water Availability Basin (WAB). If Q is not distributed by well, use full rate for each well. Any checked box indicates the well is assumed to have the potential to cause PSI.

Well	SW #	Well < ¼ mile?	Qw > 5 cfs?	Instream Water Right ID	Instream Water Right Q (cfs)	Qw > 1% ISWR?	80% Natural Flow (cfs)	Qw > 1% of 80% Natural Flow?	Interference @ 30 days (%)	Potential for Subst. Interfer. Assumed?
		<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>
		<input type="checkbox"/>	<input type="checkbox"/>			<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>

C3b. **690-09-040 (4):** Evaluation of stream impacts by total appropriation for all wells determined or assumed to be hydraulically connected and less than 1 mile from a surface water source. Complete only if Q is distributed among wells. Otherwise same evaluation and limitations apply as in C3a above.

SW #	Qw > 5 cfs?	Instream Water Right ID	Instream Water Right Q (cfs)	Qw > 1% ISWR?	80% Natural Flow (cfs)	Qw > 1% of 80% Natural Flow?	Interference @ 30 days (%)	Potential for Subst. Interfer. Assumed?
	<input type="checkbox"/>			<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>
	<input type="checkbox"/>			<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>
	<input type="checkbox"/>			<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>
	<input type="checkbox"/>			<input type="checkbox"/>		<input type="checkbox"/>		<input type="checkbox"/>

Comments: _____

C4a. **690-09-040 (5):** Estimated impacts on hydraulically connected surface water sources greater than one mile as a percentage of the proposed pumping rate. Limit evaluation to the effects that will occur up to one year after pumping begins. This table encompasses the considerations required by 09-040 (5)(a), (b), (c) and (d), which are not included on this form. Use additional sheets if calculated flows from more than one WAB are required.

Non-Distributed Wells													
Well	SW#	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
		%	%	%	%	%	%	%	%	%	%	%	%
Well Q as CFS													
Interference CFS													
		%	%	%	%	%	%	%	%	%	%	%	%
Well Q as CFS													
Interference CFS													
		%	%	%	%	%	%	%	%	%	%	%	%
Well Q as CFS													
Interference CFS													
		%	%	%	%	%	%	%	%	%	%	%	%
Well Q as CFS													
Interference CFS													
		%	%	%	%	%	%	%	%	%	%	%	%
Well Q as CFS													
Interference CFS													
		%	%	%	%	%	%	%	%	%	%	%	%
Well Q as CFS													
Interference CFS													
		%	%	%	%	%	%	%	%	%	%	%	%
(A) = Total Interf.													
(B) = 80 % Nat. Q													
(C) = 1 % Nat. Q													
(D) = (A) > (C)		<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
(E) = (A / B) x 100		%	%	%	%	%	%	%	%	%	%	%	%

(A) = total interference as CFS; (B) = WAB calculated natural flow at 80% exceed. as CFS; (C) = 1% of calculated natural flow at 80% exceed. as CFS; (D) = highlight the checkmark for each month where (A) is greater than (C); (E) = total interference divided by 80% flow as percentage.

D. WELL CONSTRUCTION, OAR 690-200

D1. Well #: 1 Logid: Desc 59549

D2. **THE WELL does not meet current well construction standards based upon:**

- a. review of the well log;
- b. field inspection by _____;
- c. report of CWRE _____;
- d. other: (specify) _____

D3. **THE WELL construction deficiency:**

- a. constitutes a health threat under Division 200 rules;
- b. commingles water from more than one ground water reservoir;
- c. permits the loss of artesian head;
- d. permits the de-watering of one or more ground water reservoirs;
- e. other: (specify) _____

D4. **THE WELL construction deficiency is described as follows:** _____

- D5. **THE WELL**
- a. was, or was not constructed according to the standards in effect at the time of original construction or most recent modification.
 - b. I don't know if it met standards at the time of construction.

D6. **Route to the Enforcement Section.** I recommend withholding issuance of the permit until evidence of well reconstruction is filed with the Department and approved by the Enforcement Section and the Ground Water Section.

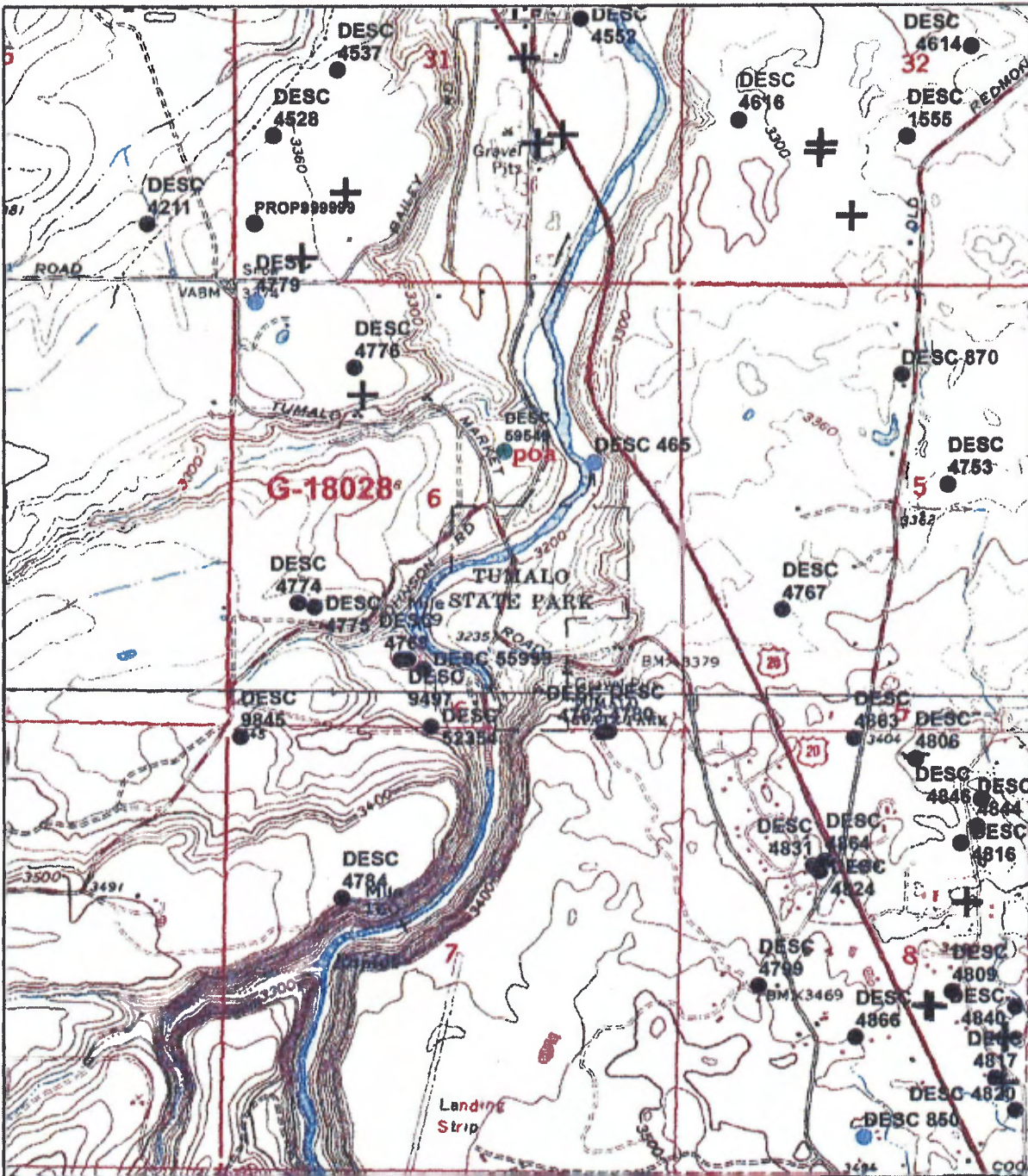
THIS SECTION TO BE COMPLETED BY ENFORCEMENT PERSONNEL

D7. Well construction deficiency has been corrected by the following actions: _____

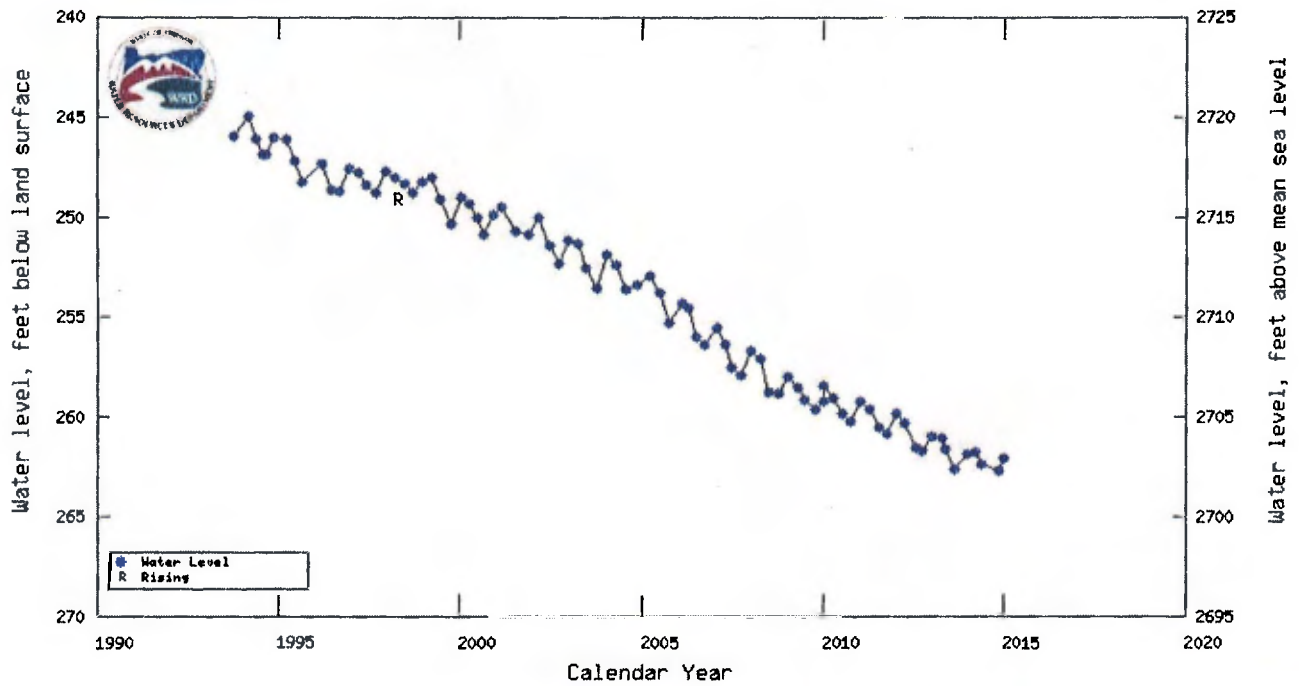
_____, 200_____
(Enforcement Section Signature)

D8. **Route to Water Rights Section (attach well reconstruction logs to this page).**

G-18028: Tumalo and Bend Quadrangles



Oregon Water Resources Department (OWRD) Well Location	15.00S/12.00E-23baa
OWRD Logid	DESC 3581
OWRD Well Tag (Well ID)	----
OWRD State Observation Well Number	1317
Total well depth (feet below land surface)	303
Land surface elevation (feet above mean sea level)	2965
Primary use of well	DOMESTIC
Primary aquifer system	----





Oregon

John A. Kitzhaber, M.D., Governor

Department of Fish and Wildlife

Eastern Region
61374 Parrell Road
Bend, OR 97702
(541) 388-6363
FAX (541) 388-6281

Ben Mundie, Reclamationist
Department of Geology and Mineral Industries
Mineral Land Regulation and Reclamation
229 Broadalbin Street SW
Albany, OR 97321-2246

January 30, 2015

Re: DOGAMI ID No. 09-0079

Dear Mr. Mundie,

DOGAMI has received an application for an operating permit from KC Development Group LLC, for an excavation and aggregate crushing operation at Klippel Acres Mining Pit in Deschutes County.

Oregon Department of Fish and Wildlife (ODFW) is opposed to DOGAMI issuing a retroactive permit to KC Development Group LLC for the following reasons:

- 1) The operation is located within a Wildlife Area (WA) Combining Zone (Tumalo Winter Range) as described in Deschutes County's Comprehensive Plan, Chapter 18.88.
- 2) ODFW has information that the developer conducted operations during the winter range closure period, from December 1 to March 31.
- 3) The operation has resulted in a loss of native wildlife habitat.
- 4) Deer migration corridors have been disrupted by the presence of two large, linear, lined ponds which now hinder east and west movements of deer.
- 5) The two ponds were built near each other, with only a narrow strip of land between them, greatly constricting deer passage.
- 6) The banks of the ponds are lined, steep and the surrounding area is covered with gravel; there is no vegetation along the ponds' edges that would provide browse, forage or cover to benefit wildlife.
- 7) Upland areas have been de-nuded and now consist of excavated rock which has no habitat value.

Based on the above listed reasons, ODFW does not recommend issuing a retroactive operational permit.

Thank you for the opportunity to comment on this application.

Sincerely,

Corey Heath, Deschutes District Wildlife Biologist

cc: Nancy Breuner, Deschutes Habitat Biologist

Exhibit 36
Page 1 of 1

Herd of 41 elk die after falling through ice in east Oregon



A herd of 41 elk died after falling through the ice at the Brownlee Reservoir on Tuesday, Dec. 27, 2016. (Bruce Ely/Oregonian file photo)



By **Samantha Matsumoto**
[Email the author](#)

on December 27, 2016 at 6:43 PM, updated December 27, 2016 at 7:09 PM

A herd of 41 elk died Tuesday morning after the animals fell through the ice at the Brownlee Reservoir near Richland, according to the Oregon Department of Fish and Wildlife.

The elk fell through the ice at the Powder River arm of the reservoir, department spokeswoman Michelle Dennehy said.

The herd tried to cross the reservoir from the north side at about 9 a.m., Dennehy said. The ice broke in four places as the elk crossed, she said.

Herds of elk often cross the reservoir at the Powder River arm, but conditions were different when the herd crossed Tuesday, Dennehy said. Because of this, the elk fell through the ice, she said.

Fish and wildlife employees drove to the area to try to save the elk or salvage their bodies for meat, but they could do neither, Dennehy said. By the time employees got to the area, only four elk were still alive, Dennehy said.

Fish and wildlife department officials called the elk's deaths a "sad situation" in a Facebook post. They added that the cold weather in eastern Oregon "may be tough on critters this winter."

Though the extra snowpack and moisture is good for wildlife in the long run, more animals may die this winter because of the colder weather and harsher conditions, Dennehy said.

However, this winter is more typical than the past few in eastern Oregon, which has suffered a drought in recent years, she said.

Baker City had its **coldest Christmas on record this year**, with temperatures dropping as low as 6 degrees below zero. The town also saw more than seven inches of snowfall on Christmas Day, breaking records set in 1948, according to **the Baker City Herald**.

http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/12/herd_of_41_elk_di... 12/28/2016

-- Samantha Matsumoto

smatsumoto@oregonian.com

@SMatsumoto55

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Ad Choices



Oregon

Kate Brown, Governor

Water Resources Department
North Mall Office Building
725 Summer St NE, Suite A
Salem, OR 97301
Phone (503) 986-0900
Fax (503) 986-0904
www.wrd.state.or.us

March 3, 2017

KC DEVELOPMENT GROUP LLC
63560 JOHNSON RD
BEND, OR 97703

Reference: LL-1689

We received your request on March 2, 2017 for a limited license to use 50 GPM UP TO 124.790 ACRE-FEET from A WELL a tributary of DESCHUTES R for SHORT TERM AESTHETIC AND FIRE PROTECTION. The required fee has been paid using Schwabe Williamson and Wyatt's customer account in the amount of \$280.00.

As required by OAR 690-340-030, a description of this license request will be included in the Department's weekly public notice. A-14 day public comment period will begin at that time. Any substantial public interest issues raised during the comment period must be addressed before your application is processed further.

At this time, a preliminary review of your application has been completed. As a result of that review the Department has concluded that your proposed water use may occur in an area that may affect the habitat of sensitive, threatened or endangered fish species. This determination is based upon information provided by Oregon Department of Fish and Wildlife, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service or the appropriate Indian tribes.

This letter will serve as your notice (required by OAR 690-33-330 (1)) that based on this preliminary determination, your proposed use may affect the habitat of sensitive, threatened or endangered fish species and the application may be conditioned or denied.

We are also required to notify an interagency review team comprised of staff from the Departments of Agriculture, Environmental Quality, Fish and Wildlife, Water Resources and other state natural resource agencies as appropriate.

The interagency review team will be convened, as needed; to review applications that the Department determines may affect sensitive, threatened or endangered fish species. The interagency review team, if possible, will attempt to condition the proposed use, if necessary, to ensure there is no loss of essential habitat as identified by ODFW.

If the interagency review team cannot condition the proposed use to ensure there is no loss of essential habitat as identified by ODFW, the interagency review team may recommend denial of the application unless it concludes that the proposed use would not harm the species.

If you need further assistance, contact Jerry Sauter in the Water Rights Section at the address listed above or phone 503.986.0817.

Enclosure

cc: File
Watermaster #11
BRETT HODGSON, ODFW
SMITA MEHTA, DEQ\



GARVEY
SCHUBERT
BARER

Thomas and Dorbina Bishop Appeal

Deschutes County LUCS Decision
Appeal 247-14-000238-PS/274-A

January 29, 2015

Anchorage Beijing New York Portland Seattle Washington, D.C.

www.GSBLaw.com

Location of KCDG Reservoirs near Tumalo Butte, west of the City of Bend



KCDG Property generally shown in red rectangle

“A” denotes Johnson Road

Location of the Recreational Reservoirs near Johnson Road west of Bend

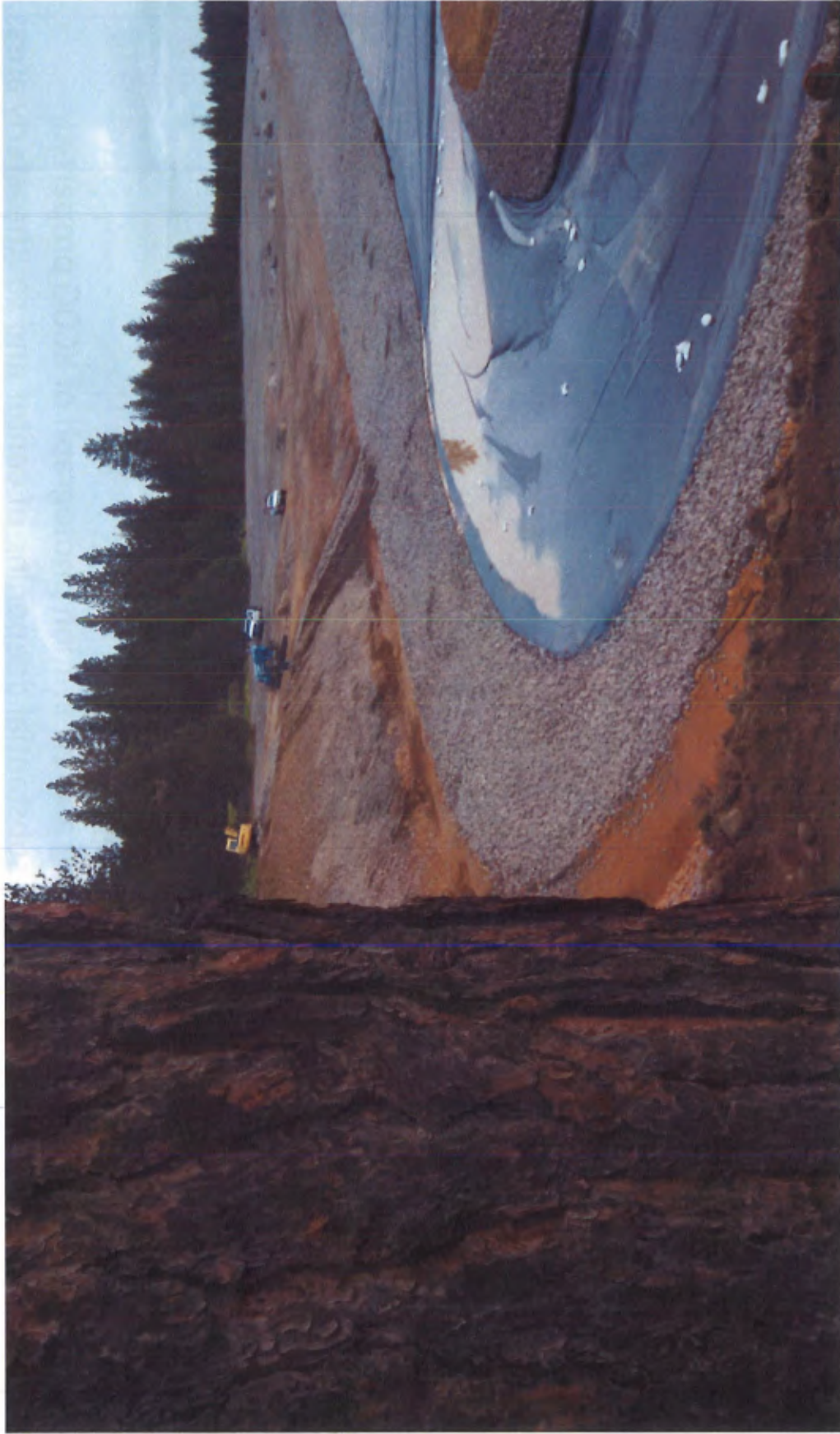




May 5, 2007 - Photographs of KCDG Property, two years after the site had been reclaimed from surface mining activity. Additional vegetation and forage grew between 2007 and 2014.



May 14, 2014 Surface mining and excavation photograph of KCDG property.
Complete re-contouring of site and substantial deepening of center and southeasterly areas.



Steep sloped construction of the water ski lake on June 27, 2014



July 20, 2014 photograph of water ski lake, partially filled showing uncovered liner. And rock securing and covering upper portions of the liner.

This unnatural, unattractive, intense recreational facility is now an **area used by man**, instead of the reclaimed mining site approved in 1992, where the mining applicant was required to return the site to native vegetation as part of the east/west migratory route for mule deer.



Water skiing and recreational use of the reservoirs – ongoing since the reservoirs were filled with water beginning in June 2014.



Residential cluster development becoming a reality



By reconfiguring the lot lines coupled with the LUCS for the water transfer, residential cluster development was all but guaranteed.

Plan of KCDG Cluster Development published since 2011

Published information states, “Kimble Ranch is a proposed Planned Unit Development that is expected to be the most unique and exclusive neighborhood in Bend, Oregon... and is just eight minutes from the downtown core. The proposed lots will be a minimum of two acres in size and will either front on the proposed lake or sit high atop the rim rock overlooking Tumalo Creek. Kimble Ranch will be a gated community with a focus on outdoor recreation...”

Development will commence with construction of a 2100 foot long Water ski lake... A sixteen to eighteen lot homeowners association will be formed...”

The finished development will look Like this example from Bakersfield, CA – a cluster of homes surrounding The water ski lake.



Don't Let the Developer Piecemeal this Project in a way that compromises wildlife area protections

Under the cluster development criteria, DCC 18.128.200.B.3.b prohibits intense recreational uses in the WA zone:

In the Wildlife Area Combining Zone, in addition to compliance with the WA zone development restrictions, uses and activities must be consistent with the required Wildlife Management Plan. The Plan shall be approved if it proposes all of the following in the required open space area:

* * *

Prohibits golf courses, tennis courts, swimming pools, marinas, ski runs or other developed recreational uses of similar intensity. Low intensity recreational uses such as properly located bicycle, equestrian and pedestrian trails, wildlife viewing areas and fitness courses may be permitted



Surface Mining without a Conditional Use Permit

- Preemption
- Excavation for new reservoirs
- Comprehensive Plan Matters



Earthwork Volumes for the Water Ski Lake

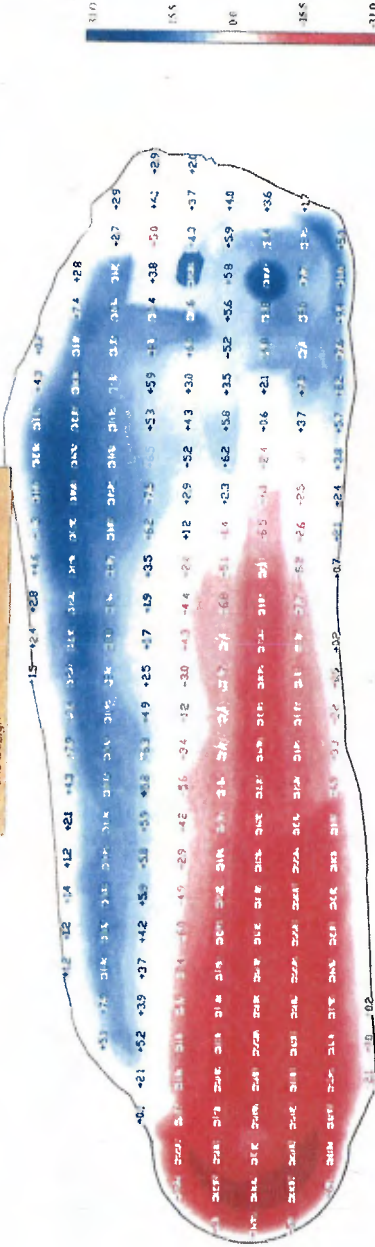
Multi-Use Ponds
 Earthwork Volumes South Pond
 Existing Ground
 VS
 Finish Grade Plus 1'

SOUTH POND RAISED 1' VOLUME EXHIBIT
 Cut: 25984.00 CY
 Fill: 167998.00 CY
 Export: 91982 CY

With 138536 CY available, we need to remove the aggregate & dirt from this quantity to produce a net export for the North Pond design. See below:

Available Material: 51982 CY
 Dirt: - 4150 CY
 River Rock: - 4072 CY
 Agg. for Roads & Stockpile: - 13880 CY
 Stockpile: - 18200 CY

Net Export for Water Pond Design: 51760 CY



RECEIVED
 M.I.R.R.
 OCT - 8 2014

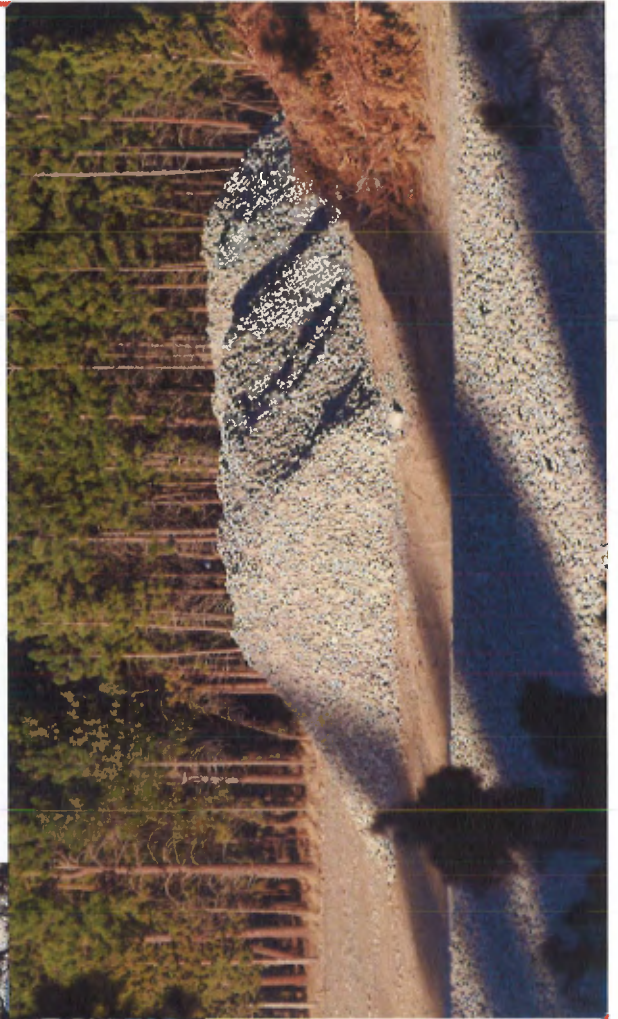


Volume: 138536 CY
 Area of Cut: 57,057.93 SF
 Area of Fill: 128,635.53 SF
 Average Cut Depth: 2.39 feet
 Average Fill Depth: 1.35 feet

Volume Change to Road: 51982 CY
 Volume Change to Stockpile: 18200 CY
 Cut (CY) / Area (Acres): 505.69
 Fill (CY) / Area (Acres): 822.05



Three separate large overburden piles left onsite.



CONCLUSION

The County must enforce its Comprehensive Plan and Code to ensure that the appropriate conditional use approval will be issued and can be attained – for cluster development, recreational uses, and surface mining – before a LUCS can issue.

QUESTIONS?