



Community Development Department

Planning Division Building Safety Division Environmental Soils Division

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MEMORANDUM

DATE: December 30, 2014

TO: Board of County Commissioners

FROM: Anthony Raguine, Senior Planner

RE: Tumalo Irrigation District Land Use Compatibility Statement Appeal of Hearings Officer Decision (File Nos. 247-14-000238-PS, 247-14-000274-A, 247-14-000452-A)

Before the Board of County Commissioners (Board) are two appeals. One appeal was filed by Tumalo Irrigation District (TID). The other appeal was filed by Thomas and Dorbina Bishop. The appeals were submitted in response to a Deschutes County Hearings Officer's decision reversing a Planning Division decision to issue an affirmative Land Use Compatibility Statement (LUCS). Both appellants request the Board formally reconsider the Hearings Officer's decision.

BACKGROUND

TID submitted a LUCS to the Planning Division to allow an intra-district transfer of 108 acre-feet of Tumalo Creek water from Tumalo Reservoir to a pair of newly-constructed reservoirs at the former Klippel Surface Mine (SM 294). The subject property is owned by KC Development Group (KCDG). The Planning Division issued the LUCS on August 13, 2014, finding the water transfer involves the operation, maintenance and piping of an existing irrigation system operated by an Irrigation district, which is a use permitted outright under Deschutes County Code (DCC) 18.60.020.

On August 22, 2014, Thomas and Dorbina Bishop, neighbors to the subject property, appealed the Planning Division decision to issue the LUCS. A public hearing before the Deschutes County Hearings Officer was held on October 7, 2014. After significant public testimony and evidence submittal, the Hearings Officer reversed the Planning Division's issuance of the LUCS for the following reasons:

1. The Hearings Officer found that the activity conducted on the subject property to create the two reservoirs constituted surface mining in conjunction with the operation and maintenance of irrigation systems operated by an irrigation district, which is a use that requires conditional use permit approval under DCC 18.60.030(W).
2. The Hearings Officer found that the southern reservoir was specifically designed for water skiing, with undisputed evidence in the record that water skiing has occurred on

the southern reservoir. The Hearings Officer further found that the southern reservoir is a recreation-oriented facility requiring large acreage, which is a use that requires conditional use permit approval under DCC 18.60.030(G).

3. For these reasons, the Hearings Officer found that the Planning Division incorrectly categorized the use on the LUCS, and erred in issuing the LUCS without further review.

On December 23, 2014, TID appealed the Hearings Officer decision. On December 29, 2014, the Bishops appealed the Hearings Officer decision.

APPEAL

Both TID and the Bishops submitted letters describing several assignments of error. These errors are summarized below.

1. Is the LUCS a development action or a land use action? TID argues the LUCS is a development action appealable only by TID. The Bishops argue the exercise of discretion by the Planning Director makes the LUCS a land use action.
2. The proposed water transfer is a use permitted outright, not a surface mining activity, which requires conditional use permit approval.
3. The site activity to create the reservoirs was either specifically allowed under temporary use permit TU-14-8¹, or excluded from the definition of surface mining under DCC 18.04.030².
4. The new reservoirs are not structures as defined under DCC 18.04.030.
5. The southern reservoir is not a recreation-oriented facility requiring a conditional use permit.
6. The Hearings Officer determined that Exhibits W and X of the applicant's final argument could not be considered because they were received past the deadline for receipt. Similarly, the Hearings Officer should have specifically excluded the Oregon Department of Fish and Wildlife letter (October 31, 2014) which was received three days after the close of the initial evidentiary round of submittals.
7. The Hearings Officer erred in excluding certain exhibits from the record as "new evidence".
8. The Hearings Officer erred by not requiring conditional use permit approval for a cluster development.
9. The LUCS should not have been processed because the property owner, KCDG, did not sign the LUCS application.

¹ TU-14-8 allowed rock crushing on-site for the maintenance of private roadways and landscaping.

² DCC 18.040.030(B)2) excludes from the definition of surface mining, "Excavation and crushing of sand, gravel, clay rock or other similar materials conducted by a landowner...for the primary purpose of construction, reconstruction or maintenance of access roads...and excavation or grading operations in the process of...on-site road construction and other construction..."

10. Exhibit J of TID's November 20, 2014 submittal should be stricken from the record as new evidence.

The appellants requests *de novo* review. If the Board decides to hear the appeal, the review shall be on the record unless the Board decides to hear the appeal *de novo* because it finds the substantial rights of the parties would be significantly prejudiced without *de novo* review and it does not appear that the request is necessitated by failure of the appellant to present evidence that was available at the time of the previous review; or whether in its sole judgment a *de novo* hearing is necessary to fully and properly evaluate a significant policy issue relevant to the proposed land use action.³ At its discretion, the Board may determine that it will limit the issues on appeal to those listed in the notice of appeal or to one or more specific issues from among those listed on the notice of appeal.⁴

DECLINING REVIEW

If the Board decides that the Hearings Officer's decision shall be the final decision of the county, then the Board shall not hear the appeal and the party appealing may continue the appeal as provided by law. The decision on the land use application becomes final upon the mailing of the Board's decision to decline review. In determining whether to hear an appeal, the Board may consider only:

1. The record developed before the Hearings Officer;
2. The notice of appeal; and
3. Recommendations of staff⁵

STAFF RECOMMENDATION

The Hearings Officer's decision provides an analysis of code provisions in light of specific legislative history. The Hearings Officer's method of analysis and conclusions were not presented by any parties, and are essentially "new" to the record. Staff believes the public should be given an opportunity to weigh in on the decision. Additionally, while staff concurs with the Hearings Officer's code interpretation, it is the Board's code interpretation that will be given deference should the county's decision be appealed to LUBA. Finally, the LUCS decision and subsequent appeal to the Hearings Officer has generated significant public interest. For these reasons, staff recommends that the Board hear this matter. Staff also recommends that this matter be heard *de novo*.

Attachments:

1. Notice of Decision on the LUCS (247-14-000238-PS)
2. Hearings Officer decision on the LUCS
3. TID appeal letter
4. Bishop appeal

³ DCC 22.32.032.0247(B)(2)(c) and (d)

⁴ DCC 22.32.027(B)(4)

⁵ DCC 22.32.035(B) and (D)



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NOTICE OF DECISION

FILE NUMBER: 247-14-000238-PS

APPLICANT: Tumalo Irrigation District
64697 Cook Avenue
Bend, OR 97701

OWNER: KC Development Group, LLC
63560 Johnson Road
Bend, OR 97701

REQUEST: Land Use Compatibility Statement Permit Sign-Off (PS) to transfer in place 108 acre feet of Tumalo Creek water from Tumalo Reservoir to Klippel Acres Mining Pit.

STAFF CONTACT: Nick Lelack, Community Development Director

I. APPLICABLE CRITERIA:

Title 22 of the Deschutes County Code, Development Procedures Ordinance
Chapter 22.16 Development Action Procedures

Title 18 of the Deschutes County Code, the County Zoning Ordinance:
Chapter 18.60, Rural Residential Zone District
Chapter 18.88, Wildlife Area Combining Zone
Chapter 18.120, Exceptions

II. BASIC FINDINGS:

- A. LOCATION:** The subject property is located at 63560 Johnson Road, Bend; and is further identified on County Assessor's Map 17-11-13 as Tax Lots 828 and 824.
- B. ZONING:** The subject property is zoned Rural Residential and is within the Wildlife Area Combining Zone.
- C. PROPOSAL:** Tumalo Irrigation District (TID) proposes to move its Regulation Pond storage from its current in-district storage at Tumalo Reservoir to Klippel Acres Mining

Pit. The new site will be upstream and located in a line storage facility to prevent leakage and make water available to its entire distribution network.

- D. **REVIEW PERIOD:** File 247-14-000238-PS was submitted on August 4, 2014, and deemed complete by the Planning Division on August 6, 2014.

III. **CONCLUSIONARY FINDINGS:**

Title 22 of the Deschutes County Code, Development Procedures Ordinance

CHAPTER 22.16 DEVELOPMENT ACTION PROCEDURES

22.16.010, REVIEW OF DEVELOPMENT ACTION APPLICATIONS

- B. **The Planning Director has the discretion to determine that for the purposes of DCC Title 22 a development action application should be treated as if it were a land use action application.**

FINDING: For the purposes of Title 22, TID's application for Land Use Compatibility Statement Permit Sign-Off shall be treated as if it were a land use application.

Title 18 of the Deschutes County Code, County Zoning

CHAPTER 18.60 RURAL RESIDENTIAL ZONE DISTRICT

18.60.020, USES PERMITTED OUTRIGHT

- I. **Operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District except as provided in DCC 18.120.050.**

FINDING: According to information provided by Tumalo Irrigation District, TID "has decided to move its Regulation Pond storage to [the Klippel Mining Pit] a site upstream from our current in-district storage at the Tumalo Reservoir." TID states that the existing Reservoir "was designed and built in the 1920's and does not adequately serve TID's needs", and that the new site "will be a significant upgrade to operations and maintenance." The Planning Director finds that 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 this zone.

CHAPTER 18.88 WILDLIFE AREA COMBINING ZONE

18.84.030 USES PERMITTED OUTRIGHT

In a zone with which the WA Zone is combined, the uses permitted outright shall be those permitted outright by the underlying zone.

FINDING: The same outright permitted uses are allowed in the Rural Residential Zone District and the WA Combining Zone. Therefore, the "operation, maintenance, and piping of existing

irrigation systems operated by an Irrigation District except as provided in DCC 18.120.050" is an outright permitted use.

CHAPTER 18.120. EXCEPTIONS

18.120.050, FILL AND REMOVAL EXCEPTIONS

- C. Fill and removal activities conducted by an Irrigation District involving piping work in existing canals and ditches within wetlands are permitted outright.**

FINDING: This application does not propose to pipe existing canals and ditches within wetlands. This criterion is not applicable.

IV. DECISION:

APPROVAL of the Land Use Compatibility Statement Permit Sign-Off (PS) to transfer in place 108 acre feet of Tumalo Creek water from Tumalo Reservoir to Klippel Acres Mining Pit.

V. DURATION OF APPROVAL:

The applicant shall initiate the proposed use within two (2) years of the date this decision becomes final, or obtain an extension of time pursuant to Section 22.36.010 of the County Code, or this approval shall be void.

This decision becomes final twelve (12) days after the date of mailing, unless appealed by a person or entity entitled to appeal a land use decision under Title 22 of the Deschutes County Code.

DESCHUTES COUNTY PLANNING DIVISION



Written by: Nick Lelack, Community Development Director

Dated this 13th day of August, 2014

Mailed this 13th day of August, 2014

DECISION OF DESCHUTES COUNTY HEARINGS OFFICER

FILE NUMBERS: 247-14-000-238-PS, 247-14-00274-A

APPLICANT: Tumalo Irrigation District
64697 Cook Avenue
Bend, Oregon 97701

PROPERTY OWNER: KC Development Group, LLC
63560 Johnson Road
Bend, Oregon 97701

**APPLICANT'S AND
PROPERTY OWNER'S
ATTORNEY:** Elizabeth A. Dickson
Hurley Re Attorneys at Law PC
747 S.W. Mill View Way
Bend, Oregon 97702

APPELLANTS: Thomas and Dorbina Bishop,
Trustees of the Bishop Family Trust
63382 Fawn Lane
Bend, Oregon 97701

**APPELLANTS'
ATTORNEY:** Jennifer Bragar
Garvey Schubert Barer
121 S.W. Morrison Street, 11th Floor
Portland, Oregon 97204

PROPOSAL: Appellants appeal a LUCS decision that the applicant's transfer of a water storage right from Tumalo Reservoir to new reservoirs on the subject property is a use permitted outright in the RR-10 Zone.

STAFF REVIEWER: Anthony Raguine, Senior Planner

HEARING DATE: October 7, 2014

RECORD CLOSED: November 20, 2014

I. APPLICABLE STANDARDS AND CRITERIA:

A. Title 18 of the Deschutes County Code, the Deschutes County Zoning Ordinance

- 1. Chapter 18.04, Title, Purpose and Definitions**
*** Section 18.04.030, Definitions**
- 2. Chapter 18.60, Rural Residential (RR-10) Zone**
*** Section 18.60.020, Uses Permitted Outright**
*** Section 18.60.030, Conditional Uses Permitted**

3. **Chapter 18.84, Landscape Management Combining Zone (LM)**
 - * **Section 18.84.020, Application of Provisions**
 - * **Section 18.84.030, Uses Permitted Outright**
 - * **Section 18.84.040, Uses Permitted Conditionally**
 4. **Chapter 18.88, Wildlife Area Combining Zone (WA)**
 - * **Section 18.88.020, Application of Provisions**
 - * **Section 18.88.030, Uses Permitted Outright**
 - * **Section 18.88.040, Uses Permitted Conditionally**
- B. Title 22 of the Deschutes County Code, the Development Procedures Ordinance**
1. **Chapter 22.04, Introduction and Definitions**
 - * **Section 22.04.020, Definitions**
 2. **Chapter 22.08, General Provisions**
 - * **Section 22.08.010, Application Requirements**
 - * **Section 22.08.020, Acceptance of Application**
 - * **Section 22.08.035, False Statements on Application and Supporting Documents**
 3. **Chapter 22.16, Development Action Procedures**
 - * **Section 22.16.010, Review of Development Action Applications**
 4. **Chapter 22.20, Review of Land Use Action Applications**
 - * **Section 22.20.010, Action on Land Use Action Applications**
 - * **Section 22.20.055, Modification of Application**
 5. **Chapter 22.24, Land Use Action Hearings**
 - * **Section 22.24.140, Continuances and Record Extensions**
 6. **Chapter 22.32, Appeals**
 - * **Section 22.32.050, Development Action Appeals**
- C. Oregon Revised Statutes**
1. **Chapter 197, Comprehensive Land Use Planning**
 - * **ORS 197.015, Definitions for Chapters 195, 196 and 197**

II. FINDINGS OF FACT:

- A. Location:** The subject property is identified as Tax Lots 824 and 828 on Deschutes County Assessor's Map 17-11-13. It is the site of the former Klippel Surface Mine (SM Site 294) and is located east of Johnson Road, north of Fawn Lane, south of Klippel Road, and west of Tumalo Creek west of Bend.
- B. Zoning and Plan Designation:** The subject property is zoned Rural Residential 10-Acre Minimum (RR-10). Portions of the property are located within the Landscape Management (LM) Combining Zones associated with Tumalo Creek and Johnson Road, and much of the property is within the Wildlife Area (WA) Combining Zone protecting the Tumalo Deer

Winter Range. The property is designated Rural Residential Exception Area on the Deschutes County comprehensive plan map.

- C. Site Description:** The subject property is approximately 79 acres in size and consists of two adjacent tax lots. Tax Lot 824 contains 15.31 acres and Tax Lot 828 contains 63.45 acres. The property previously was the site of the Klippel Surface Mine (SM Site 294) which the record indicates consisted of multiple mining pits. The property is developed with two man-made, lined reservoirs filled with water. According to design drawings in the record,¹ the larger of the reservoirs, located on Tax Lots 824 and 828, (hereafter “southern reservoir”) has a capacity of approximately 68 acre feet of water. It has two man-made islands comprised of gravel and dirt, and at its north end has a small marina, boat ramp, dock, and pilings to support a boat house.² The smaller reservoir, located on Tax Lot 828, (hereafter “northern reservoir”) has a capacity of approximately 57 acre feet of water. Near the southern end of the southern reservoir is a headgate regulating the flow of water from Tumalo Irrigation District’s (TID’s) irrigation canal into the southern reservoir. The remainder of the subject property is undeveloped with graded level areas and undisturbed areas with scattered pine trees and native brush. Access to the subject property is from a gravel drive off Fawn Lane on the south and from a gravel drive off Klippel Road on the north.
- D. Surrounding Zoning and Land Uses:** The subject property is adjacent to the Klippel Acres subdivision zoned RR-10 and WA and developed with rural residences. To the east is Tumalo Creek. To the west are Johnson Road and the Saddleback Subdivision zoned RR-10 and WA and developed with rural residences.
- E. Land Use/Development/Code Enforcement History:** The subject property previously was the site of the Klippel Surface Mine (SM Site 294). The mine was fully mined and reclaimed and received reclamation approval from the Oregon Department of Mineral and Aggregate Resources (DOGAMI) on September 27, 2005.³ In May of 2007, Harris Kimble, the applicant’s predecessor in title, applied for a plan amendment, zone change and goal exception to redesignate SM Site 294, including the subject property, from Surface Mine and Agriculture to Rural Residential Exception Area, and to rezone the site from Surface Mining (SM) and Exclusive Farm Use-Tumalo/Redmond/Bend Subzone (EFU-TRB) to RR-10. In a decision dated November 8, 2007, this Hearings Officer approved the plan amendment, zone change and goal exception.⁴ In my decision, I described the property to be rezoned in part as follows:

“The subject property is approximately 160 acres in size and very irregular in shape. A significant portion of the property has been disturbed due to previous surface mining and reclamation activities. The disturbed area consists of reclaimed extraction pits and berms created from overburden removed from the extraction sites. The undisturbed portions of the property have varying topography and a mixture of native vegetation including scattered stands of pine and juniper trees, as well as native brush and

¹ See Hearing Exhibit 1.

² These features are shown in the photographs included in the record in Exhibit 6 to appellants’ October 6, 2014 submission.

³ Aerial photographs of the reclaimed mining pits taken in 2011 and 2012 are included in the record as pages 2 and 3 of Exhibit 11 to appellants’ October 6, 2014 submission.

⁴ A copy of that decision is included in the record as Exhibit G to TID’s September 26, 2014 submission.

grasses, and pasture grasses seeded as part of the surface mine reclamation. Part of the eastern border of the subject property is located in the canyon of Tumalo Creek and includes steep slopes and rock outcrops. The record indicates the subject property has 58.91 acres of irrigation water rights administered by TID

The record indicates some of these water rights currently are leased for in-stream use. There is a small irrigation ditch that traverses the subject property within an easement.”

The subject property was purchased by KC Development Group LLC (hereafter “KCDG” or “property owner”) in October of 2013. The following chronology of events following that purchase is taken from Senior Planner Anthony Raguine’s October 28, 2014 Staff Memorandum included in the record.

On October 8, 2013, staff from the county’s Community Development Department (CDD) met with representatives of KCDG and their then-attorney Tia Lewis to discuss development of the subject property with a residential cluster development. No development proposal was submitted.

On March 18 and 19, 2014, CDD received three code violation complaints concerning the subject property alleging that rock crushing, construction of a lake with a boat dock and fuel tanks, and use of a private road were occurring without required land use approval. These complaints were investigated by Deschutes County Code Enforcement Technician Tim Grundeman who concluded that no code violations had occurred. KCDG applied for a temporary use permit to allow rock crushing on the subject property in association with private road maintenance and landscaping, and on April 2, 2014, CDD issued a temporary use permit for such use (TU-14-8).⁵ On June 4, 2014, CDD received another code violation complaint related to similar “unpermitted activities” on the subject property. The record indicates that as of the date the record in this matter closed that code enforcement case was still pending.

On June 13, 2014, CDD staff, Deschutes County Assistant Legal Counsel John Laherty, representatives of TID, TID’s attorney William Hopp, and TID’s and KCDG’s attorney Elizabeth Dickson met to discuss the need and process for obtaining a Land Use Compatibility Statement (LUCS) for the transfer in place of use of a water storage right from Tumalo Reservoir to the subject property. Ms. Dickson advised CDD staff that an application for a residential cluster development on the subject property would be submitted in the future, potentially within six months. On or about June 16, 2014, CDD Director Nick Lelack determined to treat any request for a LUCS submitted by TID as a “land use action” and to process it according to the county’s procedures therefor.

On June 17, 2014, KCDG submitted applications for a building permit (247-14-003315-STR) and an electrical permit (247-14-003315-ELEC-01) for a boat house and boat slip on the southern reservoir. CDD staff advised KCDG that the Planning Division could not sign off on the building or electrical permit while any LUCS request was pending.

On June 19, 2014, CDD received a letter from Ken Rieck, TID Manager, explaining the need for the transfer in place of use of its water storage right and TID’s belief that the proposed transfer is a use permitted outright in the RR-10 Zone.

⁵ A copy of that permit is included in the record as Exhibit P to TID’s September 29, 2014 response to appellants’ notice of appeal.

On July 25, 2014, John Laherty sent a letter to Elizabeth Dickson, included in the record as Exhibit E to Mr. Raguine's Staff Memorandum, stating in relevant part:

" . . . [T]o 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."

On July 25, 2014, CDD staff and county legal counsel conducted a site visit to the subject property at the request of neighboring property owners.

By a letter dated August 6, 2014, Deschutes County Building Official Dave Peterson issued a stop work order to KCDG for work performed on the boat house foundation on the southern reservoir without land use approval or a building permit. The previously submitted building and electrical permit applications were withdrawn by KCDG.

On September 16, 2014, CDD received a code violation complaint for construction of a new road on the subject property. The complaint was investigated by Tim Grundeman who found no code violation. On September 22, 2014, CDD received a code violation complaint regarding recreational activities – i.e., waterskiing – occurring on the southern reservoir. On October 10, 2014, CDD issued a Notice of Violation to KCDG for operating a recreation-oriented facility requiring large acreage without land use approval.

- F. Procedural History:** As noted above, on or about June 16, 2014, CDD Director Nick Lelack determined to treat any request by TID for a LUCS as a "land use action" and to process it according to the county's procedures therefor. On August 4, 2014, TID submitted its LUCS request on a form provided by the Water Resources Department (WRD). The form stated TID intended to submit to WRD an application for a "water right transfer – storage," and described the intended use of water as "storage." TID further described its intended use of water on the form in part as follows:

"This is an intra-district transfer in place of use of 108 a.f. [acre feet] of Tumalo Creek Water. TID to TID (Storage water). The transfer of this

storage water is necessary for the operation 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."

Attached to the LUCS form was a two-page letter dated June 19, 2014 from Ken Rieck, TID Manager, to Nick Lelack describing the reason for the LUCS request. The Planning Division accepted the LUCS request as complete on August 6, 2014. Therefore, the 150-day period for issuance of a final local land use decision under ORS 215.427 expires on January 2, 2015.

On August 13, 2014, Mr. Lelack completed the WRD form by checking the box stating:

"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):"

Mr. Lelack attached to the LUCS form a three-page "Notice of Decision" dated August 13, 2014. The decision cited Section 18.60.020(l) listing "operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District," and included the following relevant findings:

"According to information provided by Tumalo Irrigation District, TID 'has decided to move its Regulation Pond storage to [the Klippel Mining Pit] a site upstream from our current in-district storage at Tumalo Reservoir.' TID states that the existing Reservoir 'was designed and built in the 1920's and does not adequately serve TID's needs,' and that the new site 'will be a significant upgrade to operations and maintenance.' The Planning Director finds that 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 this zone."

Notice of the LUCS decision was provided to the owners of all property located within 250 feet of the subject property.

On August 22, 2014, appellants Thomas and Dorbina Bishop filed their appeal of the LUCS. The record indicates appellants own and reside on property adjacent to the subject property. On October 3, 2014 the Hearings Officer conducted a site visit to the subject property and vicinity, accompanied by Anthony Raguine. On October 7, 2014, the Hearings Officer held a public hearing on the appeal. At the hearing, the Hearings Officer disclosed her observations and impressions from the site visit, received testimony and evidence, left the written evidentiary record open through November 13, 2014, and allowed the applicant through November 20, 2014 to submit final argument pursuant to ORS 197.763.

On November 20, 2014, Ms. Dickson electronically submitted TID's final argument, consisting of a 40-page letter, and 24 exhibits (Exhibits A through X) totaling 180 pages, through several sequential electronic mail messages with attachments. Copies of these electronic mail messages and electronic mail logs included in the record show the last e-mail message with attachments was sent at 4:58 p.m. on November 20th but was not

received by the county until 5:01 p.m. By an e-mail message dated November 21, 2014, Anthony Raguine advised the Hearings Officer of the late submission, which included a portion of Exhibit W and all of Exhibit X to the applicant's final argument.

By a letter dated November 26, 2014, appellants' attorney Jennifer Bragar objected to portions of TID's final argument as consisting of "new evidence" prohibited from being submitted with final argument under ORS 197.763(6)(e). Ms. Bragar identified this "new evidence" as Exhibits E, I, J, M-Q and T-V to the applicant's final argument. Ms. Bragar requested that the Hearings Officer either strike these exhibits from the record or reopen the record to provide additional time for appellants to respond to them. On December 1, 2014, Ms. Dickson submitted a letter responding to Ms. Bragar's objections and arguing the Hearings Officer should neither strike the exhibits identified in Ms. Bragar's letter nor reopen the record because these exhibits do not constitute "new evidence."

By an order dated December 4, 2014, the Hearings Officer: (a) declined to reopen and extend the record; (b) found Exhibits E, T, U, V and X to the applicant's final argument, and the portion of Exhibit W to the applicant's final argument described as "Recreation Usage in Code-Comp Plan 11.18.14," could not be considered; and (c) found Exhibits I and J to the applicant's final argument, and the definitions in Exhibits M, N, O, P and Q to the applicant's final argument, could be considered by the Hearings Officer.

Because the applicant did not agree to extend the written record from October 7 through November 20, 2014, under Section 22.24.140 of the county's Development Procedures Ordinance the 150-day period was not extended and expires on January 2, 2015. As of the date of this decision there remain 18 days in the 150-day period.

- G. Proposal:** Appellants appeal the LUCS decision that found TID's transfer in place of use of its water storage right from Tumalo Reservoir to the subject property is a use permitted outright in the RR-10 Zone and on the subject property.
- H. Public Agency Comments:** The record indicates the Planning Division sent notice of the applicant's proposal to the Oregon Department of Fish and Wildlife (ODFW) which submitted a responsive letter on October 31, 2014.
- I. Public Notice and Comments:** The Planning Division mailed individual written notice of the LUCS decision and the public hearing on the appeal to the owners of record of all property located within 250 feet of the subject property. The record indicates these notices were mailed to the owners of 33 tax lots. In addition, notice of the public hearing was published in the Bend "Bulletin" newspaper and the subject property was posted with a notice of proposed land use action sign. As of the date the record in this matter closed, the county had received thirteen letters from the public in response to these notices. In addition, eight members of the public testified at the public hearing.
- J. Lot of Record:** The record indicates the county recognizes the two tax lots comprising the subject property as two separate legal lots of record.

III. CONCLUSIONS OF LAW:

A. Preliminary Issues.

1. Applicant.

FINDINGS: TID requested a LUCS for property owned by KCDG. The county did not require KCDG to sign the request or give written authorization for TID to submit it. Although Section 22.08.010(B) of the procedures ordinance states applications for development actions or land use actions shall be submitted by the property owner or person who has written authorization from the property owner, Section 22.08.010(C) exempts from the owner authorization requirement “applications submitted by or on behalf of a public entity or public utility having the power of eminent domain with respect to the property subject to the application.” The Hearings Officer finds irrigation districts are public entities with the power of eminent domain, including the power to condemn for reservoirs and the storage of water in reservoirs, under ORS 545.239.⁶ The record indicates the subject property is located within TID’s boundaries. Therefore, I find the county did not err in accepting TID’s LUCS request without written authorization from KCDG.

2. Notice.

FINDINGS: At the public hearing, William Kuhn questioned why the county did not notify the Bureau of Land Management (BLM) of TID’s LUCS request. Anthony Raguine responded that notice to the BLM was not provided because according to the county’s current data the closest BLM land is located approximately 2.4 miles to the northwest, and for that reason planning staff concluded the proposed transfer of water right would not affect BLM lands or the management thereof. The Hearings Officer concurs with staff’s analysis and finds the county did not err in failing to provide notice of the LUCS request or decision to the BLM.

3. Modification of Application.

FINDINGS: TID’s LUCS request states its proposed use is the transfer in place of use of a storage water right for 108 acre feet of water from Tumalo Reservoir to the “Klippel Mining Pit.” As Exhibit K to its October 28, 2014 evidentiary submittal, TID included a copy of a contract between TID and KCDG dated October 14, 2014 (“new contract”). The new contract states it replaces an earlier contract dated June 10, 2014 (“old contract”) and included in the record as Exhibit J to TID’s October 28, 2014 submittal. The new contract states TID intends to store 125 acre feet of water in the Klippel Mining Pit. In their November 23, 2014 memorandum, appellants argue the new contract constitutes a “modification” of the LUCS request and therefore the Hearings Officer cannot consider the new contract unless and until TID submits a modification application, citing Section 22.20.055 of the procedures ordinance.

Section 22.04.020 defines “modification of application” as:

. . . the applicant’s submittal of new information after an application has been deemed complete and prior to the close of the record on a pending application that would modify a development proposal by changing one or more of the following previously described components: proposed uses,

⁶ That statute provides in pertinent part:

- (1) The board of directors [of the irrigation district] * * * has the right to acquire, by lease, purchase, condemnation or other legal means, all lands, water, water rights, rights of way, easements and other property, including canals and works and the whole of irrigation systems or projects constructed or being constructed by private owners, necessary for the construction, use, supply, maintenance, repair and improvement of any canals and works proposed to be constructed by the board. The board also has the right to so acquire lands, and all necessary appurtenances, for reservoirs, and the right to store water in constructed reservoirs, for the storage of needful waters, or for any other purpose reasonably necessary for the purposes of the district.**

operating characteristics, intensity, scale, site layout (including but not limited to changes in proposed setbacks, access points, building design, size or orientation, parking, traffic or pedestrian circulation plans), or landscaping in a manner that requires the application of new criteria to the proposal or that would require the findings of fact to be changed. It does not mean an applicant's submission of new evidence that merely clarifies or supports the pending application.

The Hearings Officer agrees with appellants that the water quantity recitals in the new contract constitute new information that changes the scale of the proposed use – transferring 125 acre feet of storage water right rather than 108 acre feet. However, I find this increase in storage water quantity does not require the application of new criteria because the scale of the proposed use is not determinative of its nature or whether and under what circumstances such storage is allowed on the subject property. For the same reason, I find the quantity recitals in the new contract do not require the findings of fact to be changed because, as discussed in the findings below, the amount of water to be stored in the new reservoirs on the subject property is not material to the analysis of whether the county's LUCS decision was correct. Therefore, I find the new contract does not constitute a modification of the LUCS request and I can consider it.

4. Mootness

FINDINGS: TID's LUCS August 2014 LUCS request was for a temporary storage water transfer permit. In appellants' October 27, 2014 submission, Ms. Bragar states the temporary permit expired at the end of the irrigation season in mid-October because under WRD's statutes – i.e., ORS 540.570(1) and (7) -- "a temporary transfer order is for one season only and the water use automatically reverts to the terms and conditions of the original certificate at the end of the season." Nevertheless, appellants argue the Hearings Officer should render a final decision on their appeal not consider it moot because the issues presented in their appeal are "capable of repetition yet evading review," citing LUBA's published order in *Wetherell v. Douglas County*, 66 Or LUBA 454 (2012). In that case, the county issued a temporary use permit for an outdoor music festival on EFU-zoned land. The county argued that an appeal of that permit was moot because the festival had taken place by the time LUBA heard the appeal. LUBA found there was no doubt the property owner would seek another temporary festival permit in the future, and therefore the issues presented by the county's issuance of the permit would be repeated. However, LUBA found those issues could evade its review because the event would take place and the permit would expire before the county and LUBA appeals could occur.⁷

The circumstances in this case are somewhat different from those presented in *Wetherell* because the record indicates TID has submitted an application to WRD for a *permanent* transfer of its stored water from Tumalo Reservoir to the new reservoirs on the subject property. However, it is not clear from the record whether TID has been, or will be, required by WRD to submit another LUCS request for the permanent water right transfer. Nevertheless, the Hearings Officer agrees with appellants that the same principles enunciated in *Wetherell* should apply here. I find there is no doubt TID intends to use the new reservoirs to store irrigation water on a long-term basis, and if necessary TID will request that WRD issue another temporary water right transfer for next year's irrigation season. The record indicates the irrigation season lasts approximately six months. Therefore I find it could end before a local and LUBA appeal of a LUCS could be completed. For these reasons, I find appellants' appeal is not moot.

B. Nature of LUCS Decision and Appeal.

⁷ LUBA noted counties have 150 days to issue final decisions, and the LUBA appeal process also could take months.

FINDINGS: TID applied for a LUCS for the transfer in place of use of a storage water right from Tumalo Reservoir to the Klippel Mining Pit, claiming its proposal constitutes an outright permitted use in the RR-10 Zone under Section 18.60.020(I) as the “operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District.” The county’s LUCS decision found the proposed use is permitted without review under this section. As noted in the Findings of Fact above, CDD Director Nick Lelack determined to treat TID’s LUCS request as a “land use action” rather than as a “development action.”

1. LUCS -- Development Action vs. Land Use Action.

FINDINGS: Section 22.040.020 defines “development action,” “land use action,” and “land use permit,” respectively, as follows:

“Development action” means the review of any permit, authorization or determination that the Deschutes County Community Development Department is requested to issue, give or make that either:

- A. Involves the application of a County zoning ordinance or the County subdivision and partition ordinance and is not a land use action.**
- B. Involves the application of standards other than those referred to in DCC 220.40.030(A), such as the sign ordinance.**

“Land use action” includes any consideration for approval of a quasi-judicial plan amendment or zone change, any consideration for approval of a land use permit, and any consideration of a request for a declaratory ruling (including resolution of any procedural questions raised in any of these actions).

“Land use permit” includes any approval of a proposed development of land under the standards in the County zoning ordinances or subdivision and partition ordinances involving the exercise of significant discretion in applying those standards. (Emphasis added.)

In *Curl v. Deschutes County*, __ Or LUBA __ (LUBA No. 2013-086/095, March 19, 2014), LUBA discussed whether a LUCS decision is a “development action” or a “land use action” for purposes of determining LUBA’s jurisdiction. In that case, the petitioners appealed the county’s LUCS decision finding a proposal by the Central Oregon Irrigation District (COID) to pipe one of its existing open irrigation canals was a use permitted outright in the applicable zones. Petitioners also appealed the county’s decision rejecting their request for a local appeal of the LUCS. The county argued petitioners had no right to a local appeal because the LUCS decision was a “development action.” LUBA agreed with the county based on the following findings:

“Petitioners contend that the April 25, 2013 LUCS decision is properly characterized as a ‘land use action’ instead of a ‘development action,’ because determining whether the proposed piping complies with the county’s land use regulations constituted the ‘approval of the proposed development of land’ under the county’s land use regulations, and required the exercise of significant discretion. Consistent with that position, petitioners argue under the first and second assignments of error in LUBA No. 2013-086 that the LUCS decision constitutes a ‘permit’ as defined at ORS 215.402(4), and therefore the county erred in failing to provide notice and a

hearing, and to follow the other procedural requirements in ORS 215.416 for making a 'permit' decision.

We disagree with petitioners that the April 25, 2013 LUCS decision is a 'land use permit' or, for that matter, a 'permit' as defined at ORS 215.402(4). As with many LUCS decisions, the initial question posed to the county is whether a proposed use -- piping of an irrigation canal -- is allowable or not under the county's comprehensive plan and land use regulations. As presented, that question basically requires the county to categorize the proposed use under its land use regulations, and determine whether the proposed use is not allowed in the applicable zone, or whether it is allowed without review, allowed with review under certain standards or upon obtaining certain county permits (e.g. site or design review), allowed as a conditional use, allowed as a nonconforming use, etc. In short, the initial question posed and answered by a LUCS is typically a determination of the use category that best fits the proposed use. That initial inquiry will determine whether county approval of the proposed use is required, and if so what standards will apply or which permits will be required. If that is all the LUCS decision determines, then it is very similar in function to a use or zoning classification decision described in ORS 215.402(4)(b). A LUCS decision that is limited to a categorization of the proposed use is not a 'land use action' as defined at DCC 22.32.050 (or a 'permit' as defined at ORS 215.402(4)) for the simple reason that the LUCS decision does not approve the proposed development of land, no matter how much interpretation or discretion may go into that use categorization.

Where the lines between a LUCS decision and a statutory 'permit' can blur is where in response to a LUCS request the county goes further and actually applies the approval standards to conduct any required reviews, and in the same decision issues the required permits or approvals for the proposed use. In that circumstance, the county has 'approved' the proposed development of land and, if the applicable land use standards require the exercise of discretion, the county's resulting decision is a 'permit' as defined at ORS 215.402(4) or, in the county's parlance, a 'land use permit.' In that circumstance, the county must apply the procedures applicable to ORS 215.402(4) permits, set out in ORS 215.416, including the right of local appeal for permit decisions made without a hearing at ORS 215.416(11)(a)(A). The county's final decision in that circumstance is a land use decision and does not fall within any of the exclusions at ORS 197.015(10)(b)(H). See *Campbell v. Columbia County*, __ 18 Or LUBA __ (LUBA No. 2012-060, January 28, 2013), slip op 7-9 (a LUCS decision that also verifies or approves an alteration of a nonconforming use is a permit decision and not subject to the exclusions at ORS 197.015(10)(b)(H)). ORS 215.402(4)(b) excludes from the definition of 'permit' a 'decision which determines the appropriate zoning classification for a particular use by applying criteria or performance standards defining the uses permitted within the zone, and the determination applies only to land within an urban growth boundary[.]'

In the present case, the county's decision does not approve the proposed development of land, but simply determines that the proposed use is allowed without review under the county's code. Putting aside for the moment the correctness of that conclusion, on its face the decision clearly is limited to a LUCS decision, and does not purport to apply any land use regulations to approve the proposed use.

Petitioners argue nonetheless that the conclusion that the proposed use is ‘allowed without review’ is tantamount to ‘approval’ of that use for purposes of ORS 215.402(4), because the applicant may immediately proceed to develop the property with the proposed use. However, the conclusion that the use is ‘allowed without review’ means essentially that no county approval is necessary. A determination that no county approval is necessary for a proposed use does not ‘approve’ the use for purposes of ORS 215.402(4).” (Underscored emphasis added.)

The Hearings Officer finds the LUCS decision at issue in this case is the same type of decision as the one at issue in *Curl* – i.e., it simply categorizes TID’s proposal as a use allowed without review under the county’s code and does not approve that use. **Therefore, I find the LUCS decision is a development action and not a land use action.**

2. Local Appeal. Mr. Lelack elected to treat TID’s LUCS request as a “land use action” pursuant to Section 22.16.010, which provides:

- A. A development action application may be handled administratively by the Planning Director without public notice or hearing.**
- B. The Planning Director has the discretion to determine that for the purposes of DCC Title 22 a development action application should be treated as if it were a land use action application.** (Underscored emphasis added.)

As a result of this election, notice of the LUCS was provided to the owners of property located within 250 feet of the subject property, and the parties were afforded a local appeal before the Hearings Officer. TID argues appellants’ appeal should be dismissed because the LUCS decision was a “development action,” and as such appellants had no standing to appeal.⁸ I disagree. In *Kuhn v. Deschutes County*, 58 Or LUBA 483 (2009), LUBA held that although the Hearings Officer is not bound by the CDD Director’s determination to treat a LUCS is a “land use action” rather than a “development action,” nevertheless where the county provided notice and a the opportunity for a local appeal under the process for “land use actions,” the appellants were entitled to take advantage of that appeal. I find the circumstances presented here are essentially the same as those in *Kuhn*, and therefore, there is no merit in TID’s argument that appellants’ appeal should be dismissed.⁹

C. Categorization of Proposed Use.

FINDINGS: In *Curl*, LUBA held the question of whether the county *correctly categorized* the use at issue in a LUCS is different from the question of whether the LUCS is a development action. In that case, COID’s LUCS request was “to pipe 4,500 feet of its Pilot Butte Canal” to “eliminate water loss through the canal and place 7.95 cfs [cubic feet per second] of water permanently instream in the Deschutes and Crooked Rivers.”¹⁰ However, LUBA noted the proposed piping project was referred to in the record as “Phase 1” of a piping project for COID’s Juniper Ridge hydroelectric facility located downstream. LUBA found there was no dispute about the proposed piping project’s

⁸ Under Section 22.32.050 only the applicant for a development action permit may appeal.

⁹ Because Section 22.16.010(B) authorizes the Planning Director to treat a development action as a land use action “for the purposes of DCC Title 22,” the Hearings Officer expresses no opinion on whether that determination has any effect on LUBA’s jurisdiction under ORS 197.825 to hear an appeal to LUBA of the LUCS decision or my decision.

¹⁰ A copy of COID’s LUCS request is in the record as Exhibit BB to TID’s October 28, 2014 submission.

association with the hydroelectric facility, and held the county mischaracterized the nature of the proposed use for purposes of the LUCS decision, and that because hydroelectric facilities are a conditional use in one of the affected zones, the county also erred in categorizing the proposed piping project as one allowed outright.

Appellants and other opponents argue TID's LUCS request and the county's LUCS decision in this case also mischaracterized the proposed use as one allowed without review in the RR-10 Zone. For the reasons set forth in the findings below, the Hearings Officer agrees.

a. LUCS Form and Decision. TID's LUCS request was presented to the county through submission of a four-page "Land Use Information Form" from the Oregon Water Resources Department (WRD). At the top of the form's front page, WRD gives notice to an applicant that the 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.*" (Bold and bold underscored emphasis in original; underscored emphasis added.)

The WRD form was accompanied by a letter dated July 18, 2014, from Susan Douthit of WRD to Ken Rieck, TID Manager, included in the record as Exhibit U to appellants' appeal. The letter states in relevant part:

"This temporary transfer proposes to move a portion of the authorized storage water from Upper Tumalo Reservoir (evidenced by Certificate 76684) into new storage facilities within T17S R11E, Section 13, W.M.

Because this change, unlike typical temporary district water right transfers, involves structural changes and/or the creation of new impoundment facilities, a completed Land Use Information Form is required. (See Oregon Administrative Rules 690-005-0025)." (Underscored emphasis added.)

In other words, WRD concluded TID's water right transfer request was not exempt from the LUCS requirement because it involves "structural changes and/or the creation of new impoundment facilities" – i.e., new reservoirs.

On the portion of the WRD form completed by TID, the "proposed use" is described as "Water Right Transfer – Storage." The source of water is identified as "Reservoir/Pond" and the intended

use of the water is identified as “Storage.” TID described the proposed use in more detail on the form as follows:

“This is an intra-district transfer in place of use of 108 a.f. [acre feet] 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 Service responders, and provide increased efficiency in the operations and maintenance of the TID system overall.”

WRD’s form asks the county to check one of two boxes categorizing the proposed use as either:

- land uses to be served by the proposed water uses (including proposed construction) that are allowed outright or are not regulated by the comprehensive plan; or
- land uses to be served by the proposed water uses (including proposed construction) that involve discretionary land-use approvals.

If the local government checks the second box, the form asks whether any required land use approvals have been obtained or are pending.

CDD Director Nick Lelack checked the first box – allowed outright or not regulated -- and referred to the Notice of Decision attached to the form. The LUCS decision describes the request as a “Land Use Compatibility Statement Permit Sign-Off (PS) to transfer in place 108 acre feet of Tumalo Creek water from Tumalo Reservoir to Klippel Acres Mining Pit.” The decision describes TID’s proposal in more detail as follows:

“Tumalo Irrigation District (TID) proposes to move its Regulation Pond storage from its current in-district storage at Tumalo Reservoir to Klippel Acres Mining Pit. The new site will be upstream and located in a lined storage facility to prevent leakage and make water available to its entire distribution network.”

Based on TID’s description of the proposed use, Mr. Lelack concluded it was a used allowed outright on the subject property as the “operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District” under Section 18.60.020(l) of the RR-10 Zone.

b. Additional Uses.

New Reservoirs

Neither TID’s information on the WRD form nor the county’s LUCS decision identified creation and use of new reservoirs as part of TID’s proposed place of use transfer of storage water, although TID acknowledged a new reservoir is essential to its proposal. The record indicates the county was aware of the new reservoirs at the time TID’s LUCS request was submitted, having received code violation complaints about them in March and June of 2014. Under these circumstances, the Hearings Officer finds omission of any reference to new reservoirs was material to the LUCS request and decision. That is because, as discussed below, like the hydroelectric facility at issue in

Curl, the omitted components of TID's proposal -- new reservoirs and the surface mining activity required to create them -- are *conditional uses* in the RR-10 Zone under Title 18.¹¹

"Reservoir and water impoundment" is a use permitted only conditionally, and only in three zones: Forest Use (F-1) Zone, Section 18.36.030(N); Forest Use (F-2) Zone, Section 18.04.030(O); and Sunriver Unincorporated Community Forest District, Section 18.108.180(B)(3). Inclusion of this use in the county's forest zones implements the Department of Land Conservation and Development's (DLCD's) administrative rules. Specifically, OAR 660-006-0025(4)(m) states counties *may* authorize "reservoir and water impoundments" in the forest zones.

The term "reservoir" is not defined in Title 18. Its ordinary definition is "a place where water is collected and stored for use." *Webster's New World Dictionary and Thesaurus, Second Edition*. "Impoundment" is defined in Section 18.04.030 as "any man-made structure which is or may be used to impound water." That section also defines "structure" as "something constructed or built having a fixed base on, or fixed connection to, the ground or another structure" (emphasis added). TID argues the new reservoirs on the subject property are not "structures" because they are not "built" or "constructed."¹² The Hearings Officer disagrees.

The ordinary definitions of "build" and "construct," respectively, are:

"Build: 1) to make by putting together materials, parts, etc., 2) to establish, base; 3) to create or develop.

Construct: to build, devise, etc." Webster's New World Dictionary and Thesaurus, Second Edition.

The Hearings Officer finds the evidence in the record clearly shows the new reservoirs on the subject property were "built" or "constructed" within the reclaimed mining pits on the Klippel mining site. As discussed in the Findings of Fact above, at the time the subject property was rezoned from SM to RR-10, the Klippel site had been reclaimed by grading and re-contouring the mining pits and reseeding them with pasture grasses to prevent erosion. The numerous aerial and ground-level photographs of the subject property in the record, confirmed by my site visit observations, show the new reservoirs bear little if any resemblance to the reclaimed and reseeded mining pits that existed at the time of rezoning. The pits have been converted to reservoirs by excavating and grading the areas for holding water, building islands at each end of the southern reservoir, lining both reservoirs with an impermeable fabric, and affixing that fabric to the ground with an overlay of sand and gravel. For these reasons, I find the reservoirs clearly fall within the definition of "structure."

¹¹ Appellants argue the Hearings Officer should "void" the LUCS decision because TID made a "false statement" by not disclosing the true uses for the new reservoirs, citing Section 22.08.035 which states:

If the applicant or the applicant's representative or apparent representative makes a misstatement of fact on the application regarding property ownership, authority to submit the application, acreage, or any other fact material to the acceptance or approval of the application, and such misstatement is relied upon by the Planning Director or Hearings Body in making a decision whether to accept or approve the application, the Planning Director may upon notice to the applicant and subject to an applicant's right to a hearing declare the application void.

The Hearings Officer finds this provision authorizes the *Planning Director* and not the Hearings Officer to void an application. It does not authorize me to deny the LUCS decision on the basis of an alleged material misstatement on the application. Therefore, I find no merit to this argument.

¹² TID makes this argument in the context of application of the site plan requirement in the Landscape Management (LM) Zone under Section 18.84.050 for "structures."

Therefore, I find the new reservoirs on the subject property constitute “reservoirs and water impoundments.”

Under ordinary rules of statutory construction, where a land use is expressly listed as permitted in some zones but not in others, the presumed intent of the drafters is to prohibit that use in zones where it is not listed. However, the Hearings Officer finds that rather than relying on that presumption, the proper inquiry is to determine whether reading the zoning ordinance language to exclude reservoirs and water impoundments in zones other than the forest zones is consistent with its text, context and legislative history. *State v. Gaines*, 346 Or 160, 206 P3d 1042 (2009); See, also, *Devlin Oil Co., Inc. v. Morrow County*, 62 Or LUBA 247 (2010). I find the relevant context includes other provisions in Title 18 that address or regulate reservoirs, water impoundments and water storage.

The Hearings Officer has searched Title 18 and found a number of provisions that address water storage, reservoirs and impoundments. Section 18.80.72 regulates water impoundments in the Airport Safety (AS) Zone. Due to the tendency of water impoundments to attract birds and create hazards for aircraft, this section prohibits “new or expanded water impoundments one-quarter acre in size or larger” within 5,000 feet of the end of a runway, on airport land, and within certain airport approach surfaces. I find that because this provision is so specific to airports and their unique circumstances, it is of little value in establishing context for how the “reservoir and water impoundment” use is to be interpreted.

Section 18.52.050, listing conditional uses in the SM Zone, allows “water storage facilities, owned or operated by a public, private or cooperative water company for the distribution of water.” Title 18 does not define “water company.” However, the Hearings Officer finds that because “irrigation district” is a term of art separately referenced in Title 18, it is not reasonable to interpret “water company” to include irrigation districts. Therefore, I find this provision also is not helpful in establishing a context for the “reservoir and water impoundments” use.

Several zones, including the RR-10 Zone, allow as a *conditional use*:

Surface mining of mineral and aggregate resources in conjunction with the operation and maintenance of irrigation systems operated by an Irrigation District, including the excavation and mining for facilities, ponds, reservoirs, and the off-site use, storage, and sale of excavated material” (emphasis added).¹³

In addition, Section 18.128.280 establishes specific conditional use approval criteria for “Surface Mining of Non-Goal 5 Mineral and Aggregate Resources.” Paragraph (C) of that section lists standards for surface mining activity that involves “the maintenance or creation of man-made lakes, water impoundments or ponds.”

The record includes the legislative history of both of these reservoir-related “surface mining” provisions. They were added to the text of Title 18 in 2001 at the request of the former Squaw

¹³Those zones are: MUA-10, Section 18.32.030(GG); O,S & C, Section 18.48.030(H); RR-10, Section 18.60.030(W); Terrebonne Rural Community, Section 18.66.020(B)(15); Terrebonne R-5, Section 18.66.030(B)(13); Terrebonne Commercial, Section 18.66.040(C)(15); Terrebonne Rural Commercial, Section 18.66.050(C)(10); Tumalo Residential, Section 18.67.020B(B)(13); Tumalo R-5, Section 18.67.030(B)(10); Tumalo Commercial, Section 18.67.0040(C)(13); Tumalo R&D, Section 18.67.050(B)(8); LM (if permitted conditionally in underlying zone), WA, (if permitted conditionally in the underlying zone), SBMH (if permitted conditionally in underlying zone); CH (if permitted conditionally in underlying zone); and FP, Section 18.96.040(N).

Creek Irrigation District through Ordinance No. 2001-039.¹⁴ That ordinance also added to a number of zones the outright permitted use of “operation, maintenance, and piping of existing irrigation systems, operated by an Irrigation District” – the provision the county found authorized TID’s proposed storage water place of use transfer.¹⁵ The staff report for Ordinance No. 2001-039 explains the reason for the text amendment in relevant part as follows:

“The applicant, Squaw Creek Irrigation District, initiated a text amendment to the Deschutes County Zoning Ordinance and Comprehensive Plan that would allow Irrigation Districts to operate, maintain, and pipe existing irrigation systems without a land use permit and to conduct surface mining activities, including the off-site use and sale of excavated material, as a Conditional Use. . . . [T]he applicant is requesting an amendment to the County Zoning Ordinance that allows them to use and sell the excavated material accumulated in their canals, ditches, and reservoirs, including material excavated for the expansion or construction of new reservoirs.”
(Underscored emphasis added.)

The Hearings Officer finds that by amending Title 18 to create both outright permitted and conditional uses relating to irrigation district operations, the county intended to distinguish between the districts’ routine operation and maintenance of “existing irrigation systems” that likely would have minimal impacts (outright permitted uses), and the more intensive activities including excavation to create or expand reservoirs (conditional uses).

The parties submitted extensive arguments as to whether the new reservoirs fairly can be considered part of TID’s “existing irrigation systems” under the outright permitted use because, among other reasons, the reservoirs were constructed by KCDG on its own land and did not become a part of TID’s “systems” until TID’s stored water was piped into them. The Hearings Officer finds these arguments miss the point. It is the surface mining required to construct or expand a reservoir that distinguishes the conditional use from the outright permitted use authorized by Ordinance No. 2001-039. Such surface mining need only be performed “in conjunction with” the irrigation district’s operation and maintenance of its systems for it to fall within the parameters of the conditional use. There is no dispute in this record that the new reservoirs were created in coordination with TID and, at least in part, in order to facilitate TID’s operation of its irrigation systems.¹⁶

Considering all of these provisions and the available legislative history, the Hearings Officer finds the county’s listing of “reservoir and water impoundments” as a conditional use in only three zones only reflects the county’s intent to comply with DLCD’s administrative rules governing forest zones and not to exclude reservoirs and water impoundments from other zones. However, I find these provisions and their legislative history *do* show a clear intent to require conditional use approval for

¹⁴Copies of the ordinance and staff report are included in the record as Exhibit K to TID’s September 26, 2014 submission.

¹⁵Those zones are: EFU, Section 18.16.020(M); MUA-10, Section 18.32.020(H)); O,S&C, Section 18.48.020(F); SM, Section 18.52.030(G); SMIA, Section 18.56.040); RR-10, Section 18.60.020(I)); RSC-UUC, Section 18.65.020(A)(9); Terrebonne Rural Community, Section 18.66.020(A)(7); Terrebonne R-5, Section 18.66.030(A)(7); Tumalo Industrial, Section 18.67.060(A)(8); LM (if permitted outright in the underlying zone); WA (if permitted outright in underlying zone); SBMH (if permitted outright in the underlying zone); CH (if permitted outright in the underlying zone); FP, Section 18.96.030(H); and RI, Section 18.100.010.

¹⁶The Hearings Officer finds that whether the new reservoirs were excavated by TID or by KCDG on TID’s behalf is irrelevant. There is no requirement that the excavation actually *be conducted by* the irrigation district.

surface mining and excavation required to create new reservoirs that are, or are intended to be, part of an irrigation district's irrigation systems.

Surface Mining

The next question is whether KCDG conducted "surface mining" including the "excavation and mining" for the new reservoirs. Section 18.04.030 defines "surface mining" in relevant part as follows:

"Surface mining means:

A. Includes:

1. **All or any part of the process of mining by removal of the overburden and extraction of natural mineral deposits thereby exposed by any method including open pit mining operations, auger mining operations, processing, surface impacts of underground mining, production of surface mining refuse and the construction of adjacent or off-site borrow pits, except those constructed for access roads; and**
2. **Mining which involves more than 1,000 cubic yards of material or excavation prior to mining of a surface area of more than one acre.**

B. Does not include:

1. **The construction of adjacent or off-site borrow pits which are used for access roads to the surface mine.**
2. **Excavation and crushing of sand, gravel, clay, rock or other similar materials conducted by a landowner, contractor or tenant on the landowner's property for the primary purpose of construction, reconstruction or maintenance of access roads and excavation or grading operations conducted in the process of farming or cemetery operations, on-site road construction and other on-site construction, or nonsurface impacts of underground mines; and . . .** (Emphasis added.)

The Hearings Officer finds from the record that KCDG engaged in "mining" on the subject property by "removal of overburden and extraction of mineral deposits" within the Klippel mining pits.¹⁷ Whether that activity falls within the exclusions from "surface mining" in Paragraph (B)(2) depends on the text, context and available legislative history of that provision. It appears the exclusion language was added to Title 18 in the early 90's when the county adopted its surface mining provisions and is based on the statutory surface mining definition in ORS Chapter 517. However, the exclusion in Title 18 appears to expand the excluded activities in the statute. Section 517.750(15)(b) excludes the following activity from the definition of "surface mining:"

- (A) Excavations of sand, gravel, clay, rock or other similar materials conducted by the landowner or tenant for the primary purpose of construction, reconstruction or maintenance of access roads on the same parcel or on an**

¹⁷ See, e.g., Exhibit B to appellants' notice of appeal and Exhibit 13 to appellants' October 6, 2014 submission, consisting of photographs taken between May and August of 2014 of KCDG's excavation for and construction of the reservoirs.

adjacent parcel that is under the same ownership as the parcel that is being excavated; . . . (Emphasis added.)

Section 18.04.030 defines “surface mining” to exclude both a landowner’s on-site excavation and crushing for construction and maintenance of access roads, *and* the landowner’s on-site excavation and grading for “other on-site construction.”

As discussed in the Findings of Fact above, in April of 2014 KCDG obtained a temporary use permit for rock crushing within the new reservoir(s) (TU-14-8). That decision states KCDG requested a TU to allow for rock crushing “associated with maintenance of private roadways and landscaping” under Section 18.60.020, which lists as an outright permitted use in the RR-10 Zone “Class III road projects.”¹⁸ The decision states KCDG intended to place the rock crusher “at the bottom of the old [mining] pit” and that “no offsite material will be brought to the property for crushing.” In other words, KCDG represented to the county that it would only crush material already located on the subject property – i.e., within and around the reclaimed mining pits.

The *rock crushing* permitted by the TU arguably was excluded from the definition of “surface mining” if it was for the primary purpose of constructing and maintaining private roads on the subject property. However, the TU authorization did not include *excavation and grading*. In light of the large scale and unique configuration of KCDG’s excavation on the subject property, the Hearings Officer finds that excavation was for the primary purpose of “other on-site construction” – i.e., the conversion of the former Klippel mining pits to new reservoirs, as documented by the aerial and ground-level photos of the subject property in this record and my own site visit observations.¹⁹

The remaining question is how to reconcile two apparently conflicting provisions of Title 18 -- the exclusion from the definition of “surface mining” in Section 18.04.030 for a landowner’s on-site excavation for “other on-site construction,” and the conditional use allowed under Section 18.60.030(W) of “surface mining . . . in conjunction with the operation and maintenance of irrigation systems operated by an Irrigation District, including the excavation and mining for . . . reservoirs.” These provisions appear to conflict because the exclusion from the “surface mining” definition for a landowner’s “other on-site construction” could encompass excavation on the landowner’s property for a reservoir.

As discussed above, the conditional use in Section 18.60.030(W) was added to Title 18 in 2001 through Ordinance No. 2001-039. Under ordinary rules of statutory construction, the drafters of the 2001 ordinance are presumed to have known of the “surface mining” definition and its exclusions, and are presumed not to have created a provision that would have no effect. However, again, the proper inquiry in determining the intent of ordinance provisions is through an analysis of the text, context and available legislative history.

The Hearings Officer finds the text of the conditional use in Section 18.60.030(W) is specific to surface mining related to the operation and maintenance of an irrigation district’s irrigation systems. Its context, including the legislative history of that provision discussed in the findings above, indicates the irrigation districts believed they were prohibited from engaging in surface mining including excavation and grading for reservoirs, as well as the off-site sale of extracted

¹⁸ A copy of the TU decision is included in the record as Exhibit P to TID’s September 26, 2014 submission. Section 18.04.030 defines “Road and Street Project, Class III Project” as “a modernization, traffic safety improvement, maintenance, repair or preservation of a road or street.”

¹⁹For example, included in the record as Exhibit B to appellants’ notice of appeal and Exhibit 13 to appellants’ October 6, 2014 submission are photographs taken between May and August of 2014 of the actual excavation for and construction of the reservoirs.

materials, and therefore needed express authorization for such activity. This context suggests both the irrigation districts and the county did not consider the exclusion from “surface mining” for a landowner’s “other on-site construction” to apply to the types of surface mining activities authorized through the conditional use. It also is possible the drafters simply did not consider the possibility that a reservoir to be used by an irrigation district would be constructed on property not owned by the district. However, because the text of the conditional use does not require that the reservoir excavation be performed by the irrigation district or on district property, only that such surface mining be “in conjunction with” the operation and maintenance of the irrigation district’s irrigation systems, I find it more likely the drafters intended the conditional use to authorize surface mining for reservoirs regardless of who owns the property or conducts the surface mining activity.

Considering the text, context and legislative history of the surface mining conditional use under Section 18.60.030(W), and in order to give it effect, the Hearings Officer finds the specific “surface mining” conditional use for reservoirs in conjunction with irrigation district systems does not fall within the general exclusion from the definition of “surface mining” in Section 18.04.030 for “on-site construction” on a landowner’s property.

For the foregoing reasons, the Hearings Officer finds conditional use approval was required for the surface mining required to convert the former Klippel mining pits to the new reservoirs on the subject property for TID’s irrigation water storage. Therefore, I find the county’s LUCS decision did not correctly categorize TID’s proposed use as an outright permitted use because an essential component of that use -- the mining and excavation conducted to create the new reservoirs -- was not identified or considered, and that activity required conditional use approval.

Recreation-Oriented Facility

Appellants argue the true nature of TID’s LUCS request is to provide a private recreational lake on the subject property. There is undisputed evidence in the record that the southern reservoir has been used for water skiing.²⁰ There also is substantial evidence in the record that the southern reservoir was designed specifically for water skiing, with its two islands, boat ramp, boat dock, and pilings for a boat house.²¹ As discussed in the Findings of Fact above, the county issued a stop work order to KCDG for construction of the boat house foundation without land use approval or a building permit, and the county issued a Notice of Violation to KCDG for operating a recreation-oriented facility requiring large acreage without land use approval.

TID denies any role in KCDG’s recreational use of the new reservoirs, stating only that such use is typical on water storage reservoirs. However, the record indicates TID was aware of both the design of the southern reservoir and the water skiing occurring on it.²² The June 2014 contract between TID and KCDG does not prohibit KCDG from using the reservoirs for recreation. And it requires KCDG to indemnify TID for any liability arising from KCDG’s use of the reservoirs. The county was aware of the recreational use of the southern reservoir when it issued the LUCS decision.

²⁰ See, e.g., photos included in Exhibits 3 and 5 to appellants’ October 6, 2014 submission.

²¹ The photograph included in the record as page 2 of Exhibit S to appellants’ notice of appeal shows the southern reservoir during construction. The photos included in Exhibit 21 to appellants’ October 27, 2014 submission show several water ski lakes in other states with designs virtually identical to the southern reservoir.

²² See, e.g., September 29, 2014 electronic mail message from Bill Hopp, attorney for TID, to Nick Lelack, identified by the county in this record as “Document 12.”

Section 18.60.030 permits conditionally in the RR-10 Zone “recreation-oriented facility requiring large acreage such as off-road vehicle track or race track.” Title 18 does not define “recreation-oriented facility.” *Webster’s New World Dictionary and Thesaurus, Second Edition*, includes the following relevant definitions:

“Recreation: any form of play, amusement, etc. used to relax or refresh the body or mind.

Orient: to adjust . . . to a particular situation.”

Based on these definitions, the Hearings Officer finds a “recreation-oriented facility” is one that is designed and constructed to provide opportunities for recreational activity. I find at least the southern reservoir’s design and use as a water-skiing lake is a recreation-oriented facility. I further find it is one “requiring large acreage such as an off-road vehicle track or race track” because a boat and skier(s) towed behind the boat require a large water surface area to safely and effectively maneuver, including making turns.

For these reasons, the Hearings Officer finds the county erred in not identifying and considering the conditional use of “recreation-oriented facility requiring large acreage” in categorizing TID’s proposal on the LUCS form and LUCS decision as an outright permitted use.

Cluster Development

The record includes evidence that KCDG’s predecessor in title, Harris Kimble, stated his intent to develop the subject property with a residential cluster development featuring the new reservoirs.²³ Both TID and KCDG disavow any representations made by Mr. Kimble as the plans of a “previous owner.” However, the record indicates Mr. Kimble is a partner in KCDG.²⁴ Accordingly the Hearings Officer find’s TID’s and KCDG’s position somewhat disingenuous. The record also includes similar representations made by KCDG representatives. As noted in the Findings of Fact above, at a June 13, 2014 meeting with CDD staff, Ms. Dickson stated KCDG planned to submit an application for a residential cluster development within six months. In addition, Paragraph (15) of the June 14, 2014 contract between TID and KCDG states:

“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.” (Emphasis added.)

TID and KCSG argue that since no land use application for residential cluster development approval has been submitted by KCDG, there is no basis to conclude the new reservoirs constitute the unpermitted “first phase” of such a development as claimed by appellants. Although the Hearings Officer finds there clearly is some basis to suspect the new reservoirs are planned to be part of a future residential cluster development, I agree with TID and KCDG that it is not reasonable to characterize the new reservoirs as the first phase of such development. That is because the cluster development conditional use in the RR-10 and WA Zones under Section 18.60.030(F) and 18.88.040(A), respectively, includes numerous components in addition to open space and amenities therein, such as dwellings, utility infrastructure, streets, and water and sewer

²³ For example, see Exhibit D to appellants’ notice of appeal.

²⁴ See Affidavit of Harris Kimble dated August 15, 2014, included in the record as Exhibit “N” to TID’s September 26, 2014 submission.

systems. Therefore, I find the county did not err in failing to identify the cluster development conditional use in categorizing TID's proposal on the LUCS form or in its LUCS decision.

Because the Hearings Officer has found the county's LUCS decision was in error and must be reversed and remanded, I do not address the parties' extensive arguments concerning whether the new reservoirs would satisfy the conditional use approval criteria for "recreation-oriented facility requiring large acreage" or for a residential cluster development.

IV. DECISION:

Based on the foregoing findings and conclusions, the Hearings Officer **FINDS:**

1. The county incorrectly categorized TID's proposed use on the WRD LUCS form as a use allowed without review.
2. The county erred in issuing a LUCS decision finding TID's proposed use was allowed without review.
3. The county's LUCS decision is reversed and remanded for the CDD Director to reissue the WRD LUCS form and the LUCS decision to categorize TID's proposed use as one involving discretionary land use approval(s) that have not yet been obtained – i.e., the conditional use of surface mining for reservoirs in conjunction with operation and maintenance of irrigation systems under Section 18.60.030(W), and/or a recreation-oriented facility requiring large acreage under Section 18.60.030(G).

Dated this 15th day of December, 2014.

Mailed this 16th day of December, 2014.



Karen H. Green, Hearings Officer

THIS DECISION BECOMES FINAL TWELVE DAYS AFTER MAILING UNLESS TIMELY APPEALED.

December 23, 2014

Anthony Raguine
Deschutes County Community Development Dept.
117 NW Lafayette Ave.
Bend, OR 97701

via Hand Delivery to
Anthony.Raguine@deschutes.org

**Re: Extension of 150-day Time Limit to Make Final Decision in the Matter of File Numbers
247-14- 000238-PS and 247-14-00274-A**

Dear Anthony,

On behalf of the Tumalo Irrigation District ("TID"), applicant for file numbers 247-14-00238-PS and 247-14-00274-A, we would like to request an extension of the statutory time limit (150 days) for the issuance of County's final decision. TID is appealing the Hearings Officer decision, dated December 15, 2014, on this application to the Board of County Commissioners.

We respectfully request this extension per ORS 215.427(5), which is cited as follows:

The period set in subsection (1) of this section may be extended for a specified period of time at the written request of the applicant. The total of all extensions, except as provided in subsection (10) of this section for mediation, may not exceed 215 days.

Because the nature of the application is a LUCS for the operations and maintenance of TID's irrigation system, TID requests a final decision before the start of the traditional irrigation season. Therefore, TID would like to extend the decision deadline until **March 31, 2015**.

Sincerely,



Elizabeth A. Dickson
Attorneys by Agreement
EAD/mls
Cc: Clients

SCANNED
DEC 24 2014

/S/

J. Kenneth Katzaroff

December 23, 2014

Board of County Commissioners
Deschutes Services Building
1300 NW Wall Street, Suite 200
Bend, OR 97701

via Hand Delivery and Email to
Anthony.Raguine@deschutes.org

Re: Appeal of Hearings Officer's Decision for File Numbers 247-14-000238-PS/247-A

Dear Commissioners,

On behalf of Tumalo Irrigation District ("TID" or "the District"), we request a *de novo* review by the Board of County Commissioners ("BOCC") of TID's application for File Numbers 247-14-000-238-PS and 247-14-00274-A, as provided by DCC 22.32.027. This appeal letter seeks review of Hearings Officer Karen Green's decision ("Decision") dated December 15, 2014.

By the letter dated this date, 2014, TID has agreed to extend the 150-day time limit to reach a final decision on its Land Use Compatibility Statement ("LUCS") for the Oregon Water Resources Department ("OWRD"). The letter and the LUCS have been attached as **Exhibit A** and **Exhibit B**, respectively.

The District seeks *de novo* review of the Decision on the following grounds:

1. The Decision omits or fails to consider statutory threshold questions of whether this is a land use decision;
2. The Decision makes and relies upon significant factual errors that prejudice the District's rights; and
3. The Decision makes several legal errors which significantly prejudice the substantive rights of both the District and the underlying property owner.

TID desires to improve the efficiency of its irrigation water delivery system. To that end, OWRD Watermaster Jeremy Giffin suggested that the District and KC Development Group, LLC ("KCDG"), collaborate to move a portion of the storage water held at the inefficient Upper Tumalo Reservoir into the existing, reclaimed Klippel Mining Pits on KCDG's property ("subject property"), thereby creating a New Reservoir for some of TID's water held for local delivery. To

effectuate the change, KCDG granted TID a perpetual easement to store water in the New Reservoir and TID applied for a temporary storage water transfer with OWRD to test whether the New Reservoir could receive, hold, and regulate water for the system.

OWRD requested a LUCS with the temporary water transfer application. The OWRD LUCS sought confirmation that the temporary, intra-district transfer of storage water complied with local land use laws. On August 6, 2014, Deschutes County Community Development Director Nick Lelack deemed the LUCS complete.

On August 13, 2014, Mr. Lelack approved OWRD's LUCS, finding that the transfer of storage water to the New Reservoir was permitted outright in the RR-10 Zone criteria because it was for the operations and maintenance of the District's irrigation system, a use permitted outright in the RR-10 Zone. The Notice of Decision ("NOD") has been attached as **Exhibit C**.

The NOD was appealed by neighbors [Thomas and Dorbina Bishop, Trustees of the Bishop Family Trust ("Appellant")], through their attorney Jennifer Bragar.

A public hearing was held before Hearings Officer Karen Green on October 7, 2014.

Hearings Officer Karen Green issued a decision reversing and remanding the NOD of Mr. Lelack on December 15, 2014.

TID now appeals that Decision to the BOCC under the *de novo* review provision found at DCC 22.32.027, for the following reasons:

I. The Hearings Officer Failed to Consider or Decide Threshold Legal Issues That Would Determine Whether the LUCS is a "land use decision".

A. ORS 197.015(10)(b)(H) excludes this LUCS decision from the statutory definition of "Land Use Decision" and so the appeal should have been dismissed.

State law governs what type of decision is a "land use decision" and to which land use procedures, including appeals, must attach. ORS 197.015(10)(b)(H) specifically excludes decisions such as this LUCS from the definition of "land use decision." The provision provides:

(10) "Land use decision". . . (b) Does not include a decision of a local government. . .
(H) That a proposed state agency action subject to ORS 197.180(1) is compatible with the acknowledged comprehensive plan and land use regulations implementing the plan, if:

- (i) The local government has already made a land use decision authorizing a use or activity that encompasses the proposed state agency action;

- (ii) The use or activity that would be authorized, funded or undertaken by the proposed state agency action is allowed without review under the acknowledged comprehensive plan and land use regulations implementing the plan; or
- (iii) The use or activity that would be authorized, funded or undertaken by the proposed state agency action requires a future land use review under the acknowledged comprehensive plan and land use regulations implementing the plan[.]

Each of these three conditions may be found to apply in this case. Essentially, the statute provides that a decision is not a land use decision if 1) the local government has already made a land use decision about the proposed use; 2) the proposed use is already permitted outright; or 3) if the proposed use would require later review, and so be evaluated then.

In this case, the existing decisions already made qualify the subject LUCS decision as either the exclusion in (H)(i) or (H)(ii). If the BOCC decides to broaden the scope of this LUCS decision to include secondary uses that have not been applied for by the applicant, then (H)(iii) would exclude this LUCS from the definition of a “land use decision.” These separate exclusions will be discussed in turn:

1) Two land use decisions have already been made by Deschutes County that allow the proposed use on the subject property, thus excluding this LUCS under ORS 197.015(10)(b)(H)(i).

In 2001, the County revised the RR-10 Zone code to include, as an outright permitted use, operations, maintenance, and piping of existing irrigation facilities. ORS 197.015(10) provides that amendment to a land use regulation (zoning code) is a land use decision.

In 2007, the subject property was specifically evaluated for post-reclamation, and the RR-10 Zone was applied to the subject property. Whether either of those decisions “encompasses” TID’s proposed use—a temporary transfer of storage water as part of its operations and maintenance, is the central question here.

In 2001, the County’s code amendment was comprehensive, and applied the outright use to all zones within Title 18 of its code. The amendment was made at the express request of an irrigation district, to allow for more flexibility in continuous efficient operations and maintenance of irrigation water systems throughout the Deschutes River Basin. No qualifications were made to the outright use. The County recognized that irrigation districts have plenary authority under state and federal law, and that authority needed to be reflected in the County land use code. Therefore, the County’s decision to adopt the outright permitted use provisions throughout the code encompassed irrigation district activities. It is reasonable to conclude that this authority includes storage transfers, as contemplated by this LUCS to OWRD. If the BOCC concludes that the 2001 code change may reasonably be interpreted to include the

irrigation districts' ability to relocate some of its stored water within its district, land use review has already been made, and this LUCS decision should be excluded from the definition of a land use decision.

This statutory exclusion of LUCSs based on already approved activity was raised below. The Hearings Officer's decision did not address this statute. We request that the Decision be reversed, and that the BOCC approve the LUCS as a use already permitted outright, and excluded from the definition of a land use decision.

2) No land use review is required because the proposed use is permitted outright, excluding this LUCS under ORS 197.015(10)(b)(H)(ii).

This LUCS is also not appealable as a land use decision because it has been expressly excluded from the statutory definition of a "land use decision" under ORS 197.015(10)(b)(H)(ii). Mr. Lelack stated in his NOD that TID's planned move of its "Regulation Pond storage from its current in-district storage at Tumalo Reservoir to Klippel Acres Mining Pit" was permitted outright for all applicable criteria. Using the words of the State's 2009 statute, the proposed use was "allowed without review under the acknowledged comprehensive plan and land use regulations implementing the plan." In fact, before the LUCS was even filed, Mr. Lelack informed Ms. Douthit at the OWRD (who required the LUCS), that the proposed use was permitted outright. See letter from Susan Douthit, attached as **Exhibit D**. The statute expressly excludes this LUCS decision from the definition of "land use decision".

This point was raised before the Hearings Officer, as well. The Hearings Officer failed to consider or address this exclusion and so her Decision should be reversed, and the BOCC should approve the LUCS as permitted outright and excluded from the definition of "land use decision".

It is interesting to note that the Decision does not find that TID's proposed use is not permitted outright. Instead, the Decision finds that the activity to create the mining pits required conditional use review. However, the Hearings Officer incorrectly attributed mining activity to the excavation of the New Reservoir, but such activity was actually permitted under TU-14-8 for on-site road maintenance, or as earlier DOGAMI-permitted surface mining that created the Klippel Mining Pits. The Klippel Mining Pits that now form the New Reservoir existed before the concept of the New Reservoir was even suggested by OWRD employee Giffin. The determination of Mr. Lelack that lining the existing pits, transferring of water into them, and using them as a New Reservoir was permitted outright is the correct decision. We ask that the BOCC apply the same reasoning as its Planning Director.

3) In the alternative, if conditional use is required for later recreational use, this LUCS is excluded under ORS 197.015(10)(b)(H)(iii).

In the alternative, if the BOCC decides to expand the scope of this LUCS and examine the secondary or ancillary use of the New Reservoir for recreation or other secondary uses, then

ORS 197.015(10)(b)(H)(iii) excludes this LUCS decision from the definition of “land use decision”. As discussed below, Oregon land use law examines the primary use of land when judging compatibility with local land use regulations. However, if the BOCC decides to not only examine the primary use as an irrigation storage facility but also the secondary uses for recreation which require conditional use review, then this LUCS is excluded from the land use process because it only contemplates the primary use; a water storage facility for TID.

If the BOCC decides to open the discussion to uses not applied for by the applicant TID and not requested to be reviewed for compatibility by OWRD, then that review is properly done in a different forum and not in a LUCS decision to OWRD for a use already determined to be permitted outright. A review of potential secondary recreational uses should be conducted separately, excluding this LUCS under ORS 197.015(10)(b)(H)(iii). The Hearings Officer’s decisions improperly comingles these possible secondary uses for the water here.

B. The LUCS decision is a development action, appealable by Applicant TID only, so Appellant lacked standing to appeal.

Both Mr. Lelack and the Hearings Officer determined that the LUCS decision constituted a “development action” instead of a “land use action” under the Deschutes County Code. Under DCC 22.16.010, only the planning director (Mr. Lelack), has the discretion to treat a true development action as a land use action. Therefore, only Mr. Lelack has the authority to overlay land use action procedures onto this LUCS decision, and only for his decision-making process. Mr. Lelack’s decision, once made, terminates the matter’s temporary treatment as a “land use action”. The decision then reverts to its true nature, that of a development action.

Pursuant to DCC 22.32.050, only an applicant has standing to appeal a development action. Because the Hearings Officer also independently noted that the LUCS decision was a development action, only the applicant, TID, has standing to appeal that decision. The Hearings Officer has no authority to overlay land use action procedures onto development actions. That authority rests solely with the planning director.

Therefore, when the Hearings Officer correctly determined that the LUCS decision was development action, she was bound to dismiss the appeal because Appellant’s standing was not extendable under DCC 22.32.050.

Instead, the Hearings Officer analogized that this to a case where the planning department expressly represented to a potential appellant that specific appeal provisions would be available to the project opponent. This case has no such facts. In this case, Mr. Lelack cited only to the provisions on appeals, which provide for appeal of both development actions and land use actions, and did not by express writing extend specific appeal rights to the Appellant. The Hearings Officer did not address this critical distinction. Instead, she stated that “the Hearings Officer expresses no opinion on whether that determination has any effect on LUBA’s jurisdiction under ORS 197.825 to hear an appeal to LUBA of the LUCS decision of my decision.” Decision at footnote 9.

Because the Hearings Officer did not consider or address the threshold standing arguments, they remain unresolved. State statutes relating to LUCSs as land use actions are critical to the outcome of this matter. We ask the BOCC to accept this appeal, address these questions as raised, and approve the LUCS as approved in the original Lelack Notice of Decision.

It should also be noted that because the Hearings Officer determined this LUCS is a development action, pursuant to DCC 22.32.050, only TID is entitled to appeal, only TID is entitled to participate in the appeal, and only TID is entitled to notice of the appeal or a hearing date for the appeal.

II. The Hearings Officer's Decision Contains Multiple Legal Errors which Prejudice the District and Should be Reversed

A. The LUCS proposed use includes a water storage reservoir and is permitted outright.

The Hearings Officer determined that the LUCS could not be issued because the actual proposed use was not specified or considered by the LUCS. Her reasoning was that the LUCS only proposed the transfer of storage water, and not the creation of a new reservoir. While we understand her desire to address the issue as one of creating a new land use, that being a reservoir, that is respectfully not the question OWRD asked to be answered on their LUCS form Mr. Lelack recognized that and answered the question asked: Is the temporary movement of stored water from one location to another by an irrigation district allowed by Deschutes County's land use code?

The Hearings Officer then finds that because the creation of a reservoir was not specifically contemplated, the LUCS could not issue. In so finding, she's essentially made up a new question, then found a different answer in the code. Therefore, the Decision should be reversed. We ask the Board to consider the real question correctly on appeal, and render a well-reasoned, but admittedly narrower decision like the one reasoned by Mr. Lelack.

1) Creation of a reservoir was specifically contemplated by the LUCS Decision.

Mr. Lelack's NOD was made based on the information submitted to him by TID. This included the LUCS form, the Letter from Ken Rieck to Nick Lelack, and the District Boundary Map. The LUCS form specifically names the proposed use as storage water. The Letter specifically states TID's proposal to move its regulation pond storage. The NOD states that transferring in-district storage from the Tumalo Reservoir up-system to the Klippel Acres Mining Pit is permitted outright. NOD, **Exhibit C**, at page 2.

In the Decision, the Hearings Officer herself defines "reservoir" as "a place where water is collected and stored for use." Page 15, Decision. Therefore, the Decision, if it is allowed to stand, finds that any place where water is stored is a "reservoir". This new definition does not limit the concept by area or volume or even that it be located outdoors. Respectfully, The

Hearings Officer exceeded her authority by formulating such a broad definition on her own, without legislative authority to do so. We ask this Board to accept this appeal and resolve the ambiguity created by this newly created law.

She goes on to find that this newly defined use warrants additional review. This is a legal error. Therefore, the Decision should be considered on appeal, reversed and the LUCS approved as permitted outright.

2) The reservoir was not created through surface mining activities and no conditional use approval was required.

There is no dispute that the Klippel Acres Mining Pits were created by past surface mining activity. The Hearings Officer's Decision mentions that in her 2007 decision to rezone the property, noting that surface mining had taken place and several "disturbed areas" still existed.

In fact, surface mining occurred up through much of 2004. In 2005, the site was deemed reclaimed by DOGAMI. In total, more than 1,320,000 cubic yards of material were extracted from the site. That is equivalent to approximately 400 Olympic-sized swimming pools. The excavations left were so large that they could not feasibly be filled. The land remained unoccupied and unusable for a decade.

In spring 2014, KCDG applied for a temporary use permit, TU-14-8, to perform rock crushing within the Klippel Pits for on-site road maintenance and landscaping to begin improvements on the largely abandoned property. The County approved all activity that occurred on site. Code enforcement complaints with regards to the scope of activity were investigated by Code Enforcement Technician Tim Grundeman, who found no violations.

In her Decision, the Hearings Officer ignored all evidence of prior surface mining activity despite the fact that she'd examined the site herself after mining was complete and reclamation could occur according to RR-10 Zone acceptable uses. She determined that because any rock crushing took place on site, it must have included surface mining and been by the irrigation district, and must have been to create the New Reservoir. She found that conditional use review was required because irrigation districts cannot perform such activity without conditional use review. That conclusion is also not supported by any evidence in the Record, because it is not true.

The only activity that took place on site was permitted rock crushing for road maintenance and landscaping, and that was performed by owner KCDG, LLC, under permit. The Klippel Pits were already in existence – no new surface mining occurred to create them. Therefore, no surface mining can be attributed to their creation or to TID's acts. The Hearings Officer's Decision only considers snapshots of the site and draws conclusions that are significant evidentiary leaps, not supported by the evidence. The Record establishes that rock crushing equipment was used for maintenance of a road on the western edge of the property. The Record establishes that the activity performed by that equipment was completed at the bottom of the pre-existing Klippel

Pits. The Record does not establish or support the conclusion that surface mining took place to create the Klippel Pits.

Stated simply, the Hearings Officer's Decision ignores the fact that the Klippel Pits were an existing excavation, constructed under DOGAMI regulation, and later found to be conducive to the storage of water by OWRD's Watermaster. Concluding that the New Reservoir was constructed by surface mining by attributing decade-old activity and ignoring permitted road work constitutes a legal error which should be reversed. We ask this Board to accept this appeal and do so.

a. No new surface mining occurred to create the reservoir.

The Hearings Officer attributed all potential surface mining activity that occurred on the subject property to the construction of the New Reservoir. She is in error. The Hearings Officer ignores substantial evidence that the only surface mining activity that took place on the site was permitted under temporary use TU-14-8, issued to KCDG, LLC, which allowed for excavation and rock crushing for maintenance of roads and landscaping by KCDG, LLC. She accepts as fact that pictures of the rock crushing machinery at the subject property are conclusive that surface mining occurred to create the New Reservoir, and TID performed it. Essentially, the Hearings Officer ignores the fact that an access road was improved on the subject property, ignores that the county permitted the activity to improve the road, and determines that because required machinery for that permitted activity was on the site – it was really for creating a reservoir. This conclusion never mentions the road and ignores that the permitted activity should be attributed to it. That finding is a legal error, is not supported by the evidence, and should be reversed.¹ We ask this Board to review these erroneous conclusions and resolve them locally, correcting the Deschutes County decision.

The Hearings Officer stated that TU-14-8 did not permit "excavation and grading" at the site. This is incorrect. The permit on its face allows for excavation. Code enforcement reviewed these facts at the time and found no violation. Deschutes County does not have a grading ordinance, per se, and so does not regulate that activity outright. Therefore, any decision that relies on "excavation and grading" to conclude that activity at the site was unpermitted or requires conditional use approval is a legal error and should be reversed.

The Hearings Officer made findings based upon a past land use decision – the granting of the permit TU-14-8. The scope of that permit and the ability to appeal its grant lapsed over 6 months ago. Re-opening that permit constitutes a legal error that significantly prejudices the District, and should not be allowed to stand. The Hearings Officer does not have jurisdiction to hear claims that the permitted activity under TU-14-8 was exceeded. That jurisdiction lies within code enforcement procedures. Therefore, she committed further legal error in

¹ The Hearings Officer also fails to point to any evidence that shows surface mining to construct the reservoir. She only points to pictures which show the machinery that was used to perform the County-permitted road maintenance.

determining that the scope of that temporary use permit was exceeded, and the Decision should be corrected.

b. Site activity was legal: either specifically allowed by TU-14-8 or definitionally excluded from “surface mining”.

The Hearings Officer determined that conditional use approval was required for the construction of the reservoirs because they are associated with an irrigation district. As noted above, to get there she had to craft a definition of “reservoir,” determine the holes were dug for the reservoir, and conclude that TID dug it; none of which are true. The Hearings Officer determined that although “on-site construction” by a landowner is excluded from the definition of “surface mining,” conditional use was nonetheless required in this case because it was for a reservoir associated with an irrigation district. This constitutes a significant legal error that burdens TID’s rights and should be reversed.

As we stated above, no surface mining activity took place to build the New Reservoir. Rock crushing on site was permitted for maintenance of a road and for landscaping purposes. Even if surface mining had occurred, DCC 18.04.030 excludes from the definition of “surface mining” “construction, reconstruction or maintenance of access roads and excavation or grading operations conducted in the process of farming or cemetery operations, on-site road construction and other on-site construction. . . .” Thus, in this case, any on-site construction that KCDG performed is excluded from the definition of “surface mining.”

However, the Hearings Officer determined that under DCC 18.60.030(W), surface mining that can be attributed to an irrigation district is a conditional use; and, because activity occurred on the site of the reservoir, it was attributed to the irrigation district and thus required conditional use approval. That conclusion is a legal error and should be reversed.

DCC 18.60.030(W) requires that surface mining must occur in order for the code provision to apply. In this case, activity on the site is expressly excluded from the definition of “surface mining,” as the County defines it. Therefore, no surface mining occurred, and the code provision does not apply. Yet, the Hearings Officer applied it, in error.

The Hearings Officer made additional findings that because of DCC 18.60.030(W), although any other property owner could use the “on-site construction” exclusion for surface mining to exclude this very activity, an irrigation district may not; and in addition, that any landowner is also precluded if it can tenably be related to an irrigation district. This reasoning is a stretch at best. Further, as legal error, as applied such reasoning may violate the Equal Protection Clause of the United States Constitution because it is not rationally related to any legitimate interest of Deschutes County. The restriction is applicable only, and exclusively, to irrigation districts, and as explored in the Decision, there is scant reasoning to justify the restriction.

B. The New Reservoir cannot be considered a structure because it has no fixed base.

The Hearings Officer interpreted that the New Reservoir was a “structure” because it was “built” or “constructed.” This finding relied again on TID’s “excavation and grading,” and so is a legal error. The Hearings Officer’s Decision also fails to consistently apply the definition of “structure” in the DCC. In order for something to be a “structure” there must be a “fixed base on, or connection to, the ground or another structure,” as noted in the Record. As is already addressed in the Record, the New Reservoir is an existing deep excavation, merely lined with an impermeable material. It has no fixed based, nor is it “affixed” to the ground or any other structure. Water can flow between it and the ground, as can air. Taking the Decision’s reasoning to its literal conclusion, it would mean that any time a person lays a tarp on the ground, or stacked a rock, or smoothed their driveway, they have created a “structure”. That conclusion would be inconsistent with existing interpretations, a substantial legal error, and should be reversed. We ask this Board not to let such faulty reasoning stand as a Deschutes County interpretation.

Determining that the New Reservoir is a structure is contrary to established precedent in Deschutes County. The Record and testimony by planning department staff at the October 7, 2014, Hearing establish that Deschutes County only classifies developments that require a building permit as “structures.” The planning department and code enforcement staff have already determined that no building permit was necessary to line the Klippel Mining Pits to create the New Reservoir. Therefore, the New Reservoir may not now consistently be interpreted as a “structure”. Determining otherwise is a legal error and should be reversed.

Additionally, TID would like to point out that based upon the precedent created by the Hearings Officer’s Decision, TID would be precluded from upgrading any of its system. TID routinely lines its canals with clay, shotcrete, or concrete, to prevent seepage losses, or uses steel pipe. Some patches are small, while others repair whole lengths of system to better hold water. This is no different than lining the Klippel Pits. Essentially, the Hearings Officer’s Decision finds that while TID might be able to move its storage water into the Klippel Pits, the act of lining them turned them into a “structure”. This is a legal and policy error. If TID merely moved the water, the water would seep out like it does at the Upper Tumalo Reservoir. This would be no better for water conservation or the Deschutes Basin as a whole. It would allow TID to better regulate its system, but the myriad other benefits would be precluded. The BOCC should find that TID is able to line this storage facility just like it can line or pipe its canals and other irrigation facilities, as an outright use.

C. Recreation-oriented facility does not apply, based on prior Deschutes County decisions.

The Hearings Officer determined that the south pond of the New Reservoir was a recreation-oriented facility. The finding was made by defining “recreation” as “any form of play, amusement, etc., used to relax or refresh the body or mind,” and “orient” as “to adjust . . . to a

particular situation.” This finding is overly broad, not based on rational findings, and creates an untenable precedent for Deschutes County.

Oregon Law, Deschutes County, and the OWRD LUCS form only examine the proposed use of the applicant when determining compatibility with local land use laws. It is not the local government’s responsibility, or right, to entertain all other possible uses for a proposed use. The Hearings Officer’s Decision failed to consider the primary use or primary purpose for the south pond – as a temporary water storage location for TID. The Hearings Officer did not even address the question of primary use versus secondary use, in direct conflict with established precedent. The omission of primary/proposed use analysis constitutes a legal error and the Decision should be reversed.

Additionally, taking her finding to its logical conclusion, any and all development actions or land use applications would also have to be analyzed as a “recreation-oriented facility” because such use could be arranged to provide amusement at any time. Adopting the findings of this Hearings Officer, not supported by the law, constitute a legal error which should be reversed. The LUCS should be approved because the proposed use is permitted outright under the applicable criteria.

The finding that the south pond is a recreation-oriented facility is also inconsistent with the Hearings Officer’s Decision’s earlier findings. On page 9, the Hearings Officer says “I find there is no doubt that TID intends to use the new reservoirs to store irrigation water on a long-term basis. . .” This clearly states that the proposed and primary use of the New Reservoir is for storage and not recreation. Finding otherwise is inconsistent and a legal error, and should be reversed.

D. The Decision includes several errors in the official Record, and so should be reversed.

The Decision contains a number of errors in the Record that constitute legal errors. First, the Hearings Officer ruled on December 4, 2014, on a number of issues related to what was allowed in after the open record period was closed. The Hearings Officer determined that Exhibits W and X of our final argument could not be considered because they were past the deadline. By that same ruling, the Hearings Officer should have also rejected the letter received from Oregon Department of Fish and Wildlife because it was received three days after the close of the open record period. Not doing so constitutes a legal error which prejudices TID.

Second, in her Order dated December 4, 2014, to exclude certain exhibits from the record as “new evidence,” the Hearings Officer erred. As stated in our letter dated December 1, 2014, and submitted as **Exhibit E**, Oregon Law requires that Appellant show why items constitute “new evidence” in order for them to be excluded from consideration. Appellant did not show why any of the exhibits constituted new evidence. Appellant merely submitted a letter challenging every Exhibit that had not been submitted to date.² Therefore, because Appellant

² And some that had already been submitted, but which the Hearings Officer correctly left as part of the Record.

did not meet their burden, the Exhibits should not have been excluded from the Record. Because they were excluded from the Record, the Decision contains legal errors and should be reversed, and the LUCS should be approved as permitted outright.

III. The Hearings Officer's Decision Includes Several Factual Errors that Prejudice the District's Substantive Rights and Should Be Resolved by a Correct Decision

A. Harris Kimble is not the Applicant's Predecessor in Title.

The Decision states that Harris Kimble is the Applicant's predecessor in title to the subject property. The Applicant for this LUCS was TID. TID holds a perpetual easement over property owned by KCDG. Harris Kimble previously owned the subject property, and sold it KCDG. Harris Kimble is now a member of KCDG.

Although we understand how this error could have been made, it requires correction. It appears as though the Hearings Officer does not adequately understand the parties or their relationships. It also again highlights inconsistencies within the Decision itself. For example, on page 3, it calls Harris Kimble the predecessor in title of the Applicant (TID), yet on page 21 it calls Harris Kimble the predecessor in title to KCDG.

Because the Hearings Officer has made basic factual errors regarding the parties and their relationships, the Decision should be corrected and the BOCC should approve the LUCS as originally issued.

B. LUCS submission did not include a letter from OWRD's Susan Douthit.

The Hearings Officer's Decision suggests that the LUCS is subject to land use procedures because the LUCS form was submitted with a letter from OWRD's Susan Douthit. See Decision at page 13. This is a significant factual error. As the Record shows, the LUCS was only submitted with a Letter to Nick Lelack from Ken Rieck, TID District Manager, and a map of the District's boundaries. This is a significant factual error that colors the review and approval of the LUCS by Mr. Lelack.

Additionally, at the October 7, 2014 public hearing, the Hearings Officer expressly precluded OWRD rules, decisions, and considerations from her deliberations on the LUCS. Relying on the letter and interpreting its language in the Decision was thus both a factual and legal error and should be reversed.

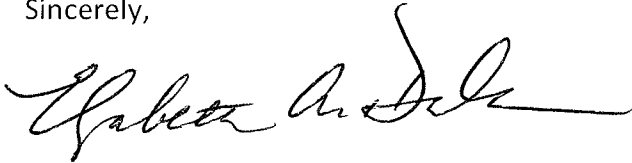
IV. Conclusion

We believe that the current decision on this matter reaches insubstantial factual and legal conclusions, and relies on those errors to make wrong conclusions and creates untenable precedents. Pursuant to DCC 22.32.027, we request that the BOCC accept this appeal, and do so *de novo*.

To effectuate timely, yet appropriately thoughtful review of this matter, we have requested that the statutory deadline for the County to make a final decision on this matter be extended from January 2, 2014, until March 31, 2015.

We believe that once the County has had the opportunity to adequately review the appropriate issues, the LUCS will be again approved as permitted outright under the applicable criteria, and/or excluded from the definition of a "land use decision" and thus the land use process.

Sincerely,



/s/

Elizabeth A. Dickson
Counsels by Agreement for Tumalo Irrigation District
EAD/mls
Encs. As noted below

J. Kenneth Katzaroff

Exhibits Attached and Incorporated by Reference

- A. 150-Day Extension Letter, December 19, 2014
- B. LUCS
- C. Notice of Decision, August 13, 2014
- D. Susan Douthit Letter, OWRD, July 18, 2014
- E. TID Response to Objections Letter, December 1, 2014

December 23, 2014

Anthony Raguine
Deschutes County Community Development Dept.
117 NW Lafayette Ave.
Bend, OR 97701

via Hand Delivery to
Anthony.Raguine@deschutes.org

**Re: Extension of 150-day Time Limit to Make Final Decision in the Matter of File Numbers
247-14- 000238-PS and 247-14-00274-A**

Dear Anthony,

On behalf of the Tumalo Irrigation District ("TID"), applicant for file numbers 247-14-00238-PS and 247-14-00274-A, we would like to request an extension of the statutory time limit (150 days) for the issuance of County's final decision. TID is appealing the Hearings Officer decision, dated December 15, 2014, on this application to the Board of County Commissioners.

We respectfully request this extension per ORS 215.427(5), which is cited as follows:

The period set in subsection (1) of this section may be extended for a specified period of time at the written request of the applicant. The total of all extensions, except as provided in subsection (10) of this section for mediation, may not exceed 215 days.

Because the nature of the application is a LUCS for the operations and maintenance of TID's irrigation system, TID requests a final decision before the start of the traditional irrigation season. Therefore, TID would like to extend the decision deadline until **March 31, 2015**.

Sincerely,



Elizabeth A. Dickson
Attorneys by Agreement
EAD/mls
Cc: Clients

/s/

J. Kenneth Katzaroff

Land Use Information Form

EXHIBIT B



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

EXHIBIT B



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

Applicant(s): Tumalo Irrigation District

Mailing Address: 64697 Cook Avenue

City: Bend

State: OR

Zip Code: 97701

Daytime Phone: 541-382-3053

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 ¼	Tax Lot #	Plan Designation (e.g., Rural Residential/RR-5)	Water to be:	Proposed Land Use:
<u>17</u>	<u>11</u>	<u>13</u>	_____	<u>1711130000828</u>	<u>RR-10</u>	<input type="checkbox"/> Diverted <input type="checkbox"/> Conveyed <input type="checkbox"/> Used	<u>storage</u>
<u>17</u>	<u>11</u>	<u>13</u>	_____	<u>1711130000824</u>	<u>RR-10</u>	<input type="checkbox"/> Diverted <input type="checkbox"/> Conveyed <input type="checkbox"/> Used	<u>storage</u>
_____	_____	_____	_____	_____	_____	<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 - Storage ☐ 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: _____ ☐ 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 Storage

Briefly describe:

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.

Affected tax lots are 1711130000828 and 1711130000824. See attached for TID Boundary map.

EXHIBIT B



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. →

EXHIBIT B

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.

Receipt for Request for Land Use Information



Applicant name: _____

City or County: _____ Staff contact: _____

Signature: _____ Phone: _____ Date: _____

The map displays a grid of sections for Range 11 and Range 12. Range 11 is shaded and contains five numbered circles (1-5). Range 12 is unshaded. The Deschutes River and Tumalo River are shown flowing through the ranges. The map is overlaid on a grid with section numbers 1 through 36.

Exhibit B
Page 5 of 7

EXHIBIT B

TUMALO IRRIGATION DISTRICT

64697 Cook Ave.
Bend, OREGON 97701
Phone (541) 382-3053
FAX (541) 383-3287
Email: tid@tumalo.org
Web Page: www.tumalo.org

RECEIVED

JUN 24 2014

Deschutes County CDD

June 19, 2014

Nick Lelack
Community Development Director
Deschutes County
117 NW Lafayette Ave.
Bend, OR 97701

By U.S. Mail and email to Nick_Lelack@co.deschutes.or.us

Re: Tumalo Irrigation District Regulation Pond Storage Move to Klippel Acres Mining Pit

Dear Nick;

Tumalo Irrigation District (TID) has decided to move its Regulation Pond storage to a site upstream from our current in-district storage at the Tumalo Reservoir. The Reservoir was designed and built in the 1920's and does not adequately serve TID's needs. It is located far down in the District's points of delivery to intercept many of our deliveries, it is very shallow so encourages loss due to evaporation and allows solar heating of the water, and it leaks. The new site will be at the top of the system so will provide the ability for us to hold water in District for the entire distribution network, it will be deeper due to the mining pits already in place, and it will be lined so it will not suffer from appreciable leakage. In short, it will be a significant upgrade to operations and maintenance capability for the District.

We also anticipate that use of this storage site will enable us to reduce dependence on Tumalo Creek for our natural flow, an ongoing goal for both TID and the Deschutes Basin as a whole. The site will also continue to provide emergency water supplies for the District as well as for other Emergency Services responders, as it did during its trial period last week, when it was the primary source for both tanker and air fire suppression efforts in the Two Bulls fire immediately to the west.

We have received mail from an Attorney Bragar and an Attorney Newman on behalf of a Mr. Bishop, concerned that our choice to move our storage to the new location is not compliant with applicable law, including land use law. We have reviewed the County's code, and find that we are allowed to operate and maintain our system without land use approval from Deschutes County. The subject property is in the Rural Residential 10 acre minimum (RR 10) zone, which allows our operations to go forward as an outright use. Here are the applicable code provisions we rely upon:

EXHIBIT B

Tumalo Irrigation District Letter to Deschutes County
Page 2

Chapter 18.60. RURAL RESIDENTIAL ZONE - RR-10

18.60.020. Uses Permitted Outright.

- I. Operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District except as provided in DCC 18.120.050.

Chapter 18.120. EXCEPTIONS

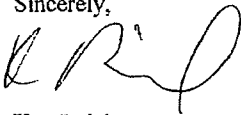
18.120.050. Fill and Removal Exceptions.

C. Fill and removal activities conducted by an Irrigation District involving piping work in existing canals and ditches within wetlands are permitted outright.

We read these provisions to mean that Tumalo Irrigation District is legally entitled to proceed with this improvement to our system without Deschutes County land use review. Please advise regarding this analysis.

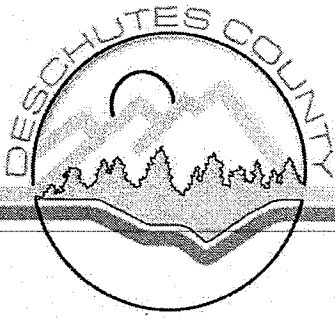
Thank you, in advance, for your attention to this matter.

Sincerely,



Ken Reick
Tumalo Irrigation District Manager

Cc: Liz Dickson, attorney for KCDG, LLC, underlying property owners of new site.



Community Development Department

Planning Division Building Safety Division Environmental Soils Division

P.O. Box 6005 117 NW Lafayette Avenue Bend, Oregon 97708-6005
(541)388-6575 FAX (541)385-1764
<http://www.co.deschutes.or.us/cdd/>

NOTICE OF DECISION

FILE NUMBER: 247-14-000238-PS

APPLICANT: Tumalo Irrigation District
64697 Cook Avenue
Bend, OR 97701

OWNER: KC Development Group, LLC
63560 Johnson Road
Bend, OR 97701

REQUEST: Land Use Compatibility Statement Permit Sign-Off (PS) to transfer in place 108 acre feet of Tumalo Creek water from Tumalo Reservoir to Klippel Acres Mining Pit.

STAFF CONTACT: Nick Lelack, Community Development Director

I. APPLICABLE CRITERIA:

Title 22 of the Deschutes County Code, Development Procedures Ordinance
Chapter 22.16 Development Action Procedures

Title 18 of the Deschutes County Code, the County Zoning Ordinance:
Chapter 18.60, Rural Residential Zone District
Chapter 18.88, Wildlife Area Combining Zone
Chapter 18.120, Exceptions

II. BASIC FINDINGS:

- A. LOCATION:** The subject property is located at 63560 Johnson Road, Bend; and is further identified on County Assessor's Map 17-11-13 as Tax Lots 828 and 824.
- B. ZONING:** The subject property is zoned Rural Residential and is within the Wildlife Area Combining Zone.
- C. PROPOSAL:** Tumalo Irrigation District (TID) proposes to move its Regulation Pond storage from its current in-district storage at Tumalo Reservoir to Klippel Acres Mining

EXHIBIT C

Pit. The new site will be upstream and located in a line storage facility to prevent leakage and make water available to its entire distribution network.

- D. **REVIEW PERIOD:** File 247-14-000238-PS was submitted on August 4, 2014, and deemed complete by the Planning Division on August 6, 2014.

III. **CONCLUSIONARY FINDINGS:**

Title 22 of the Deschutes County Code, Development Procedures Ordinance

CHAPTER 22.16 DEVELOPMENT ACTION PROCEDURES

22.16.010, REVIEW OF DEVELOPMENT ACTION APPLICATIONS

- B. The Planning Director has the discretion to determine that for the purposes of DCC Title 22 a development action application should be treated as if it were a land use action application.

FINDING: For the purposes of Title 22, TID's application for Land Use Compatibility Statement Permit Sign-Off shall be treated as if it were a land use application.

Title 18 of the Deschutes County Code, County Zoning

CHAPTER 18.60 RURAL RESIDENTIAL ZONE DISTRICT

18.60.020, USES PERMITTED OUTRIGHT

- I. Operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District except as provided in DCC 18.120.050.

FINDING: According to information provided by Tumalo Irrigation District, TID "has decided to move its Regulation Pond storage to [the Klippel Mining Pit] a site upstream from our current in-district storage at the Tumalo Reservoir." TID states that the existing Reservoir "was designed and built in the 1920's and does not adequately serve TID's needs", and that the new site "will be a significant upgrade to operations and maintenance." The Planning Director finds that 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 this zone.

CHAPTER 18.88 WILDLIFE AREA COMBINING ZONE

18.84.030 USES PERMITTED OUTRIGHT

In a zone with which the WA Zone is combined, the uses permitted outright shall be those permitted outright by the underlying zone.

FINDING: The same outright permitted uses are allowed in the Rural Residential Zone District and the WA Combining Zone. Therefore, the "operation, maintenance, and piping of existing

EXHIBIT C

irrigation systems operated by an Irrigation District except as provided in DCC 18.120.050" is an outright permitted use.

CHAPTER 18.120. EXCEPTIONS

18.120.050, FILL AND REMOVAL EXCEPTIONS

- C. Fill and removal activities conducted by an Irrigation District involving piping work in existing canals and ditches within wetlands are permitted outright.**

FINDING: This application does not propose to pipe existing canals and ditches within wetlands. This criterion is not applicable.

IV. DECISION:

APPROVAL of the Land Use Compatibility Statement Permit Sign-Off (PS) to transfer in place 108 acre feet of Tumalo Creek water from Tumalo Reservoir to Klippel Acres Mining Pit.

V. DURATION OF APPROVAL:

The applicant shall initiate the proposed use within two (2) years of the date this decision becomes final, or obtain an extension of time pursuant to Section 22.36.010 of the County Code, or this approval shall be void.

This decision becomes final twelve (12) days after the date of mailing, unless appealed by a person or entity entitled to appeal a land use decision under Title 22 of the Deschutes County Code.

DESCHUTES COUNTY PLANNING DIVISION



Written by: Nick Leback, Community Development Director

Dated this 13th day of August, 2014

Mailed this 13th day of August, 2014



Oregon

John A. Kitzhaber, MD, Governor

RECEIVED

JUL 22 2014

Deschutes County CDD

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

July 18, 2014

Tumalo Irrigation District
64697 Cook Ave.
Bend, OR 97701

Carl (Bill) W. Hopp, Jr., Attorney at Law, LLC
168 NW Greenwood Ave.
Bend, OR 97701

Dear Mr. Rieck,

I was recently assigned temporary transfer application T-11833 filed by Tumalo Irrigation District. This temporary transfer proposes to move a portion of the authorized storage water from Upper Tumalo Reservoir (evidenced by Certificate 76684) into new storage facilities within T17S R11E, Section 13, W.M.

Because this change, unlike typical temporary district water right transfers, involves structural changes and/or the creation of new impoundment facilities, a completed Land Use Information Form is required. (See Oregon Administrative Rules 690-005-0025.)

During a recent telephone conversation with your legal representation, Mr. Hopp, it was mentioned the District originally submitted the Department's Land Use Information Form to Deschutes County, but later withdrew the request for completion of the form. I have since spoken with Mr. Nick Lelack, Community Development Director for Deschutes County, who stated the Planning Division of Deschutes County was prepared to sign the Department's Land Use Information Form noting that the proposed use is allowed outright.

In a subsequent conversation with Mr. Hopp, I was informed that Deschutes County will be crafting a letter, in addition to the completed land use form mention above, stating they believe the use is consistent with Deschutes County planning. I suggested that the letter be attached as an addendum to the properly filled out and appropriately signed land use form.

Because of the reasons outlined above, the Department requests submittal of an appropriating completed and signed Land Use Information Form. If the Land Use Information Form is not received by the Department by August 18, 2014, the Department may issue a Final Order denying the transfer application.

I have enclosed a Land Use Information Form for your convenience.

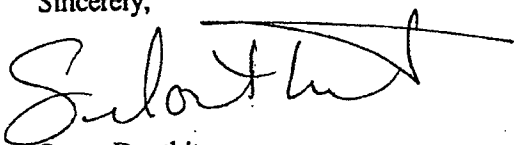


EXHIBIT D

Finally, prudence dictates the District is reminded that all uses for which a temporary transfer is approved shall revert to the terms and conditions of the water use upon expiration of the temporary transfer at the end of the irrigation season. Furthermore, should the transfer not be approved, the changes made upon submission of the transfer application must be reversed. (See OAR 690-385-3000(5))

Feel free to contact me by telephone at 503-986-0858 or via email at susan.m.douthit@wrд.state.or.us if you have any questions.

Sincerely,



Susan Douthit
Transfer and Conservation Section

Cc: Nick Lelack, Community Development Department, Director
Transfer File T-11833
Dwight French, Water Right Services Division Administrator
Doug Woodcock, Field Services Division Administrator
Kyle Gorman, Region Manager

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.

EXHIBIT D

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: _____
First Last

Mailing Address: _____

City State Zip Daytime Phone: _____

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 1/4	Tax Lot #	Plan Designation (e.g., Rural Residential/RR-5)	Water to be:			Proposed Land Use:
						<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	
						<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:

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: _____ ☐ 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 _____

Briefly describe:

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. →

EXHIBIT D

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
		<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.

Receipt for Request for Land Use Information

Applicant name: _____

City or County: _____ Staff contact: _____

Signature: _____ Phone: _____ Date: _____

HURLEY RE
ATTORNEYS AT LAW P.C.

747 SW Mill View Way, Bend, OR 97702
541-317-5505 • Fax: 541-317-5507 • info@hurley-re.com

December 1, 2014

Karen Green
Hearings Officer
Deschutes County
117 NW Lafayette Avenue
Bend, OR 97701

By email to Anthony Raguine <Anthony.Raguine@deschutes.org>

**RE: Appeal of Deschutes County LUCS Decision No. 247-14-000238-PS
Response to Objections Raised by Appellant**

Dear Ms. Green:

As you know, our office represents Tumalo Irrigation District ("TID") for Appeal No. 247-14-000238-PS. This letter is in response to Ms. Bragar's letter dated November 26, 2014, on behalf of her clients Thomas and Dorbina Bishop, Trustees of the Bishop Family Trust ("Appellant"). That letter objects to alleged "new evidence" submitted as part of TID's statutory right to final written argument under ORS 197.763(6)(e).

In her letter, Ms. Bragar asks this Hearings Officer to either strike various TID Exhibits, or to reopen the record so that Appellant may address the alleged "new evidence." This Hearings Officer should deny both requests.

ORS 197.763(9)(b) defines "evidence" as "facts, documents, data or other information offered to demonstrate compliance or noncompliance with the standards believed by the proponent to be relevant to the decision." And, to be considered "new evidence" in violation of ORS 197.763(6)(e), at a minimum, it must be shown why the evidence goes beyond commentary of arguments already in the record, and more importantly, why it relates to the applicable criteria set forth by applicant.¹ *City of Damascus v. Metro*, 51 Or. LUBA 210, at 228 (Jan. 26, 2006); *See also Columbia Riverkeeper v. Clatsop County*, 58 Or. LUBA 190, at 199 (Jan. 27, 2009).

Ms. Bragar has not shown that Exhibits E, I, J, M-Q, and T-V meet the definition of "new evidence" in violation of ORS 197.763(6)(e), or that the Exhibits even meet the definition of "evidence." Therefore, Appellant's request should be denied. We will discuss these Exhibits in turn.

Exhibit E is legislative history that demonstrates why Appellant lacks standing to bring this appeal. Because it does not relate the applicable criteria, it is not "evidence" under the statutory definition.

¹ The applicable criteria can be found on the Notice of Decision for File Number 247-14-000238-PS, which has been submitted into the record and is provided with this letter for convenience.

EXHIBIT E

Exhibit I was previously submitted as Exhibit BB in TID's October 28, 2014 submittal. It was offered for convenience only. Therefore, the Exhibit cannot be "new evidence" because it is already part of the record.

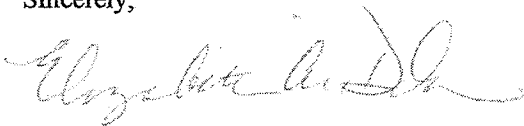
Exhibit J was previously submitted as part of Exhibit D in TID's October 28, 2014 submittal. An additional line was drawn on the Exhibit to address arguments made by Appellant. No new evidence or facts were submitted to the record.

Exhibits M-Q are definitions. They do not constitute new facts or data and are thus not evidence. See *PacifiCorp v. Deschutes County*, LUBA no. 2014-016, at 13 (Aug. 1, 2014) (allowing definitions not previously in the record and questioning whether definitions could be characterized as evidence). The Exhibits were offered merely to provide additional context for the definitions already submitted into the record. They are an extension of commentary to the record, and addresses Appellant's arguments as to why the New Reservoir cannot fit the applicable criteria. As we noted in our final submittal, Appellant did not offer any definitions to TID's previously submitted definitions, only arguments as to why they believed it should not fit. Allowing Appellant to reopen the record and shoe-horn in a final argument on this issue would be contrary to the ORS 197.763(6)(e) which only provides Applicant (TID) the ability to submit final rebuttal.

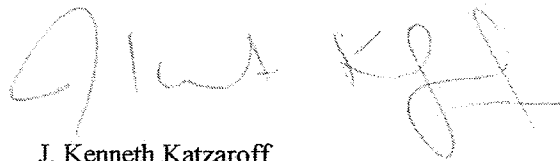
Exhibits T-V are offered as commentary to Appellant's conclusory statements that wildlife has been negatively impacted. These exhibits are offered as comment to our previous statements that no wildlife has been negatively impacted. Therefore, they should not be struck and Appellant should not be given the opportunity provide additional argument. Additionally, the Exhibits do not meet the definition of "evidence" because they do not relate to the applicable criteria. The applicable criteria permits outright uses in the Wildlife Area Combining Zone ("WA zone") to be the same as the zone with which it is combined; here, the Rural Residential Zone ("RR-10 zone"). Because TID's proposed use is permitted outright in the RR-10 zone, it is permitted outright in the WA zone. And, contrary to Appellant's assertion throughout this appeal, no wildlife impact analysis is contained within the applicable criteria. Thus, the alleged negative impacts are not applicable criteria – failing the statutory definition of evidence.

Because Appellant has failed to show that any of the objected-to Exhibits can properly be considered as "new evidence" or, even as "evidence," under ORS 197.763, the request to strike the Exhibits from the record, or to allow Appellant another bite at the apple, should be denied.

Sincerely,



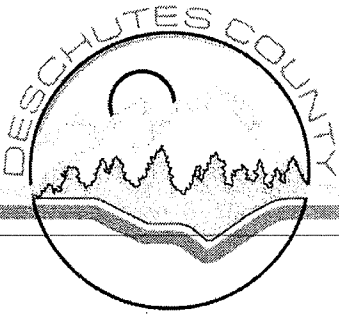
Elizabeth A. Dickson
Counsels by Agreement for Tumalo Irrigation District
Encs. as noted below



J. Kenneth Katzaroff

Notice of Decision for File Number 247-14-000238-PS
City of Damascus v. Metro, 51 Or. LUBA 210
Columbia Riverkeeper v. Clatsop County, 58 Or. LUBA 190
PacifiCorp v. Deschutes County, LUBA no. 2014-016

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Community Development Department

Planning Division Building Safety Division Environmental Soils Division

P.O. Box 6005 117 NW Lafayette Avenue Bend, Oregon 97708-6005
 (541)388-6575 FAX (541)385-1764
<http://www.co.deschutes.or.us/cdd/>

APPEAL APPLICATION

FEE: \$2655.00

EVERY NOTICE OF APPEAL SHALL INCLUDE:

1. A statement describing the specific reasons for the appeal.
2. If the Board of County Commissioners is the Hearings Body, a request for review by the Board stating the reasons the Board should review the lower decision.
3. If the Board of County Commissioners is the Hearings Body and *de novo* review is desired, a request for *de novo* review by the Board, stating the reasons the Board should provide the *de novo* review as provided in Section 22.32.027 of Title 22.
4. If color exhibits are submitted, black and white copies with captions or shading delineating the color areas shall also be provided.

It is the responsibility of the appellant to complete a Notice of Appeal as set forth in Chapter 22.32 of the County Code. The Notice of Appeal on the reverse side of this form must include the items listed above. Failure to complete all of the above may render an appeal invalid. Any additional comments should be included on the Notice of Appeal.

Staff cannot advise a potential appellant as to whether the appellant is eligible to file an appeal (DCC Section 22.32.010) or whether an appeal is valid. Appellants should seek their own legal advice concerning those issues.

Appellant's Name (print): Thomas & Dorian Bishop, Trustees of Bishop Family Trust Phone: (503) 228-3939

Mailing Address: c/o Jennifer Braeger, 121 SW Morrison St., 11th Fl. City/State/Zip: Portland, OR 97204

Land Use Application Being Appealed: Hearings Officer Decision, File Number 247-14-000238-PS

Property Description: Township 13 Range 11 Section 13 Tax Lot 828 and 824

Appellant's Signature: [Signature] Braeger for Thomas & Dorian Bishop

EXCEPT AS PROVIDED IN SECTION 22.32.024, APPELLANT SHALL PROVIDE A COMPLETE TRANSCRIPT OF ANY HEARING APPEALED, FROM RECORDED MAGNETIC TAPES PROVIDED BY THE PLANNING DIVISION UPON REQUEST (THERE IS A \$5.00 FEE FOR EACH MAGNETIC TAPE RECORD). APPELLANT SHALL SUBMIT THE TRANSCRIPT TO THE PLANNING DIVISION NO LATER THAN THE CLOSE OF THE DAY FIVE (5) DAYS PRIOR TO THE DATE SET FOR THE *DE NOVO* HEARING OR, FOR ON-THE-RECORD APPEALS, THE DATE SET FOR RECEIPT OF WRITTEN RECORDS.

(over)

NOTICE OF APPEAL

See attached letter



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

anchorage, alaska
beijing, china
new york, new york
seattle, washington
washington, d.c.
GSBLAW.COM

G A R V E Y S C H U B E R T B A R E R

A PARTNERSHIP OF GARVEY SCHUBERT BARER

Please reply to JENNIFER BRAGAR
jbragar@gsblaw.com TEL (503) 553-3208

December 29, 2014

Deschutes County Board of Commissioners
c/o Anthony Ragguine
Deschutes County Community Development Department
117 NW Lafayette Avenue
Bend, OR 97708-6005

RE: Appeal of Hearings Officer's Deschutes County LUCS Decision –
Appeal 247-14-000238-PS/274-A

Dear Commissioners:

This office represents Thomas and Dorbina Bishop, Trustees of the Bishop Family Trust, who live at 63382 Fawn Lane, Bend, Oregon, and are members of the Tumalo Irrigation District ("TID" or "District"), as well as residents of unincorporated Deschutes County. This letter is submitted in support of the Bishops' appeal application for the above-referenced file and the Hearings Officer Decision dated December 15, 2014 and mailed to the parties of the appeal on December 16, 2014.

The Bishops request a hearing by the Board of County Commissioners *de novo* under DCC 22.32.027¹ on the following grounds and that culminates in a decision that:

- The Hearings Officer erred in finding the land use compatibility statement ("LUCS") was a development action under the Deschutes County Code ("DCC");
- TID and KC Development Group LLC ("KCDG") must be required to obtain a conditional use approval for a cluster development prior to issuance of the LUCS;
- Exhibit J to TID's final written argument submitted November 20, 2014 should be stricken from the record as new evidence;

¹ Appellant, TID, also requested a *de novo* hearing in its December 23, 2014 appeal. However, TID only extended the 150-day deadline by 90 days, not the requisite restart of the 150-day time clock as required under DCC 22.32.027(1)(d). Therefore, the Appellant's request for *de novo* review of its issues should be denied.



- KCDG should be required to sign the application for a LUCS; and
- The record should reflect that TID filed only a notice of intent to submit a permanent transfer application to the Oregon Water Resources Department and not an application itself.

I. The Hearings Officer erred in finding the LUCS was a development action under the County Code.

- A. The Planning Director decision specifically determined that the County's process for land use actions applies to TID's LUCS, and the Hearings Officer had no discretion to determine otherwise.

The distinction in the County Code between a land use action and a development action only serves one purpose in this case – to define the local appeal procedures of the decision. Under DCC 22.16.010, only the Planning Director has discretion to determine that for the purposes of DCC Title 22 a development action should be treated as if it were a land use action application. In this case, the Planning Director exercised that discretion and for purposes of DCC Title 22, the land use action rules apply.

The Hearings Officer may disagree with whether the County Code's definition of land use action fits with the Planning Director's exercise of discretion in this case, but the definition predates the decisions by LUBA in *Kuhn v. Deschutes County* and *Curl v. Deschutes County*. The Planning Director's decision to consider these cases make his determination that the LUCS application involved a land use action for local appeal purposes sound. As described in the below analysis of these cases, a land use action involves the exercise of discretion in applying the County's land use regulations. Here, the Planning Director and the Hearings Officer exercised discretion in determining the category of use in which the reservoirs fall. That determination is inextricably intertwined with the LUCS decision under review. The Hearings Officer correctly reviewed the full record on appeal to determine that the applicant must obtain one or more conditional use approvals to qualify for a LUCS and that decision involved discretion. Therefore, the Planning Director's decision to treat the LUCS decision as a land use action was correct and the Hearings Officer's conclusion that the decision was a development action was incorrect.

The Applicant contends that the Bishops lack standing because the Planning Director did not set forth the process for appeals. The Applicant further contends that this lack of direction from the Planning Director is in contrast to the e-mail at issue in *Kuhn v. Deschutes County*, 58 Or LUBA 483 (2009), where the planning department sent petitioners an e-mail explaining they could appeal the LUCS by paying the requisite fee. But, *Kuhn* directly supports the Bishops' appeal.

In *Kuhn*, LUBA determined that the planning department's e-mail indicated that the



Planning Director in that matter had exercised discretion under DCC 22.16.010.B to decide that the application for a development action would be treated as a land use action. *Id.* at 496. Here, in the Planning Director made an explicit a finding under DCC 22.16.010.B that TID's LUCS would be treated as a land use action,

“For the purposes of Title 22, TID’s application for Land Use Compatibility Statement Permit Sign-Off shall be treated as if it were a land use decision.”
See the Notice of Decision on the LUCS attached as Exhibit 1.

This finding is more explicit than the symbolic e-mail LUBA was required to interpret in *Kuhn*. Therefore, the Bishops have standing to appeal under DCC 22.32.010, as the Hearings Officer correctly determined.²

Further, the error in the Applicant’s argument is found in its own submittal that states,

“Thus, even though the NOD [Notice of Decision] imposed the land use application standards, the appeal procedures were not, and so the appeal procedures for development actions apply. The NOD only states that appeals are pursuant to Title 22 of the Deschutes County Code – which provides for appeals of both development actions and land use actions. Therefore, because the planning department only applied the land use action application standards pursuant to Chapter 22.20 and not the land use action appeal standards, the planning department did not expand the procedural window or rights to allow parties other than the Applicant to appeal the LUCS...” (emphasis added).
Applicant’s October 28, 2014 submittal at p. 4.

Under DCC 22.16.010.B, the Planning Director chose to treat the LUCS as a land use application. That decision and distinction would be meaningless if the logical next step – that the County adhere to the appeals process for land use actions – were not followed by the Hearings Officer. The Planning Director did not have to repeat the Code’s provisions regarding appeals of a land use action because those criteria are set forth in Title 22, which the County broadly cited to in its decision. Under Title 22, as the applicant concedes, the appellate procedures for land use actions are defined and DCC 22.32.010 provides the Bishops with standing for appeals of land use actions. The Bishops correctly followed the process to appeal a land use decision based on the Planning Director’s findings under DCC 22.16.010.B and the appellate procedures set forth in Title 22.

In contrast to the decision in *Curl v. Deschutes County*, LUBA No. 2013-086/095 (March 19, 2014) (“*Curl*”), the County Planning Director in this case recognized that his decision concluding that the reservoirs are permitted uses under DCC 18.60.020 involved discretionary

² Although the Hearings Officer was correct in this determination, the Hearings Officer’s decision to characterize the decision as a development action instead of a land use action is incorrect.



application of the local land use regulations. In fact, the exercise of discretion to apply the land use permit process to this LUCS is the application of the County's land use regulations. Further, as LUBA found in *Campbell v. Columbia County*, LUBA No. 2012-060 (Jan. 28, 2013) at 5-7, the exclusion of a LUCS from a land use decision under ORS 197.015(10)(b)(H) can only occur when one of the three listed exclusions apply and the County relies on no other bases for making its decision. Contrary to the Applicant's contention, the rezoning did not authorize the uses encompassed in this LUCS – a water ski reservoir that will act as a centerpiece for a cluster development. Thus, the LUCS in this case is similar to the *Campbell* case, which determined that the County exercised discretion about whether septic improvements were compatible with the county's land use regulations. *Id.*

Moreover, in this case, the County relied on information obtained from project neighbors, including the Bishops, that there was disagreement in whether the reservoirs constitute a permitted use under DCC 18.60.020.I. Based on this knowledge, the Planning Director exercised his discretion to subject the LUCS to the land use review process and in accordance with ORS 215.416, issued a written decision subject to appeal to the Hearings Officer. The Bishops are exhausting their local appeals pursuant to ORS 195.825(2)(a), and like the petitioners in *Curl*, share the complaint that the County staff incorrectly concluded that the uses proposed here are permitted under the County Code.³ As evidenced by these proceedings, there is ample controversy around whether the County made the correct determination in this LUCS and the Hearings Officer was further asked to use discretion to make a land use decision about whether the Applicant's uses require conditional use permits.

In its appeal, TID characterizes the County's decision about whether the LUCS decision is a land use decision or development action as having a bearing on whether LUBA has jurisdiction. Unfortunately, as the *Curl* decision makes abundantly clear, LUBA will be the arbiter of its jurisdiction regardless of whether local procedures for development or land use actions are followed. LUBA is likely to retain jurisdiction under both the definitions of permit in ORS 215.402(4) and land use decisions in ORS 197.015(10)(a) because the County's decision on the LUCS involves application and interpretation of its land use regulations.⁴

³ See *Curl* at 5.

⁴ ORS 215.402(4) provides,

“Permit” means discretionary approval of a proposed development of land under ORS 215.010 to 215.311, 215.317, 215.327 and 215.402 to 215.438 and 215.700 to 215.780 or county legislation or regulation adopted pursuant thereto. “Permit” does not include:

(a) A limited land use decision as defined in ORS 197.015;

(b) A decision which determines the appropriate zoning classification for a particular use by applying criteria or performance standards defining the uses permitted within the zone, and the determination applies



For the foregoing reasons, the Hearings Officer erred in concluding the LUCS is a development action.⁵ Nonetheless, the Hearings Officer correctly found that the Bishops have standing based on the local procedures set forth in Title 22 that give the Bishops local appeal rights, including this appeal. The Bishops continue to have standing to file this appeal because they are parties to the appeal to the Hearings Officer, and were entitled to notice and aggrieved by the County's administrative decision, under DCC 22.32.010.A.1 and 2, respectively.

II. The Hearings Officer erred in determining that TID and KCDG are not required to obtain a cluster development permit as one of the discretionary land use approvals required for issuance of a LUCS.

The Hearings Officer decision correctly concluded that TID and KCDG must obtain

only to land within an urban growth boundary;

(c) A decision which determines final engineering design, construction, operation, maintenance, repair or preservation of a transportation facility which is otherwise authorized by and consistent with the comprehensive plan and land use regulations; or

(d) An action under ORS 197.360 (1)."

Land Use decision is defined under ORS 197.015(10),

"Land use decision":

(a) Includes:

(A) A final decision or determination made by a local government or special district that concerns the adoption, amendment or application of:

(i) The goals;

(ii) A comprehensive plan provision;

(iii) A land use regulation; or

(iv) A new land use regulation;

(B) A final decision or determination of a state agency other than the commission with respect to which the agency is required to apply the goals; or

(C) A decision of a county planning commission made under ORS 433.763..."

⁵ Significantly, TID wants to have it both ways. It treats the decision as a land use decision so that it can define the 150-day time extension, but then argues the decision is not a land use decision. If TID is correct that this LUCS decision is not a land use action, then the 150-day rule would not apply at all. However, the Bishops disagree that the decision is a development action and as stated in footnote 1, TID has no right to a *de novo* review of its issues on appeal.



conditional use approvals:

“The county’s LUCS decision is reversed and remanded for the CDD Director to reissue the WRD LUCS form and the LUCS decision to categorize TID’s proposed use as one involving discretionary land use approval(s) that have not yet been obtained – i.e., the conditional use of surface mining for reservoirs in conjunction with operation and maintenance of irrigation systems under Section 18.60.030(W), and/or a recreation-oriented facility requiring large acreage under Section 18.60.030(G).”

In this appeal, the Bishops find that the Hearings Officer erred where the decision omitted a requirement to obtain a conditional use approval for a cluster development under DCC 18.60.030.F.⁶

In the findings related to the cluster development, the Hearings Officer conclusively stated that,

“TID and KCSG [*sic*] argue that since no land use application for residential cluster development approval has been submitted by KCDG, there is no basis to conclude the new reservoirs constitute the unpermitted ‘first phase’ of such a development as claimed by appellants. Although the Hearings Officer finds there clearly is some basis to suspect the new reservoirs are planned to be part of a future residential cluster development, I agree with TID and KCDG that it is not reasonable to characterize the new reservoirs as the first phase of such development. That is because the cluster development conditional use in the RR-10 and WA Zones under Section 18.60.030(F) and 18.88.040(A), respectively, includes numerous components in addition to open space and amenities therein, such as dwellings, utility infrastructure, streets, and water and sewer systems. Therefore, I find the county did not err in failing to identify the cluster development conditional use in categorizing TID’s proposal on the LUCS form or in its LUCS decision.”

These conclusory statements are inconsistent with the evidence that the Hearings Officer willingly relied upon to determine an unpermitted recreational use had been constructed. For example, the Hearings Officer relied on the attached photographs of water ski lakes in other states with designs virtually identical to the water ski reservoir. See Exhibit 2.⁷ However, the Hearings Officer stopped short of relying on the dense residential development surrounding many of these water ski lakes to contribute to a finding that a cluster development permit is required here. In addition, the Hearings Officer did not address the unpermitted construction of the westerly road to serve the recreational use and cluster development and testimony by individuals at the October 7, 2014 hearing in this matter as to the residential development

⁶ Alternatively, the use could qualify as a planned development under DCC 18.60.030.E.

⁷ These were included as Exhibit 21 to the Bishops October 27, 2014 submission to the Hearings Officer.



activities acknowledged to them by KCDG members that had commenced, including the drilling of a domestic well during February 2014 as the source of water for such development, and minutes and audio recordings of meetings of the Tumalo Irrigation District Board of directors and the Irrigation Contract between TID and KCDG entered into on June 10, 2014 with references by some TID directors, Harris Kimble and others to the residential development and contemplated homeowners association associated with it.

The Hearings Officer found that both surface mining in conjunction with construction of the reservoirs and water skiing had occurred and used these facts to determine conditional use approvals are required.⁸ But, the test is not whether an applicant has violated the code and is thus required to obtain a land use approval to cure the violation. Rather, the decision for the County is to determine whether an applicant for a LUCS has gone beyond the parameters of the code to an extent sufficient to require additional conditional use approval for a cluster development.

KCDG started development of the cluster development with:

- i) the drilling in February 2014 of the well for domestic water purposes for 15 or more houses;
- ii) commencing in March (several months before having any contract with TID pertaining either to possible water storage or the granting by KCDG of a limited easement to TID with respect to a portion of KCDG's property) construction of the reservoirs that are subject to the LUCS;
- iii) during the summer of 2014 starting the construction of a boat house, docks and other ancillary features of the reservoir structures until it received a stop work order from the County; and
- iv) filling and using as early as July 2014, for recreational purposes the lakes which were designed for recreational purposes, particularly using them for active water skiing and boating during September and October 2014, even after receiving a notice of violation on October 10, 2014 from the County's code enforcement office, while not using and not even installing systems for TID to use the stored water for any reregulation or other uses by TID for its irrigation systems.

KCDG constructed and commenced the use not only of the centerpiece reservoirs for recreational uses such as water skiing and fishing, but also constructed an unpermitted road along the western side of Tax Lot 828 (which was not the subject of the rock crushing permit issued by the County with respect to Tax Lot 824) that is serving this and future development, as

⁸ The Oregon Department of Geology and Mineral Industries ("DOGAMI") has also required KCDG to obtain a surface mining operator's permit for the unpermitted surface mining activities that occurred in early 2014.



well as stockpiled large amounts of gravel onsite to prepare foundations for the cluster or planned development and moved vast amounts of excavated material from Tax Lot 824 to Tax Lots 828 and 823 in doing site preparation for construction on areas of Lots 828 and 823. This work coincides with the location where KCDG members had already told area residents that homes are to be constructed, the owners of which would be members of the homeowners association allowing them the use of the amenities, including the lakes and the domestic well. Although TID would have the County allow it and KCDG to continue to construct uses without any oversight, they have disingenuously created a situation that seeks to avoid review. This is impermissible under the County and State land use systems and the LUCS should not issue without requiring that TID and KCDG obtain a cluster development permit. TID and KCDG wish to present a *fait accompli* to the County to ensure that approval for its subsequent cluster development application is all but assured. The County should not endorse this approach.

- A. The applicant's LUCS enables KCDG to construct Phase 1 of its cluster development without KCDG obtaining conditional use approval for the development.

Despite the applicant's claim that it is premature to consider the cluster development proposed in conjunction with the water ski lake, the Bishops contend that such an approach would allow the wholesale construction of the first phase of the cluster development without seeking other land use approvals. In particular, the cluster development approval criteria under DCC 18.128.200.E contain direction for how to fashion an approval when phasing is contemplated:

"Conditions for phased development shall be specified and performance bonds shall be required by the Planning Director or Hearings Body to assure completion of the project as stipulated, if required improvements are not completed prior to platting."

Thus, the County has a process to allow construction of the recreational element of a phased development prior to platting and that is exactly what occurred on the KCDG property.⁹

⁹ Further support that a phased approach is likely for a development focused on a recreational centerpiece – such as water ski and fishing reservoirs – is found in the County's definition of destination resorts under DCC 18.04.030:

"'Destination resort' means a self-contained development providing visitor-oriented accommodations and developed recreational facilities in a setting with high natural amenities. To qualify as a "major destination resort" under Goal 8, a proposed development must meet the following standards:

- A. The resort is located on a site of 160 or more acres.
- B. At least 50 percent of the site is dedicated to permanent open space, excluding yards, street and parking areas.



However, KCDG has, in effect through subterfuge, already accomplished construction of the first phase without the requisite land use approvals.

The commencement of Phase 1 of the cluster development is further supported by the development of similar water ski communities. See for example, the attached photographs showing water ski lake communities constructed in Bakersfield, CA; the reserve at Pine Lake in FL; the lakes at Timber Cove in Granbury, TX; Arvin, CA; Fresno, CA; Groveland, FL; Lake Magnolia, NC; Memphis, TN; and Milton, FL. See Exhibit 2. All of these examples show cluster developments centered on a water ski lake. Here, the record contains admission by the developers of their plan to build housing around the lake as evidenced in the local news coverage of the development and in testimony by project neighbors who have recently met with the Cadwells to discuss the development (e.g. Mrs. Hamper's testimony on October 7, 2014).

Further, on May 1, 2014 Tom Bishop met with Eric and Brianna Cadwell. At the meeting, Eric Cadwell explained the cluster development plans and water ski lake design features, including the placement of the homes, the number of homes involved, the road building plans, the drilling and development of the well for domestic use for 15 or more of the homes, his express plan to build the reservoirs and road before submitting the KCDG cluster development plan to the County in order to avoid regulatory control, and his expectation to complete the project within one year. This plan for a cluster development is also evidenced in the TID/KCDG Agreement ("Agreement") entered into on June 10, 2014, several weeks after the aforementioned meeting in which the Cadwells' provided detailed descriptions of the cluster development they had already commenced, where paragraph 15 states,

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

C. At least \$7,000,000 (in 1993 dollars) is spent in the first phase on improvements for on-site-developed recreational facilities and visitor-oriented accommodations, exclusive of costs for land, sewer and water facilities and roads. Not less than one-third of this amount shall be spent on developed recreational facilities.

D. Developed recreational facilities and key facilities intended to serve the entire development and visitor-oriented accommodations must be constructed or, where permitted by DCC 18.113, guaranteed through surety bonding or substantially equivalent financial assurances prior to closure of sale of individual lots or units. In phased developments, developed recreational facilities and other key facilities intended to serve a particular phase shall be constructed prior to sales in that phase or guaranteed through surety bonding.

* * *

Similar to the destination resort concept, it makes sense that a developer would first build the recreational centerpiece and then work through Phase 2 to construct the contemplated homes as permitted under a phased cluster development. Here, KCDG's construction first, forgiveness later approach should not be sanctioned and the cluster development criteria should be applied prior to allowing the water ski reservoir and cluster development, and before a LUCS can issue for this site.



(emphasis added).

See Exhibit 3. If KCDG had not completed the first phase of its cluster development, the Agreement would not bind individuals who may have a future leasehold or ownership interest in residential lots. These residential lot plans are supported by a series of lot line adjustments that the property owner has undertaken in the last few years that will support one or more houses on tax lots 824 and 828.

The LUCS for the District's reservoirs cannot issue until all the non-prohibited activities associated with the use of the land for the reservoirs are conditionally approved. This is particularly the case where DCC 18.128.200.B.3.b governing conditional use cluster developments states,

3. 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:

* * *

- b. 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..." (emphasis added).

This code section shows that a cluster development on the KCDG property subject to the Wildlife Area Combining Zone would not be approved with a water ski lake as the centerpiece.

III. The Hearings Officer erred in factual matters that should be corrected.

- A. The Hearings Officer erred in allowing Exhibit J attached to TID's November 20, 2014 submittal to be included in the record.

In its November 20, 2014 final argument to the Hearings Officer, TID improperly included new evidence, including Exhibit J. On December 1, 2014, in response to the Bishops' complaint that TID had submitted new evidence that should not be considered as part of final argument, TID stated that it had previously submitted Exhibit J as "part of Exhibit D in TID's October 28, 2014 submittal. An additional line was drawn on the Exhibit to address arguments made by Appellant." This statement concedes that Exhibit J is new evidence. The applicant cannot add lines to evidentiary documents to make new arguments and call it commentary. This new evidence in Exhibit J is directed at the crucial issue in the appeal heard by the Hearings Officer – the extent of TID's existing irrigation system. *Brome v. City of Corvallis*, 36 Or LUBA 225, 232-233 (1999). Both Exhibit J and the applicant's argument based on that new evidence at



page 20-21 of its November 20, 2014 submittal should have been excluded from the record.

B. The Hearings Officer erred in concluding that KCDG did not have to sign the LUCS application under DCC 22.08.010.

The Hearings Officer concluded at page 8 of her decision that KCDG was not required to sign the application under DCC 22.08.010.B, which requires the property owner's signature on the application. The Hearings Officer found,

“[i]rrigation districts are public entities with the power of eminent domain, including the power to condemn for reservoirs and the storage of water in reservoirs, under ORS 545.239.”

While the quotation of the statute is accurate, the Hearings Officer erred in determining that TID could rely on the exception to the signature of the property owner requirement under DCC 22.08.010.C because no condemnation proceeding has been instigated and condemnation is not contemplated with respect to these reservoirs.¹⁰ The *power* of condemnation (as opposed to its exercise) should have no bearing on the application requirements here because TID and KCDG have entered into a contract to allow the storage of water on the KCDG property, not a project involving condemnation. The County should not have processed this application without the signature of the property owner.

C. The Hearings Officer erred in stating that TID has submitted an application to WRD for a permanent transfer of its stored water.

On page 9 of the Hearings Officer decision she states, “The circumstances in this case are somewhat different from those presented in *Wetherell* because the record indicates TID has submitted an application to WRD [Oregon Water Resources Department] for a *permanent* transfer of its stored water from Tumalo Reservoir to the new reservoirs on the subject property.” (emphasis in original). For clarification, TID has filed only a notice of its intent to submit a permanent transfer application to WRD.

Notwithstanding this clarification, the Hearings Officer correctly concluded that the County's LUCS decision is not moot because permanent water transfers require similar issuance of a LUCS from the County under OAR 690-005-0025 and 690-005-0035.

¹⁰ DCC 22.08.010.C provides,

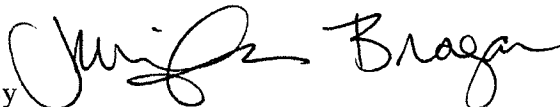
“Applications submitted by or on behalf of a public entity or public utility having the power of eminent domain with respect to the property subject to the application...”

CONCLUSION

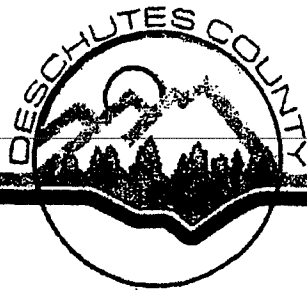
Based on the foregoing, the Board of Commissioners should grant the Bishops' appeal request on the items listed above and conclude that the application involved a land use action, or in the alternative that the Bishops have standing to appeal because they were parties to the appeal before the Hearings Officer and were aggrieved by the County's administrative decision to issue the LUCS. In addition, the Board of County Commissioners should require that TID and KCDG obtain a conditional use permit for a cluster development before land use compatibility can be determined. Last, the factual errors in the Hearings Officer's decision should be corrected in regards to the exclusion of Exhibit J to TID's final written argument to the Hearings Officer and the exclusion of the text from such final written argument pertaining to such Exhibit; and that a LUCS application for the KCDG property requires that the property owner must sign the application; and a correction to explain that TID has filed only a notice of its intent to apply for a permanent water transfer. All other aspects of the Hearings Officer decision should be affirmed. Thank you for your consideration.

Sincerely,

GARVEY SCHUBERT BARER

By 
Jennifer Bragar

Enclosures



Community Development Department

Planning Division Building Safety Division Environmental Soils Division

P.O. Box 6005 117 NW Lafayette Avenue Bend, Oregon 97708-6005
(541)388-6575 FAX (541)385-1764
<http://www.co.deschutes.or.us/cdd/>

NOTICE OF DECISION

FILE NUMBER: 247-14-000238-PS

APPLICANT: Tumalo Irrigation District
64697 Cook Avenue
Bend, OR 97701

OWNER: KC Development Group, LLC
63560 Johnson Road
Bend, OR 97701

REQUEST: Land Use Compatibility Statement Permit Sign-Off (PS) to transfer in place 108 acre feet of Tumalo Creek water from Tumalo Reservoir to Klippel Acres Mining Pit.

STAFF CONTACT: Nick Lelack, Community Development Director

I. APPLICABLE CRITERIA:

Title 22 of the Deschutes County Code, Development Procedures Ordinance
Chapter 22.16 Development Action Procedures

Title 18 of the Deschutes County Code, the County Zoning Ordinance:
Chapter 18.60, Rural Residential Zone District
Chapter 18.88, Wildlife Area Combining Zone
Chapter 18.120, Exceptions

II. BASIC FINDINGS:

- A. **LOCATION:** The subject property is located at 63560 Johnson Road, Bend; and is further identified on County Assessor's Map 17-11-13 as Tax Lots 828 and 824.
- B. **ZONING:** The subject property is zoned Rural Residential and is within the Wildlife Area Combining Zone.
- C. **PROPOSAL:** Tumalo Irrigation District (TID) proposes to move its Regulation Pond storage from its current in-district storage at Tumalo Reservoir to Klippel Acres Mining

Pit. The new site will be upstream and located in a line storage facility to prevent leakage and make water available to its entire distribution network.

- D. **REVIEW PERIOD:** File 247-14-000238-PS was submitted on August 4, 2014, and deemed complete by the Planning Division on August 6, 2014.

III. **CONCLUSIONARY FINDINGS:**

Title 22 of the Deschutes County Code, Development Procedures Ordinance

CHAPTER 22.16 DEVELOPMENT ACTION PROCEDURES

22.16.010, REVIEW OF DEVELOPMENT ACTION APPLICATIONS

- B. The Planning Director has the discretion to determine that for the purposes of DCC Title 22 a development action application should be treated as if it were a land use action application.

FINDING: For the purposes of Title 22, TID's application for Land Use Compatibility Statement Permit Sign-Off shall be treated as if it were a land use application.

Title 18 of the Deschutes County Code, County Zoning

CHAPTER 18.60 RURAL RESIDENTIAL ZONE DISTRICT

18.60.020, USES PERMITTED OUTRIGHT

- I. Operation, maintenance, and piping of existing irrigation systems operated by an Irrigation District except as provided in DCC 18.120.050.

FINDING: According to information provided by Tumalo Irrigation District, TID "has decided to move its Regulation Pond storage to [the Klippel Mining Pit] a site upstream from our current in-district storage at the Tumalo Reservoir." TID states that the existing Reservoir "was designed and built in the 1920's and does not adequately serve TID's needs", and that the new site "will be a significant upgrade to operations and maintenance." The Planning Director finds that 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 this zone.

CHAPTER 18.88 WILDLIFE AREA COMBINING ZONE

18.84.030 USES PERMITTED OUTRIGHT

In a zone with which the WA Zone is combined, the uses permitted outright shall be those permitted outright by the underlying zone.

FINDING: The same outright permitted uses are allowed in the Rural Residential Zone District and the WA Combining Zone. Therefore, the "operation, maintenance, and piping of existing

irrigation systems operated by an Irrigation District except as provided in DCC 18.120.050" is an outright permitted use.

CHAPTER 18.120. EXCEPTIONS

18.120.050, FILL AND REMOVAL EXCEPTIONS

- C. **Fill and removal activities conducted by an Irrigation District involving piping work in existing canals and ditches within wetlands are permitted outright.**

FINDING: This application does not propose to pipe existing canals and ditches within wetlands. This criterion is not applicable.

IV. DECISION:

APPROVAL of the Land Use Compatibility Statement Permit Sign-Off (PS) to transfer in place 108 acre feet of Tumalo Creek water from Tumalo Reservoir to Klippel Acres Mining Pit.

V. DURATION OF APPROVAL:

The applicant shall initiate the proposed use within two (2) years of the date this decision becomes final, or obtain an extension of time pursuant to Section 22.36.010 of the County Code, or this approval shall be void.

This decision becomes final twelve (12) days after the date of mailing, unless appealed by a person or entity entitled to appeal a land use decision under Title 22 of the Deschutes County Code.

DESCHUTES COUNTY PLANNING DIVISION



Written by: Nick Leback, Community Development Director

Dated this 13th day of August, 2014

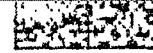
Mailed this 13th day of August, 2014

Community Development Department

2 PO Box 6005 • Bend, OR 97708-6005
117 NW Lafayette Avenue • Bend, OR 97701-1925

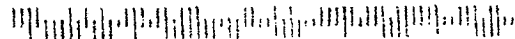
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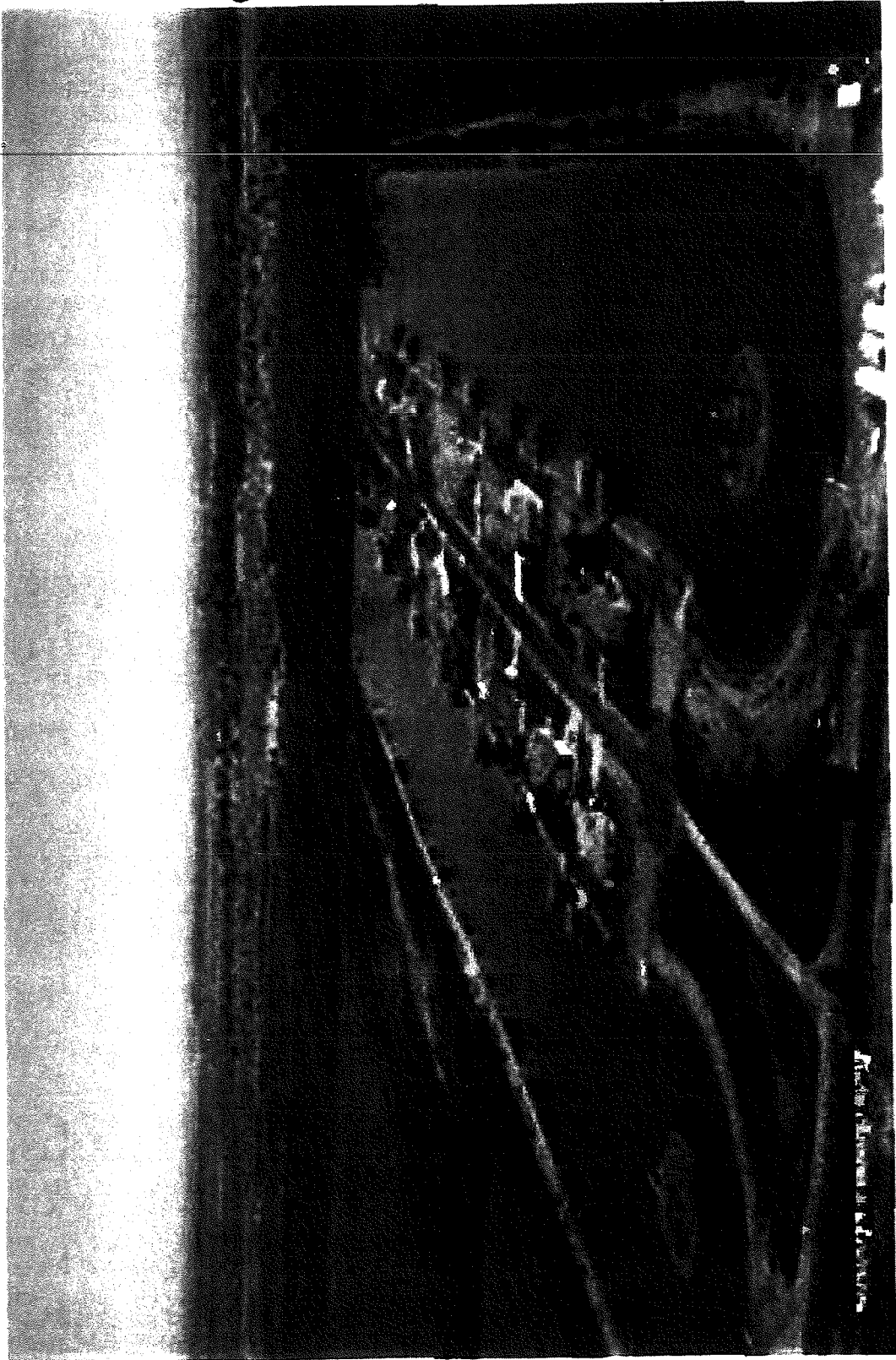
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BISHOP FAMILY LIVING TRUST
BISHOP, THOMAS E & DORBINA O TTEES
63382 FAWN LN
BEND, OR 97701-8574

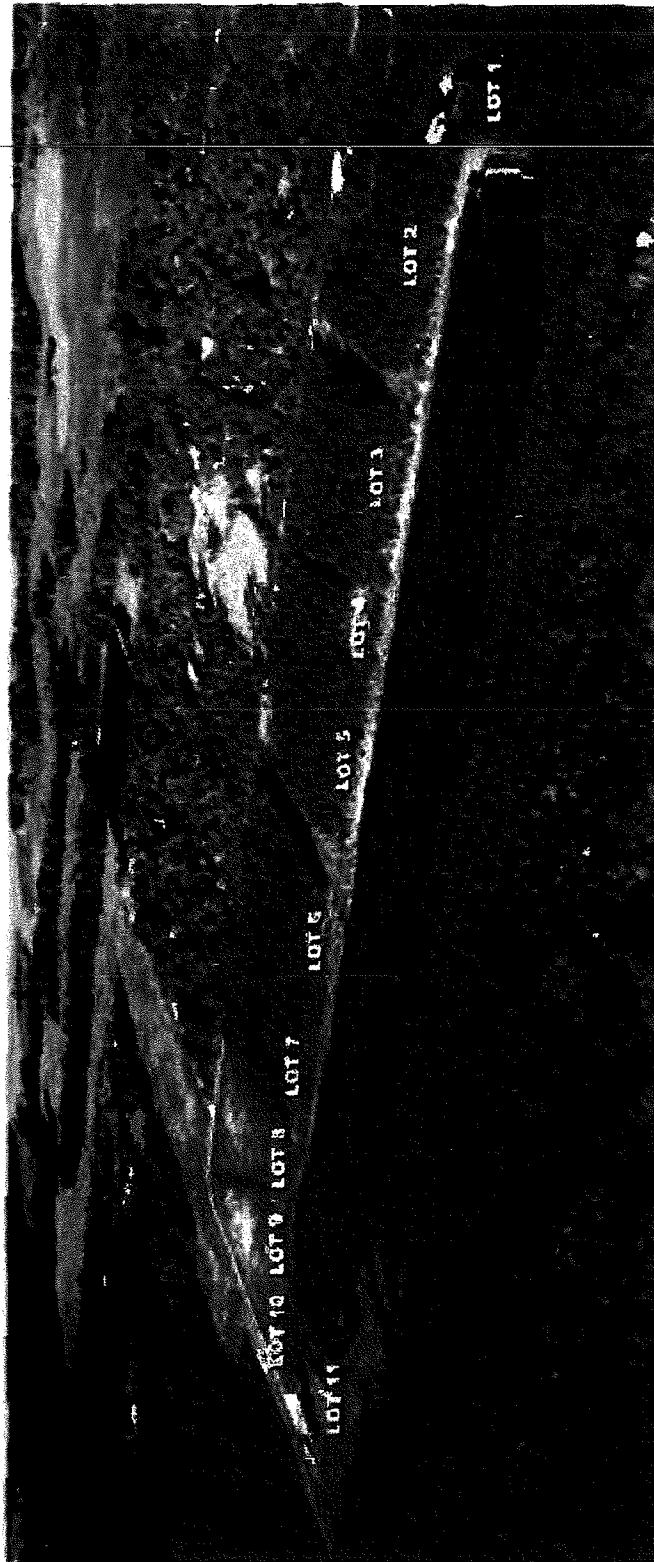
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Private Water Ski Lake in Bakersfield, California Area

EXHIBIT 2
Page 1 of 9

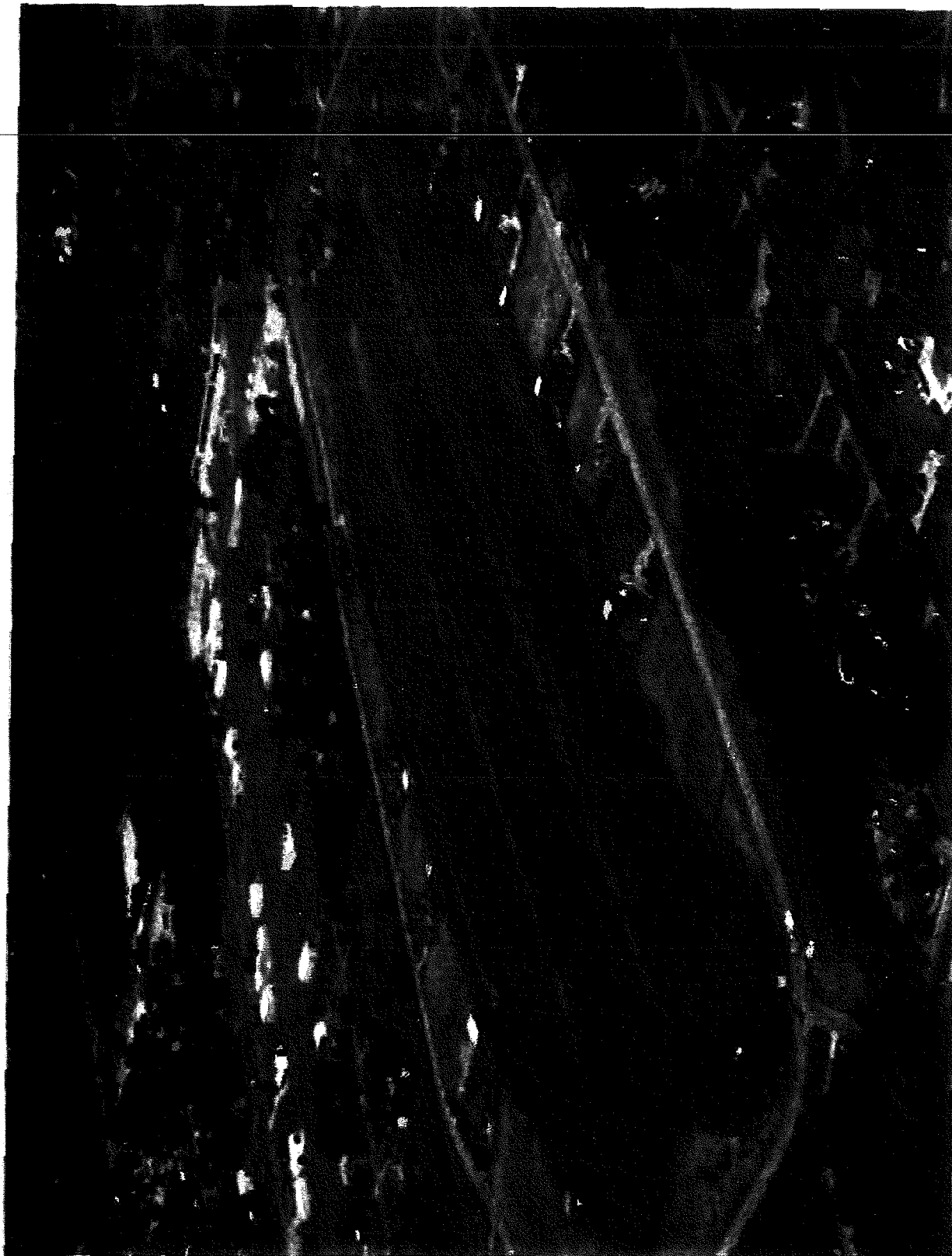


CLOSE X

Lots 2 and 10 are for sale.

The Reserve at Pine Lake in Florida

EXHIBIT 2
Page 2 of 9



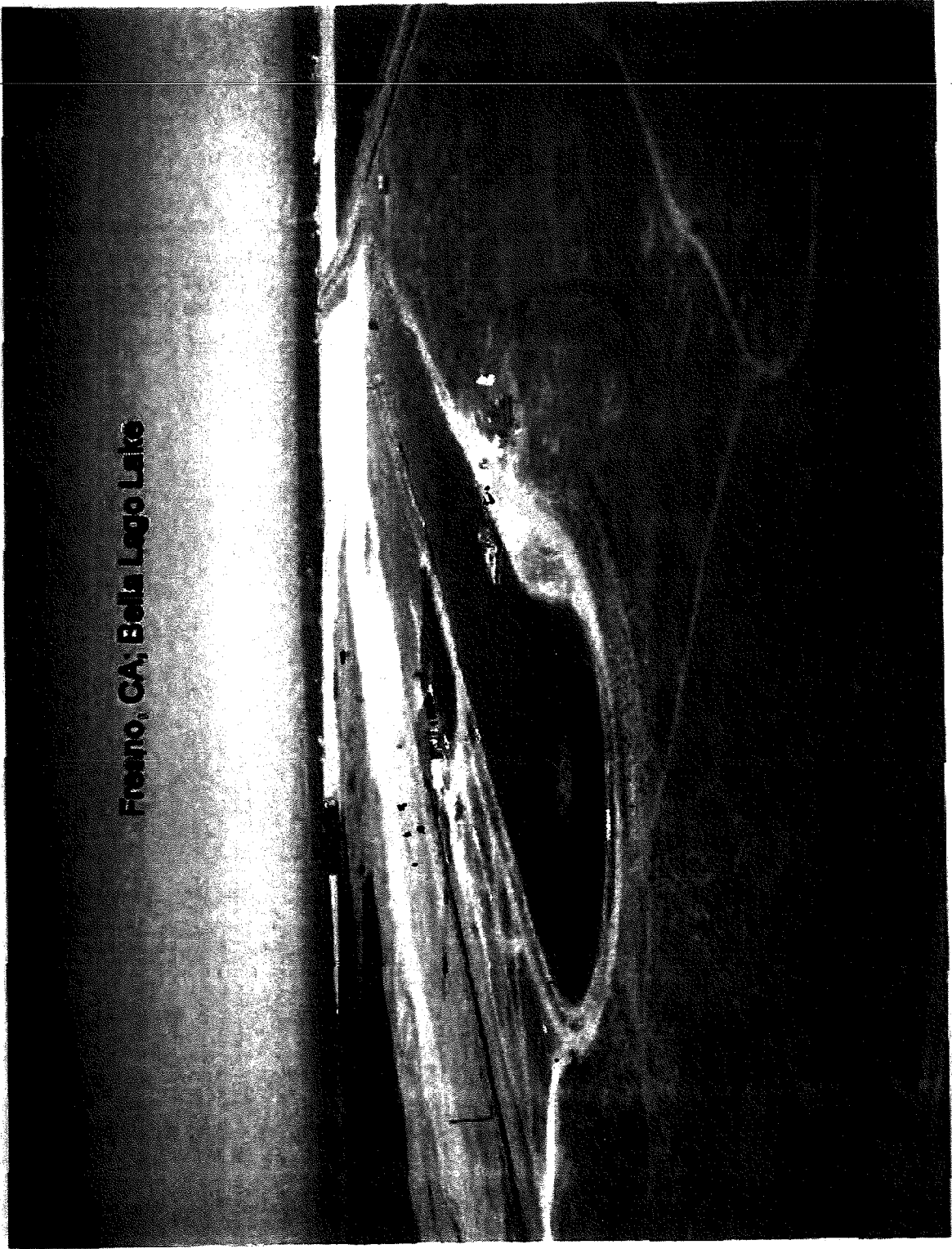
Lakes at Timber Cove in Granbury, Texas

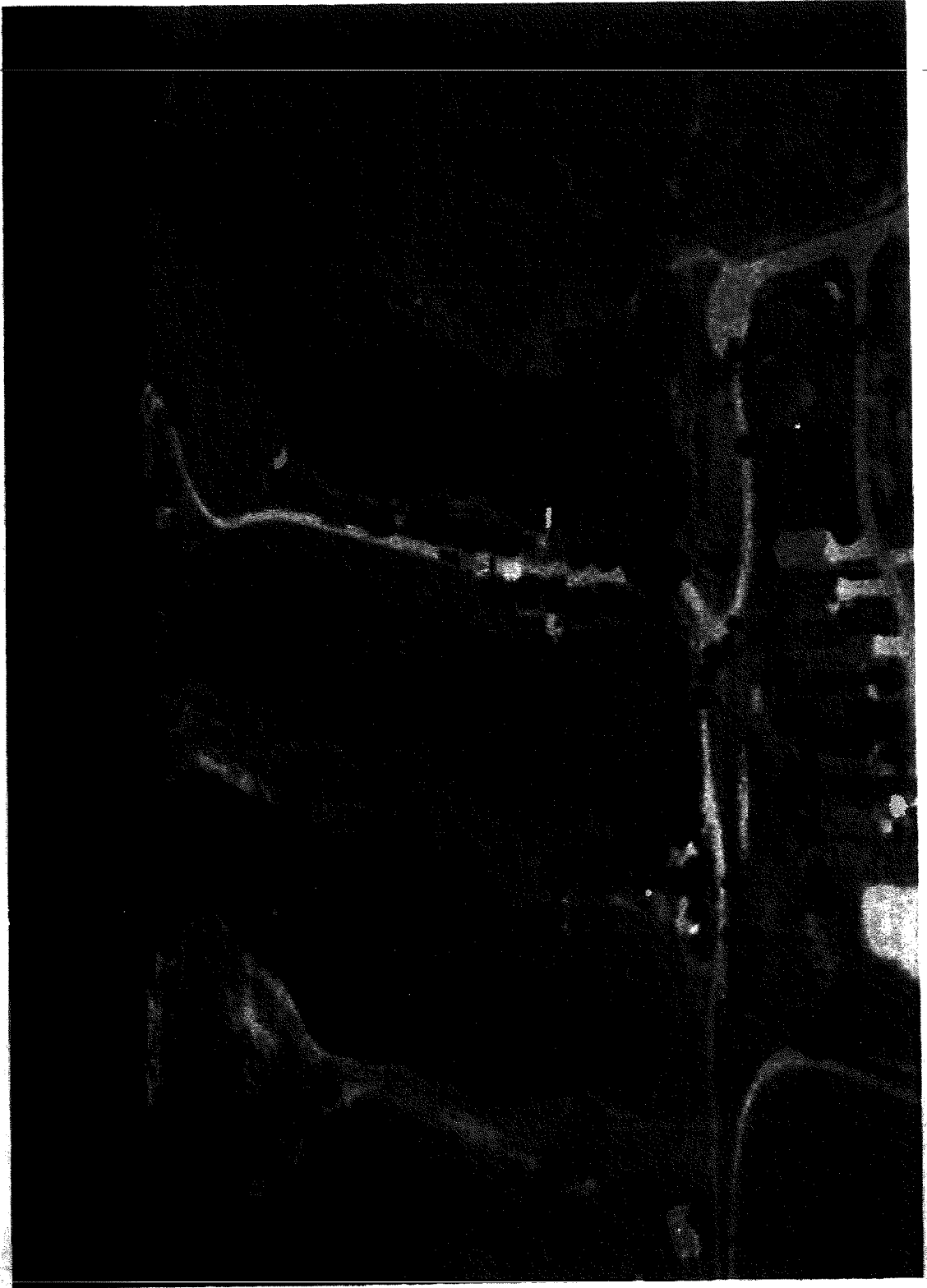
EXHIBIT 2

Page 3 of 9

Arvin, CA

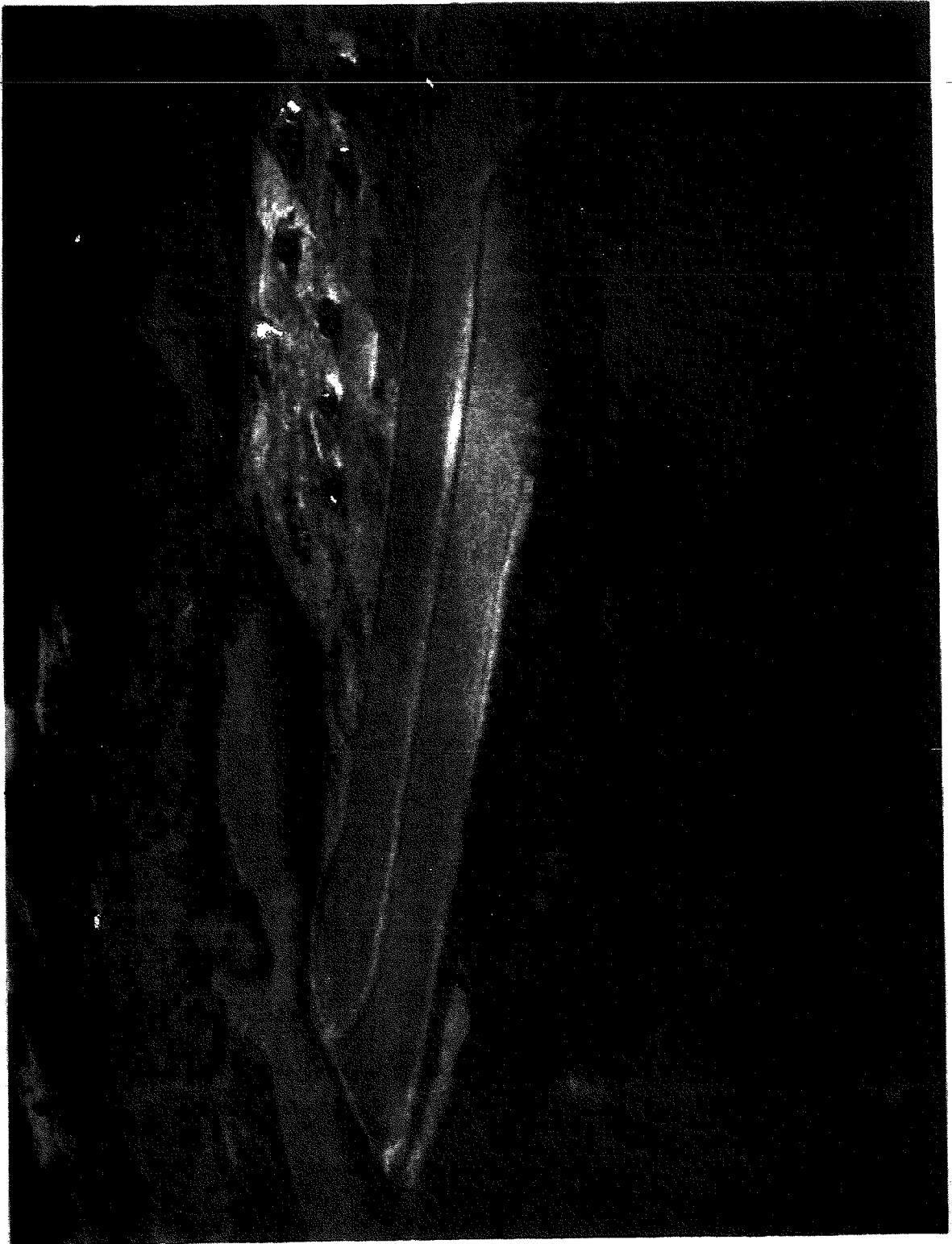
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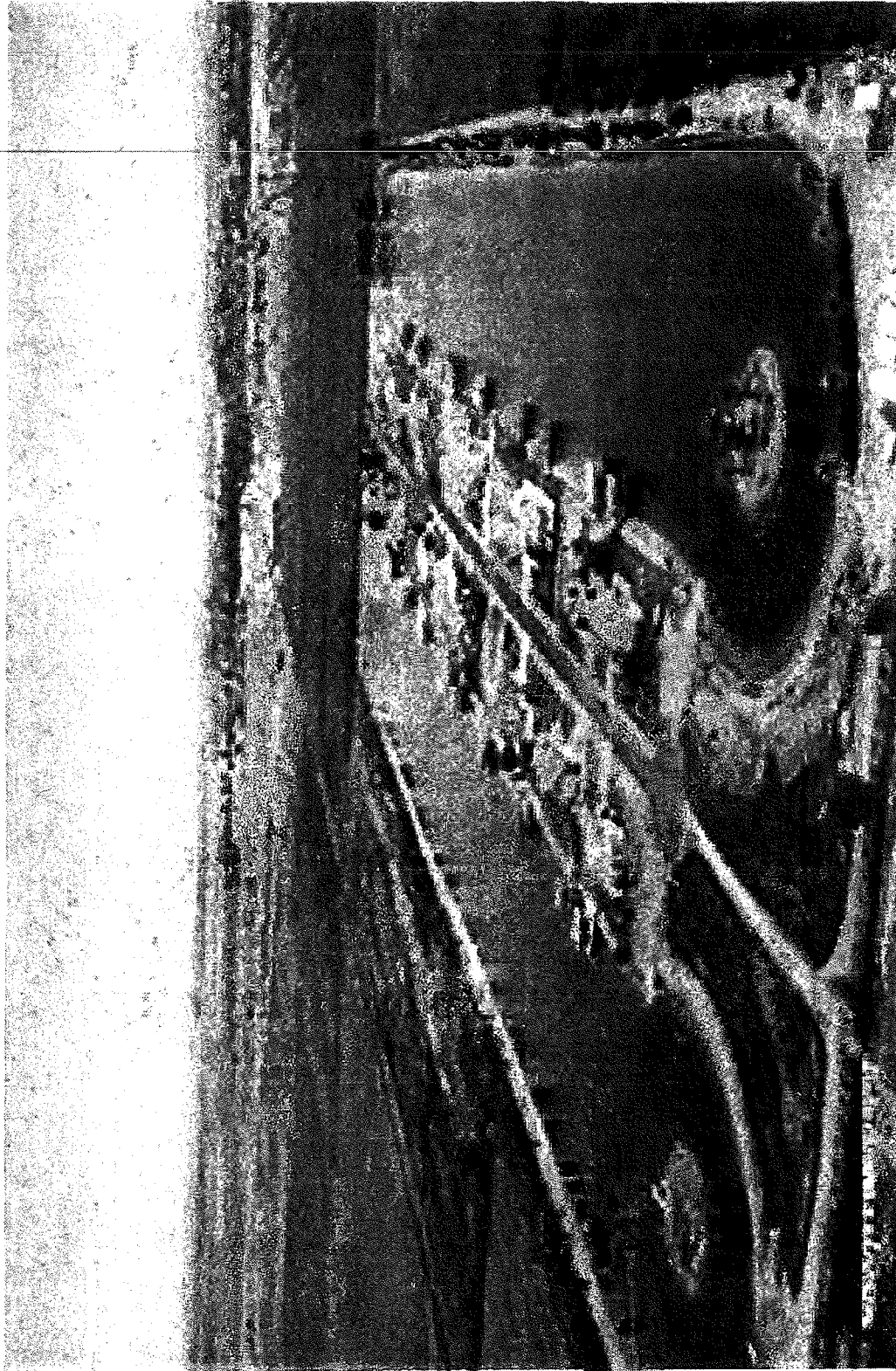












Private Water Ski Lake in Bakersfield, California Area

EXHIBIT 2
Page 1 of 9



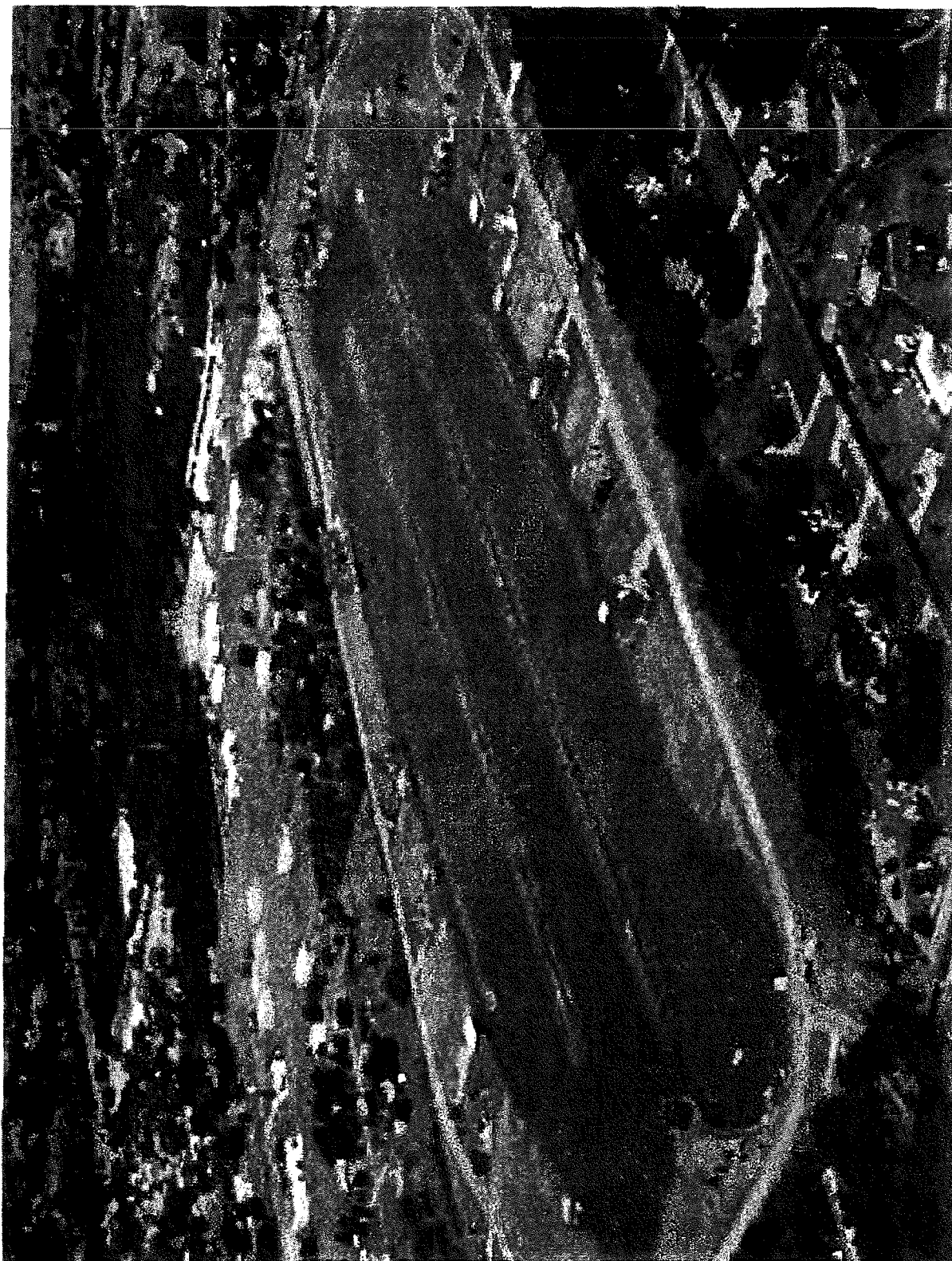
Lots 2 and 10 are for sale.

CLOSE X

The Reserve at Pine Lake in Florida

EXHIBIT 2

Page 2 of 9



Lakes at Timber Cove in Granbury, Texas

EXHIBIT 2

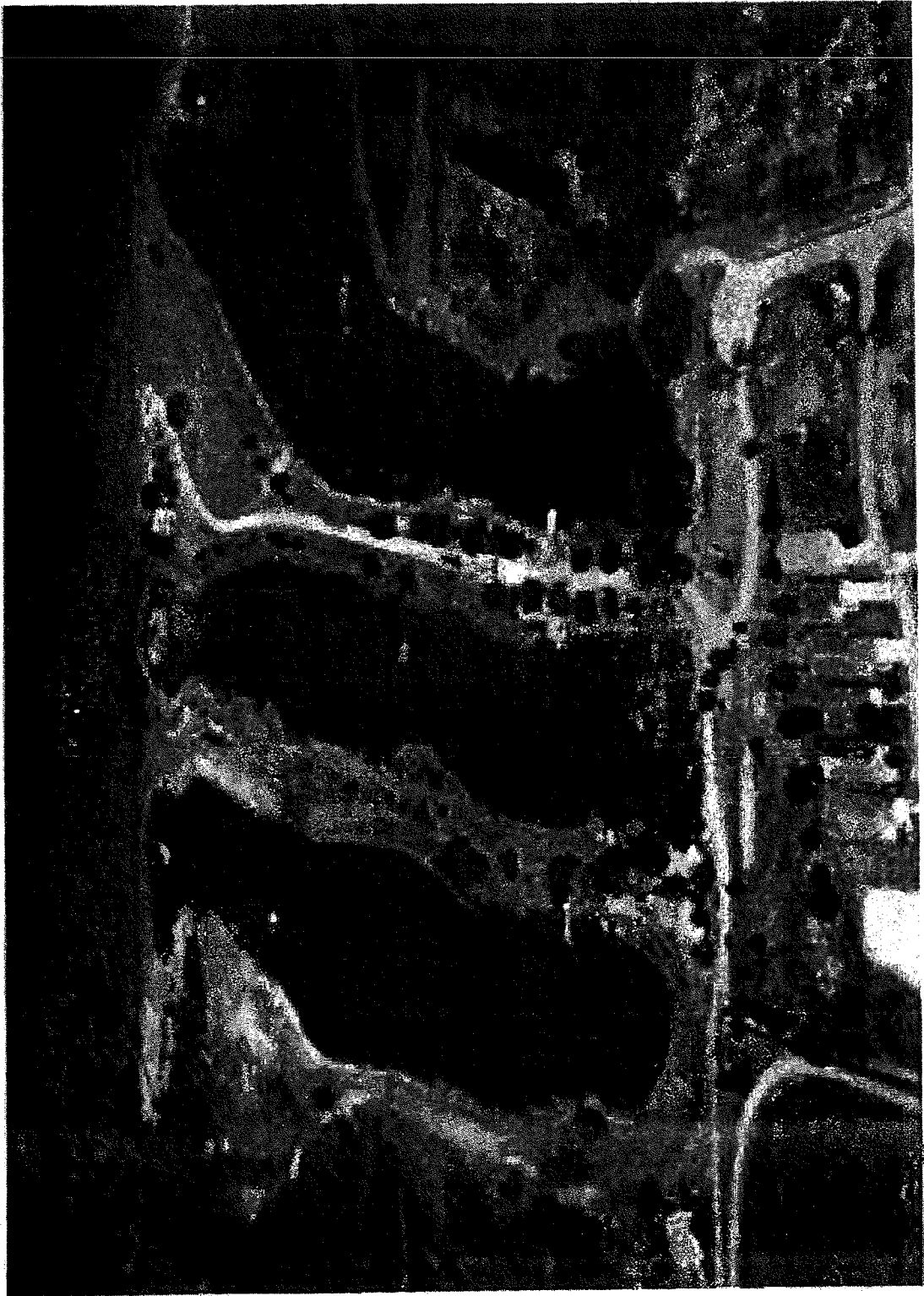
Page 3 of 9

Arvin, CA



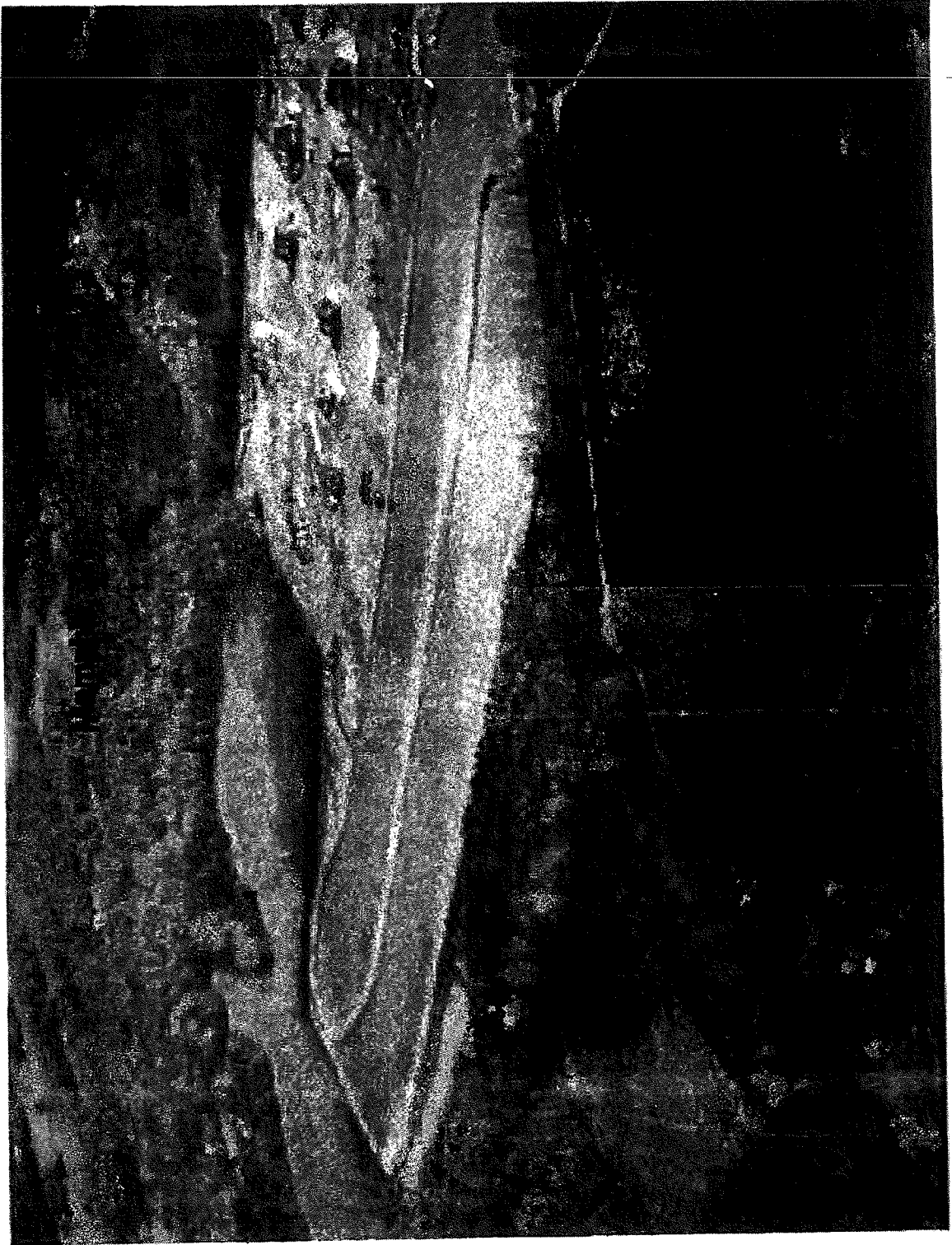
Fresno, CA; Bella Lago Lake











2014-28241



\$88.00

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

D-AG Cntsl Stmt4 SRB
\$40.00 \$11.00 \$21.00 \$10.00 \$6.00

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.)

RECEIVED

1 - WATER STORAGE EASEMENT AGREEMENT

AUG 29 2014

GARVEY SCHUBERT
BARET

EXHIBIT 3

Page 1 of 8

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 foot 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

3 - WATER STORAGE EASEMENT AGREEMENT

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.

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



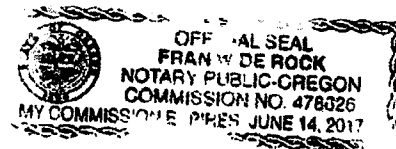
STATE OF OREGON)

) ss.

County of Deschutes)

This instrument was acknowledged before me on June 10, 2014 by
ERIC ADWELL, _____ 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-00828
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.

DESCHUTES COUNTY OFFICIAL RECORDS
NANCY BLANKENSHIP, COUNTY CLERK

2014-28241



\$88.00

After Recording, Return to:
KC Development Group, LLC

2014-28241
Booked on 7/27/14

D-AG Cnt=1 Str=4 SRB

\$40.00 \$11.00 \$21.00 \$10.00 \$8.00

08/27/2014 10:33:46 AM

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.)

RECEIVED

1 - WATER STORAGE EASEMENT AGREEMENT

AUG 29 2014

GARVEY SCHUBERT
BARER

EXHIBIT 3

Page 1 of 8

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 foot 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.

2 - WATER STORAGE EASEMENT AGREEMENT

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 connected 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.

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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 Cudweil
Its managing member

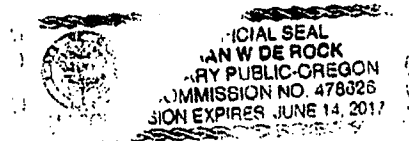
STATE OF OREGON)

) 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.

Frank W. DeRock
NOTARY PUBLIC FOR OREGON



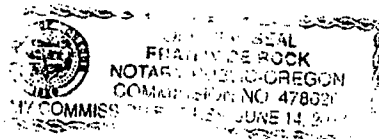
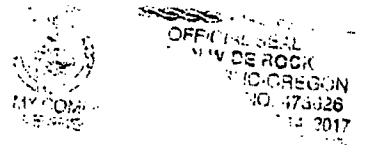
STATE OF OREGON)

) ss.

County of Deschutes)

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ERIC CADWELL, of KC Development Group,
LLC.

Frank 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**

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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.

200 300 400 500 600 700 800 900 1000 1100 1200 1300 1400 1500 1600 1700 2000

