



Community Development Department

Planning Division Building Safety Division Environmental Soils Division

P.O. Box 6005 117 NW Lafayette Avenue Bend, Oregon 97708-6005

Phone: (541) 388-6575 Fax: (541) 385-1764

<http://www.deschutes.org/cd>

MEMORANDUM

TO: Board of County Commissioners

FROM: Cynthia Smidt, Associate Planner *CS*

DATE: December 18, 2015

RE: Hearings Officer Decision (File Nos. 247-15-000222-LR, -000430-A, and -000633-A) and Order No. 2015-058 to Hear the Appeal or Decline Review

I. PURPOSE

Before the Deschutes Board of County Commissioners ("Board") at their December 28 work session is an appeal filed by Central Oregon LandWatch ("LandWatch"). The applicant is Tumalo Irrigation District ("TID"), which is represented by attorney Liz Fancher. The appeal is submitted in response to the Hearings Officer's decision approving the applicant's verification of a legal lot of record.

II. BACKGROUND

The subject property, tax lot 7891 (Assessor's tax map 16-11-00) in its entirety, is approximately 755 acres, located at 18194 Tumalo Reservoir Road. The property is owned by Tumalo Irrigation District and is the site of the Tumalo Reservoir project.¹ On April 28, 2015, the applicant filed for a Lot of Record Verification to determine if a portion of the property consisted of five legal lots of record. However, based on the overlap of historic transactions, staff reviewed the legal status of the entire subject property, which included the five requested lots. Planning Division staff issued an administrative decision on July 27, 2015 finding that the subject property constitutes eight legal lots of record, including the five legal lots requested for review with the application (Attachment 1). The Planning Division staff also found that the subject property includes four areas, which are not recognized as legal lots of record that resulted from a 1988 deed conveying land from the State of Oregon to Tumalo Irrigation District. LandWatch appealed the decision to a Hearings Officer who held a public hearing on

¹ The Tumalo Irrigation Project in 1904 promised to irrigate approximately 27,000 acres of land near Tumalo Creek, a tributary to the Deschutes. After the developers suffered nearly 10 years of financial, managerial, and engineering disasters on the project, forcing some farmers to go bust, the state took over the irrigation system in 1913. The state's solution to the Tumalo project, which lacked enough water to irrigate all of the promised land, was to build a storage reservoir. Tumalo Reservoir was completed in 1915 but failed to hold water when giant sinkholes opened on its floor.

September 8, 2015. The Hearings Officer issued a decision on November 12, 2015 approving and affirming the applicant's Lot of Record Verification and staff decision (Attachment 2).

In the early twentieth century, numerous deeds and federal land grants were conveyed in the area of the subject property. The deeds and land grants were dated and signed by the parties to the transactions, containing a separate legal description of the parcels, and eventually recorded in Deschutes County. Although most of the parcels reviewed here were included in subsequent deeds that described adjacent lands together in a single deed, Deschutes County Hearings Officers found in previous cases that this action does not eradicate the boundary lines that legally established those properties in the past. Based on this information, some parcels reviewed here were found to be remainder lots, because they are surrounded by legally created lots. Although the remainder lots do not meet the strict definition contained in Deschutes County Code (DCC) 18.040.030(A)(5), once altered by subsequent conveyances, the remnants become legal remainder parcels. This was articulated by a Hearings Officer's decision (file LR-10-2).

Evidence was not found with the TID Lot of Record Verification that indicated the lots were consolidated through a property line adjustment or platted as a subdivision or partition. In summary, it was determined that the subject property constitutes eight legal lots of record including four areas that are not.

The subject property and the surrounding area are in a Wildlife Area (WA) Combining Zone. In particular, the area is within the Tumalo Deer Winter Range. In 1988, the State of Oregon conveyed the subject property to Tumalo Irrigation District and included limitations that the property be "held in public ownership and used as a winter feeding area for wildlife satisfactory to the Oregon Department of Fish and Wildlife." As noted in the Planning staff decision, there is an unmistakable interest by the public regarding the subject property, the wildlife protections of the WA combining zone, and the 1988 conveyance. The Hearings Officer explored the issue in more detail and affirmed staff's decision.

III. APPEAL

LandWatch describes several assignments of error that are summarized in their notice of appeal (Attachment 3). As stated by the appellant, the issues raised in this case are "matters of interpretation of state law and of decisions of LUBA and the Oregon Court of Appeals." The appellant requests de novo review.

IV. DEADLINE FOR LOCAL DECISION

According to DCC 22.20.040, lot of record determinations are exempt from the 150-day time limit.

V. BOARD OPTIONS

Attachment 4 contains three versions of Order No. 2015-058. 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 staff (DCC 22.32.035(B) and (D)).

Reasons to hear:

There are a number of code and policy interpretation issues. The Land Use Board of Appeals ("LUBA") will be obligated to defer to the Board's interpretations if they are at least plausible. The Board may want to reinforce or refute some or all of the Hearing Officer's findings/interpretations prior to LUBA review.

If the Board decides to hear the appeal, staff believes that a do novo hearing is not necessary to fully and properly evaluate the significant policy issues raised in this case and that the existing record provides an adequate factual basis on which to evaluate these issues.

Reasons not hear:

The analysis of this request and the basis for appeal are inherently legal in nature. The Planning Division's administrative decision and Hearings Officer are sufficiently thorough and accurate in the 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.

Attachments

1. Planning Staff Decision (File No. 247-15-000222-LR with Figures 1 - 6)
2. Hearings Officer's Decision on Appeal (File No. 247-15-000430-A)
3. Notice of Appeal (File No. 247-15-000633-A)
4. Order No. 2015-058 (3 versions)



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/>

June 27, 2015

Tumalo Irrigation District
64697 Cook Avenue
Bend, Oregon 97703

RE: File No. 247-15-000222-LR; Lot of Record Determination for of Property Identified on Deschutes County Assessor's Map 16-11-00, Tax Lot 7891

Dear Applicant:

You submitted an application for a lot of record determination for part of the above referenced tax lot. You have requested this verification in order create a legal lot boundary between the subject property owned by Tumalo Irrigation District and land owned by the State of Oregon. Although the request is for only a portion of the subject property, based on the overlap of historic transactions this decision reviews the legal status of the entire tax lot including the five lots you requested. The Planning Division has reviewed the information you submitted with the application along with federal land conveyance records, County Assessor's records, County Surveyor records, County Clerk deeds, and County building and land use permit information.¹ Based on this information, we have determined the subject property constitutes eight (8) legal lots of record, including the five (5) legal lots requested for review with the application. The subject property also includes four (4) areas that are not recognized as legal lots of record.

Section 18.04.030 of the Deschutes County Zoning Ordinance defines a "lot of record" as:

- A. A lot or parcel at least 5,000 square feet in area and at least 50 feet wide, which conformed to all zoning and subdivision or partition requirements, if any, in effect on the date the lot or parcel was created, and which was created by any of the following means:**
- 1. By partitioning land as defined in ORS 92;**
 - 2. By a subdivision plat, as defined in ORS 92, filed with the Deschutes County Surveyor and recorded with the Deschutes County Clerk;**
 - 3. By deed or contract, dated and signed by the parties to the transaction, containing a separate legal description of the lot or parcel, and recorded in Deschutes County if recording of the instrument was required on the date of the conveyance. If such instrument contains more than one legal description, only one lot of record**

¹ The land use history including past applications and County approvals may not have been relevant in this lot of record determination.

shall be recognized unless the legal descriptions describe lots subject to a recorded subdivision or town plat;

4. *By a town plat filed with the Deschutes County Clerk and recorded in the Deschutes County Record of Plats; or*
5. *By the subdividing or partitioning of adjacent or surrounding land, leaving a remainder lot or parcel.*

B. The following shall not be deemed to be a lot of record:

1. *A lot or parcel created solely by a tax lot segregation because of an assessor's roll change or for the convenience of the assessor.*
2. *A lot or parcel created by an intervening section or township line or right of way.*
3. *A lot or parcel created by an unrecorded subdivision, unless the lot or parcel was conveyed subject to DCC 18.04.030(B).*
4. *A parcel created by the foreclosure of a security interest.*

Deschutes County adopted its first zoning ordinance (PL-5) on November 1, 1972, which described minimum lot sizes for new parcels. This zoning ordinance was replaced in 1979 with PL-15. The subdivision ordinance of 1970, PL-2, regulated subdivisions less than 10 acres in size but did not regulate partitions. The partition ordinance (PL-7) was adopted in 1977, which described the criteria under which parcels could be partitioned (divided into three or less parcels).

Land Use History and Public Comments

The subject property and the surrounding area are in a Wildlife Area (WA) Combining Zone. In particular, the area is within the Tumalo Deer Winter Range. In part, the purpose of the WA Zone is to conserve the important wildlife resources of the county. When the State of Oregon conveyed the subject property to Tumalo Irrigation District in 1988 (see additional information below), the land transfer included limitations of the property requiring it to be "held in public ownership and used as a winter feeding area for wildlife satisfactory to the Oregon Department of Fish and Wildlife." Based on the wildlife protections of the WA zone and the 1988 deed, there is an unmistakable interest by the public in the subject property and surrounding area. Several written comments were submitted to the record that expressed two common concerns. One concern was about the Lot of Record Verification as requested. The other concern involved the wildlife protections noted above.

In regards to the Lot of Record Verification, the common theme in the comments was that because the State of Oregon conveyed the entire property in a single deed in 1988, the legal lots of record reviewed here do not exist. Oregon Revised Statute (ORS) 92.017, as stated below, protects historic parcels created by deeds; in addition to, lots and parcels created by subdivisions or partitions.

92.017 When lawfully created lot or parcel remains discrete lot or parcel. A lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law.

For property boundaries to be eliminated, supporting evidence of such action is required (e.g. consolidation through a property line adjustment or platting a subdivision or partition). As noted below, evidence was not found that indicates the subject legal lots of record were consolidated through a property line adjustment approval or platted as part of a subdivision or partition. Through various Lot of Record Verification decisions, Deschutes County Hearings Officers found that when a single deed includes multiple parcels that were lawfully created with discrete

boundaries in previous conveyances, it did not result in the elimination of the previously established boundary lines (see LR-10-2/A-10-3, LR-92-43, LR-92-44, LR-92-46, and LR-92-47).

Regarding the Tumalo Deer Winter Range concerns, staff recognizes that the 1988 conveyance from the State of Oregon to Tumalo Irrigation District includes limitations on the subject property. The Lot of Record Verification, however, reviews the lawful creation of a lot or parcel and not necessarily the limitations placed on that lot or parcel. Nevertheless, the importance of the 1988 conveyance may limit future development of the subject property and thus be considered as part of any proposed development of the property. County zoning also places limits on the property. Together with the WA Zone noted above, a majority of the property is zoned Open Space and Conservation (OS&C) and Flood Plain (FP). These two zones have a common purpose of conserving important scenic and natural resources. There are small areas in the northwestern region of the property that are zoned Forest Use (F1 and F2), zones that are intended to preserve forest lands. A small region in the southeast is zoned Exclusive Farm Use (EFUTRB), a zone that is intended to preserve farmlands. According to the applicant's attorney, Liz Fancher, Tumalo Irrigation District "is not changing the use or management of the land." County records do not indicate that the applicant is seeking to divide or change the use of the subject property.

Staff finds that no specific development of the property is proposed or approved under this lot of record decision. As such, Staff is unaware of any provisions of Title 17 or 18, not otherwise addressed in this decision, which are applicable to this decision. In addition, Staff is unaware any provision of the 1988 conveyance, Deschutes County Code, or state statute that pertains to this of record decision which is not otherwise addressed in this decision.

Tax Lot 7891 History

The following information is a sequential review of land conveyances in the area involving the subject property, tax lot 7891 of map 16-11-00 (index map). For reference, **Figure 1** shows the tax lot in its current configuration.

Figure 2

For the eight years between 1905 and 1912, numerous deeds and federal land grants were conveyed in the area. The deeds and land grants were dated and signed by the parties to the transaction, containing a separate legal description of the parcels, and eventually recorded in Deschutes County. The first of these conveyances was through a U.S. federal land grant dated August 16, 1906, which conveyed 120 acres to Jerry Cramer, Assignee of Jesse Harcrow (Certificate Number 48) and was later recorded in Volume 1 of Patents, Page 422 at the Deschutes County Clerk's Office. This parcel is illustrated as **Parcel A** on Figure 2. Parcel A is described as the southeast quarter of the southwest quarter (SE $\frac{1}{4}$ SW $\frac{1}{4}$) of Section 29 and the north half of the northwest quarter (N $\frac{1}{2}$ NW $\frac{1}{4}$) of Section 32, Township 16 South, Range 11 East of the Willamette Meridian. This unit of land (Parcel A) is recognized as a legal lot of record.

Parcel B, as shown on Figure 2, was originally part of a larger parcel, including thousands of acres first conveyed in 1905 to the State of Oregon in a United States land grant (Patent Number 1).² In April 1907, the State of Oregon then conveyed to Frank V. Swisher the 80 acres shown as Parcel B (Fig. 2). This transaction was recorded in Volume 4, Page 65 in the Deschutes County Clerk's Office. Parcel B is described as the southeast quarter of the

² This land grant was later recorded in Volume 2, Page 187 at the Deschutes County Clerk's Office.

southwest quarter (SE $\frac{1}{4}$ SW $\frac{1}{4}$) and the southwest quarter of the southeast quarter (SW $\frac{1}{4}$ SE $\frac{1}{4}$) in Section 33, Township 16 South, Range 11 East of the Willamette Meridian. This unit of land (Parcel B) is recognized as a legal lot of record.

On November 15, 1907, 160 acres was conveyed to the George W. Wimer, Assignee of Jerry Cramer, in a U.S. land grant (Certificate Number 77, Patent Number 142) and later recorded in Volume 1 of Patents, Page 669 at the Deschutes County Clerk's Office. This parcel is illustrated as **Parcel C** on Figure 2 and is described as the south half of the northwest quarter (S $\frac{1}{2}$ NW $\frac{1}{4}$), the southwest quarter of the northeast quarter (SW $\frac{1}{4}$ NE $\frac{1}{4}$), and the northwest quarter of the southeast quarter (NW $\frac{1}{4}$ SE $\frac{1}{4}$) of Section 32, Township 16 South, Range 11 East of the Willamette Meridian. Parcel C is recognized as a legal lot of record.

As noted in Homestead Certificate No. 5626 (Patent Number 2902), the United States conveyed 160 acres to John B. Wimer on July 14, 1908. This land grant was later recorded at the Deschutes County Clerk's Office in Volume 1 of Patents, Page 461. This parcel is illustrated as **Parcel D** on Figure 2 and described as the southwest quarter (SW $\frac{1}{4}$) of Section 32, Township 16 South, Range 11 East of the Willamette Meridian. This unit of land (Parcel D) is recognized as a legal lot of record.

On July 14, 1908, 160 acres was also conveyed to Charles L. Wimer in a U.S. land grant (Homestead Certificate Number 5625, Patent Number 2901) and later recorded in Volume 1 of Patents, Page 462 at the Deschutes County Clerk's Office. This parcel is illustrated as **Parcel E** on Figure 2. Parcel E is described as the northeast quarter of the southeast quarter (NE $\frac{1}{4}$ SE $\frac{1}{4}$) and the south half of the southeast quarter (S $\frac{1}{2}$ SE $\frac{1}{4}$) of Section 32 and the southwest quarter of the southwest quarter (SW $\frac{1}{4}$ SW $\frac{1}{4}$) of Section 33, Township 16 South, Range 11 East of the Willamette Meridian. Parcel E is recognized as a legal lot of record.

Through a U.S. land grant dated February 25, 1909, 160 acres was conveyed to Thorwald A. Jensen (Patent Number 48056) and later recorded in Volume 2 of Patents, Page 227 at the Deschutes County Clerk's Office. This parcel is illustrated as **Parcel F** on Figure 2. Parcel F is described as the northeast quarter of the southwest quarter (NE $\frac{1}{4}$ SW $\frac{1}{4}$), the southeast quarter of the northwest quarter (SE $\frac{1}{4}$ NW $\frac{1}{4}$), and the west half of the southwest quarter (W $\frac{1}{2}$ SW $\frac{1}{4}$) of Section 29, Township 16 South, Range 11 East of the Willamette Meridian. This unit of land (Parcel F) is recognized as a legal lot of record.

On October 27, 1910, 160 acres was conveyed to the Thorwald A. Jensen in a U.S. land grant (Patent Number 159356) and later recorded in Volume 2 of Patents, Page 386 at the Deschutes County Clerk's Office. This parcel is illustrated as **Parcel G** on Figure 2 and is described as the northeast quarter (NE $\frac{1}{4}$) of Section 31, Township 16 South, Range 11 East of the Willamette Meridian. Parcel G is recognized as a legal lot of record.

As specified in Patent Number 286678, the United States conveyed 160 acres to William D. Clark on August 1, 1912. This land grant was later recorded at the Deschutes County Clerk's Office in Volume 2 of Patents, Page 460. This parcel is shown as **Parcel H** on Figure 2. Parcel H is described as the southeast quarter of the northeast quarter (SE $\frac{1}{4}$ NE $\frac{1}{4}$), the east half of the southeast quarter (E $\frac{1}{2}$ SE $\frac{1}{4}$), and the southwest quarter of the southeast quarter (SW $\frac{1}{4}$ SE $\frac{1}{4}$) of Section 30, Township 16 South, Range 11 East of the Willamette Meridian. Parcel H is recognized as a legal lot of record.

Figure 3

Transactions involving Parcels A, C, and D (Figure 2)

In 1912 and 1913 several transactions occurred involving Parcels A, C, and D, shown on Figure 2. The first transaction occurred when John and Carolyn Wimer conveyed a portion of Parcel D to George and Delilah Wimer on November 11, 1912. This deed was recorded in Volume 12, Page 405 at the Deschutes County Clerk's Office. This parcel is shown as **Parcel J** on Figure 3. Parcel J, approximately 40 acres in size, is described as the east half of the east half of the southwest quarter (E $\frac{1}{2}$ E $\frac{1}{2}$ SW $\frac{1}{4}$), of Section 32, Township 16 South, Range 11 East of the Willamette Meridian. This unit of land (Parcel J) is recognized as a legal lot of record. The result of this conveyance that separated the eastern 40 acres of Parcel D (Fig. 2) was that it left behind a remnant parcel of 120 acres with legally established boundaries. This remainder parcel is shown as **Parcel K** on Figure 3 and is described as the west half of the southwest quarter (W $\frac{1}{2}$ SW $\frac{1}{4}$) and the west half of the east half of the southwest quarter (W $\frac{1}{2}$ E $\frac{1}{2}$ SW $\frac{1}{4}$), of Section 32, Township 16 South, Range 11 East of the Willamette Meridian. Parcel K is recognized as a legal lot of record.

On November 23, 1912, George and Delilah Wimer convey a portion of Parcel A (Fig. 2) to John B. Wimer (Vol. 12, Page 312, Deschutes County Clerk's Office). This parcel is illustrated as **Parcel L** on Figure 3 and is approximately 40 acres in size. Parcel L is described as the northwest quarter of the northwest quarter (NW $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 32, Township 16 South, Range 11 East of the Willamette Meridian. Parcel L is recognized as a legal lot of record. Furthermore, the conveyance of Parcel L separated the southwestern 40 acres of Parcel A (Fig. 2) and thus a parcel with legally established boundaries remained. This remainder parcel of approximately 80 acres is shown as **Parcel M** on Figure 3 and is described as the southeast quarter of the southwest quarter (SE $\frac{1}{4}$ SW $\frac{1}{4}$) of Section 29 and the northeast quarter of the northwest quarter (NE $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 32, Township 16 South, Range 11 East of the Willamette Meridian. Parcel M is recognized as a legal lot of record.

John and Carolyn Wimer conveyed to G. F. Horner on November 29, 1912, approximately 200 acres that included Parcels K and L described above, together with the western 40 acres of Parcel C (Fig. 2). This deed was recorded in Volume 12, Page 316 at the Deschutes County Clerk's Office. Although the Parcels K and L were included in this deed, it did not eradicate the parcel's previously legally established boundaries as described above. Therefore, in this case, Parcels K and L remain in their configuration as separate legal lots. However, this conveyance did separate the western 40 acres of Parcel C, establishing discrete boundaries shown as **Parcel N** on Figure 3. Parcel N is described as the southwest quarter of the northwest quarter (SW $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 32, Township 16 South, Range 11 East of the Willamette Meridian. This unit of land (Parcel N) is recognized as a legal lot of record. By conveying the western 40 acres (Parcel N), it created a remainder parcel of the eastern 120 acres of Parcel C, which was further separated as discussed below.

The remaining 120 acres of Parcel C was separated further in the following manner. On January 14, 1913, George and Delilah Wimer conveyed to John and Sarah Byers approximately 100 acres that included Parcel M (Fig. 3), described above, together with 20 acres of Parcel C (Vol. 14, Page 161). As noted previously and further explained below, including Parcel M with the 20 acres of Parcel C did not eradicate the legally established boundaries of Parcel M and thus Parcel M remains in its configuration as a separate legal lot. The conveyance of 20 acres that was originally part of Parcel C, however, established a new parcel with discrete boundaries. This parcel is illustrated as **Parcel O** on Figure 3 and is described as west half of the southeast

quarter of the northwest quarter (W ½ SE ¼ NW ¼), of Section 32, Township 16 South, Range 11 East of the Willamette Meridian. Parcel O is recognized as a legal lot of record.

The conveyance of Parcel O separated out the remaining eastern 100 acres of Parcel C. Illustrated as **Parcel P** on Figure 3, the eastern 100 acres remained as a parcel with legally established boundaries. Parcel P is described as the east half of the southeast quarter of the northwest quarter (E ½ SE ¼ NW ¼), the southwest quarter of the northeast quarter (SW ¼ NE ¼), and the northwest quarter of the southeast quarter (NW ¼ SE ¼) all in Section 32, Township 16 South, Range 11 East of the Willamette Meridian. Parcel P is recognized as a legal lot of record.³

Transactions involving Parcels B and H (Figure 2)

In 1913 and 1914, Parcels B and H (Fig. 2) were separated in different transactions that conveyed land to the State of Oregon. Regarding Parcel B, in July 1913, Frank and Olga Swisher conveyed to the State of Oregon approximately 19.80 acres located in Section 33. This deed was later recorded in Volume 14, Page 3 at the Deschutes County Clerk's Office. This parcel is shown as **Parcel Q** on Figure 3.⁴ The result of this conveyance separated the western 19.80 acres of Parcel B (Fig. 2) located in Section 33, leaving behind a remnant parcel (approximately 60.2 acres) with legally established boundaries. Parcel Q is recognized as a legal lot of record. The remainder portion of Parcel B that was separated from Parcel Q is also a legal lot of record. However, it is not part of the subject property and further analysis is not included in this decision.

On January 5, 1914, William and Ada Clark conveyed to the State of Oregon approximately 55.96 acres located in Section 30 and thus dividing Parcel H (Fig. 2) into two separate parcels. The deed was recorded in Volume 14, Page 564 at the Deschutes County Clerk's Office. This parcel is illustrated as **Parcel R** on Figure 3.⁵ The result of the 1914 conveyance separated the eastern 55.96 acres of Parcel H (Fig. 2) located in Section 30, leaving behind a remnant parcel (approximately 104.04 acres) with legally established boundaries. Parcel R is recognized as a legal lot of record. The remainder portion of Parcel H that was separated from Parcel R is also a legal lot of record. However, it is not part of the subject property and further analysis is not included in this decision.

On July 14, 1913, Perry and Ida Woolley convey to the State of Oregon Parcels F and G, as illustrated on Figure 2, (Vol. 13, Page 612). Although the two parcels were included in a single deed from 1913, this did not eradicate the parcels' previously legally established boundaries as detailed in this decision. Therefore, **Parcel F** and **Parcel G** remain in their original configuration as separate legal lots. These parcels are illustrated on Figure 3 for reference.

Transactions involving Parcel E (Figure 2)

On January 4, 1913, Charles L. Wimer conveyed to Willard and Cora Triplett approximately 110.75 acres of Parcel E (Fig. 2). The deed was recorded at the Deschutes County Clerk's Office

³ Three months after the conveyance of Parcel O, on March 18, 1913, George and Delilah Wimer conveyed to Charles L. Wimer Parcel P and Parcel J in Volume 13, Page 481 of the Deschutes County Clerk's Office.

⁴ For the property description of Parcel Q, refer to the deed recorded in Vol. 14, Page 3.

⁵ For the property description of Parcel R, refer to the deed recorded in Vol. 14, Page 564.

in Volume 12, Page 511. This parcel is shown on Figure 3 as **Parcel S** and includes 30.75 acres in the southwest quarter of the southeast quarter (SW ¼ SE ¼) and all of the southeast quarter of the southeast quarter (SE ¼ SE ¼) of Section 32 and the southwest quarter of the southwest quarter (SW ¼ SW ¼) of Section 33, all in Township 16 South, Range 11 East of the Willamette Meridian.⁶ This unit of land, Parcel S, is recognized as a legal lot of record.

By conveying the 110.75 acres of Parcel S, it created two remainder parcels that were originally part of Parcel E. One remainder parcel is the northernmost 40 acres of Parcel E and is shown as **Parcel T** on Figure 3. Parcel T is described as the northeast quarter of the southeast quarter (NE ¼ SE ¼) of Section 32, Township 16 South, Range 11 East of the Willamette Meridian. The other remainder parcel is approximately 9.25 acres in the southwest quarter of the southeast quarter (SW ¼ SE ¼) of Section 32. This parcel is illustrated as **Parcel U** on Figure 3.⁷ These units of land, Parcel T and Parcel U, are recognized as separate legal lots of record.⁸

Figures 4 and 5

On September 8, 1988, the State of Oregon conveyed to Tumalo Irrigation District approximately 930 acres. The Statutory Quitclaim Deed was recorded at the Deschutes County Clerk's Office in Volume 170, Page 581. This unit of land is shown as **Parcel V** on Figure 4. The 1988 conveyance included all of Parcels F, G, L, M, N, O, Q, and R as shown on Figure 3. In addition, the deed included the partial conveyance of four units of land – Parcels K, P, T, and S.⁹ Although the Parcels F, G, L, M, N, O, Q, and R were included together in the 1988 deed, the conveyance did not eradicate the parcels' previously legally established boundaries as detailed in this decision. Therefore, these eight parcels remain in the configuration as described above and remain as separate legal lots of record.

As a result of partially conveying Parcels K, P, T, and S, it left behind four remnant parcels to the north of the property boundary.¹⁰ These units of land are illustrated on Figure 5 as **Parcels W, X, Y, and Z**. At the time of the 1988 conveyance to Tumalo Irrigation District, the subdivision and partition ordinance PL-14 was used to regulate all subdivisions and partitions. In addition, the zoning ordinance PL-15 regulated minimum lot sizes. The southern region of Parcel V, where four units of land were partially conveyed, was zoned Open Space and Conservation (OS&C), which did not have a specific minimum lot size.¹¹ However, the subject property did not receive the benefit of an approval for a partition or subdivision. Therefore, Parcels W, X, Y and Z are not recognized as separate legal lots of record.¹²

⁶ For the full property description of Parcel S, refer to the deed recorded in Vol. 12, Page 551.

⁷ Figure 3 illustrates only an approximate location for Parcel U. For the full property description of Parcel U, refer to the deed recorded in Vol. 13, Page 611.

⁸ It was several months later in July 1913 that Charles L. Wimer conveyed to the State of Oregon approximately 189.25 acres, which included Parcels J, P, T and U as described above (see Vol. 13, Page 611).

⁹ Based on the legal description, it appears that the units of land referred to as Parcels J and U (Fig. 3) were not included in the 1988 conveyance.

¹⁰ The conveyance left remnant parcels to the south of the property boundary. However, additional review of these remainder parcels is not necessary because they are not a part of the subject property.

¹¹ At the time, the minimum lot size of the OS&C Zone was to be "determined by the County Sanitarian to be necessary for the protection of public health and natural resources."

¹² Parcels W, X, Y, and Z may be recognized as legal lots of record using the discrete boundaries discussed with related parcels – Parcels K, P, T, and S.

Lot of Record Analysis

The applicant applied for verification of lot(s) of record under Deschutes County Code (DCC) 18.040.030(A), which is defined above. The applicant provided a complete application regarding the history of the parcel creation, which allowed staff to render a decision where only lots or parcels legally created are recognized by the County for development purposes. Based on the sequential conveyances of land, staff finds the subject property (tax lot 7891) wholly contains eight separate legal lots of record, five of which the applicant requested verification. The eight legal lots of record are shown on Figure 6 as Parcels 1 through 8, with Parcels 1, 2, 4, 5, and 6 being the five that the applicant requested verification. The noted legal lots of record are all at least 5,000 square feet in area and 50 feet wide. In addition, the sequential land conveyances for the eight legal lots of record occurred prior to the County's first subdivision ordinance and zoning ordinance (1970 and 1972, respectively). Since the applicant is not seeking to divide the subject property, the procedures set forth in the current county subdivision ordinance, Title 17, are not applicable.

Two legal lots of record, Parcels 1 and 2 on Figure 6 were established with discrete boundaries in federal conveyances from 1909 and 1910, respectively. These parcels have remained unchanged since first established. Although the two parcels were included in a single deed from 1913, the transaction did not eradicate the parcels' legally established boundaries (see comments below). Parcels 3 and 8 on Figure 6 were first established with discrete boundaries through two separate federal conveyances but were changed through transactions with the State of Oregon in 1914 and 1913, respectively. Both subsequent conveyances separated the parcels, leaving remnants not part of the subject property. Parcels 4, 5, 6, and 7 were first established with discrete boundaries through different federal conveyances but were changed through additional subsequent conveyances between 1912 and 1914. Some land transactions separated parcels and thus left a remnant of the parent parcels, such as Parcel 5, but were not altered further. Some remainder parcels were involved in additional land transactions such as Parcels 7.

There are four units of land – Parcels 9, 10, 11, and 12 – shown on Figure 6 that are not recognized as separate legal lots of record. As stated previously, a 1988 conveyance of Parcel V (Fig. 4) separated four units of land – Parcels K, P, T, and S (Fig. 3) and thus created remnant parcels – Parcels W, X, Y, and Z shown on Figure 5. Parcels W, X, Y, and Z are not recognized as separate legal lots of record because the partition and zoning ordinances were in effect at the time of the 1988 conveyance. These parcels are portions of the legal lots identified as Parcels K, P, T, and S (Fig. 3).

Most of the parcels reviewed here were included in subsequent deeds that described adjacent lands together in a single deed. Including the parcels in a single deed does not eradicate the boundary lines that legally established those properties in the past. Evidence was not found that indicated the subject legal lots of record were consolidated through a property line adjustment approval or platted as part of a subdivision or partition. In the decision LR-10-2 (A-10-3) and in LR-92-43, LR-92-44, LR-92-46, and LR-92-47, Deschutes County Hearings Officers found that the mere inclusion in a single deed of multiple parcels lawfully created by conveyances did not result in the eradication of the parcels' previous legally established boundary lines.

Furthermore, the remnant parcels reviewed here were first established as separate larger parcels with legally established boundaries, and were surrounded by legally established

boundaries of other parcels. Although the remainder parcels left behind do not meet the strict definition contained in DCC 18.040.030(A)(5) because the adjacent or surrounding lands have not been subdivided or partitioned, once altered by subsequent conveyances the remnants become legal remainder parcels. In decision LR-10-2 (A-10-3), the County Hearings Officer articulated that remainder lots are surrounded by legally created lots. Staff relies on this determination to identify remainder parcels created by deed prior to partition and subdivision requirements.

The subject property contains lands zoned Exclusive Farm Use – Tumalo/Bend/Redmond subzone (EFUTRB), Open Space and Conservation (OS&C), Forest Use (F1 and F2), and Flood Plain (FP). Portions of the property are also within the Landscape Management (LM), Wildlife Area (WA), and Sensitive Bird and Mammal Habitat (SBMH) Combining Zones. Any development of this property is subject to the requirements of Title 18, Deschutes County Zoning Ordinance. Development of this property is also subject to the requirements of the County Building and Environmental Soils Divisions.

This decision becomes final twelve (12) days from the date this decision is mailed unless appealed by a party of interest.

Sincerely,

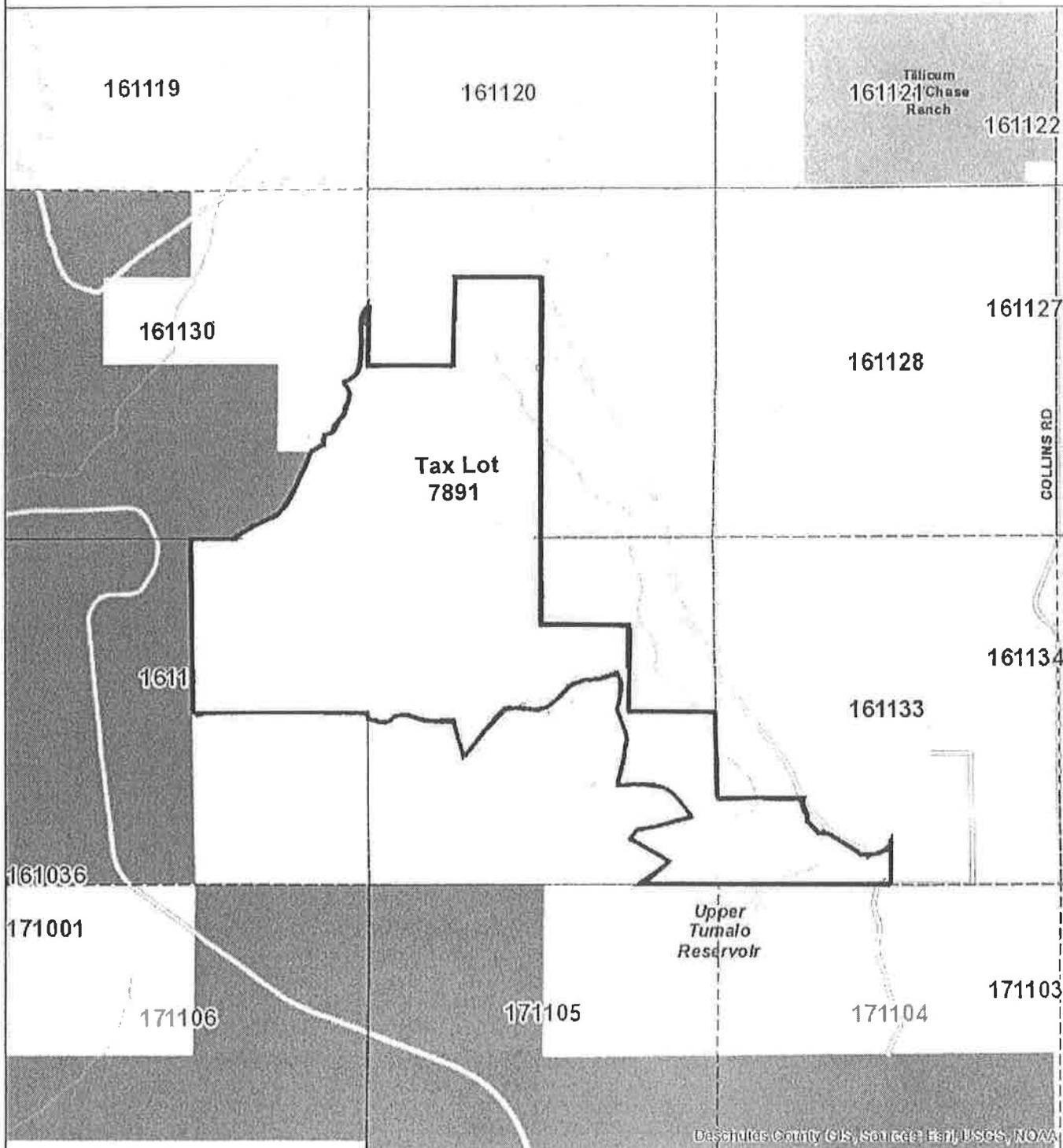
A handwritten signature in black ink that reads "Cynthia Smidt". The signature is written in a cursive, flowing style.

Cynthia Smidt, Associate Planner

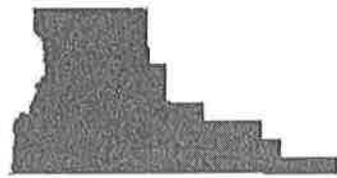
Enclosures

FIGURE 1

Deschutes County File 247-15-000222-LR



Deschutes County GIS, Sources: BLM, USGS, NOAA

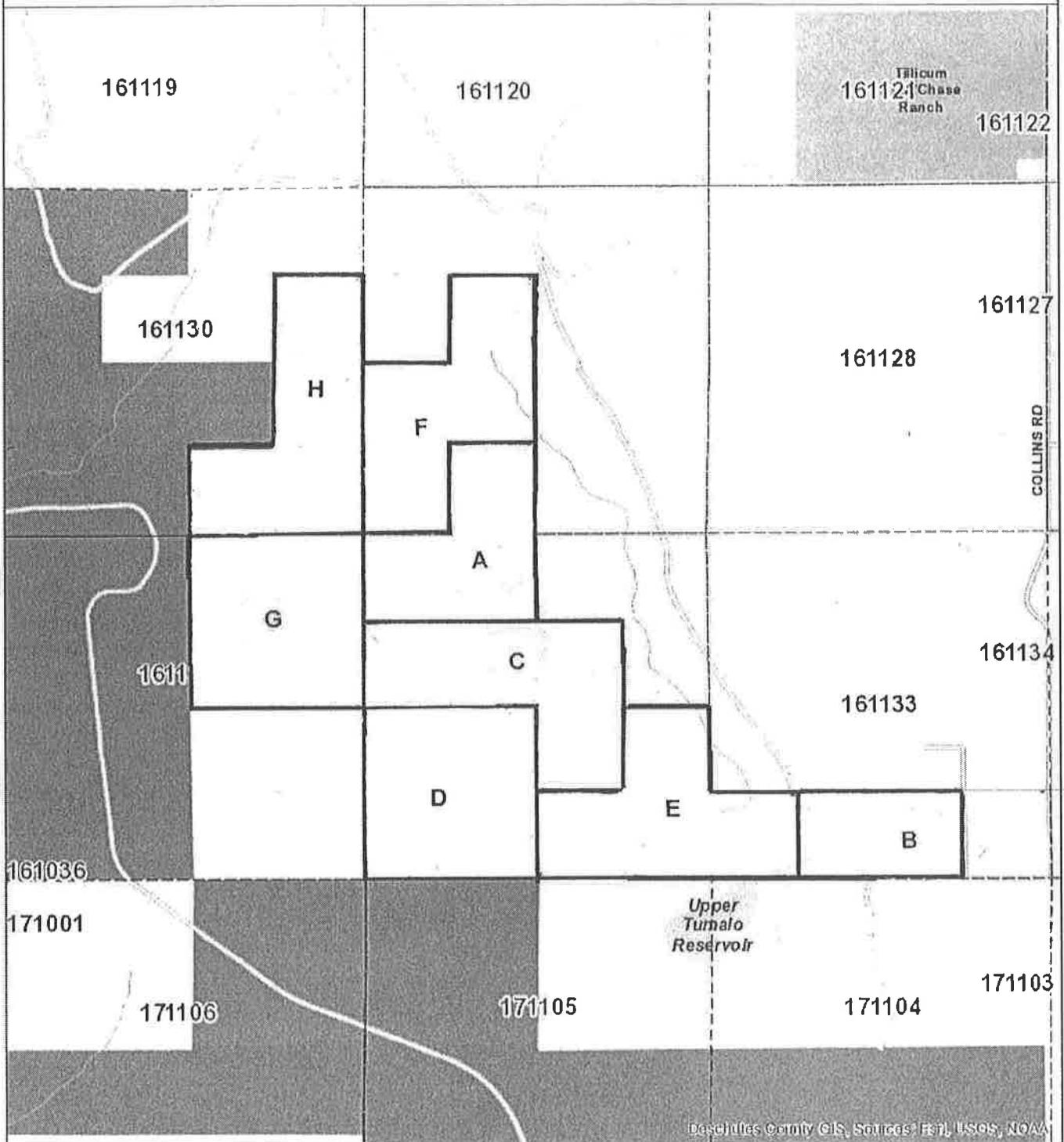


CURRENT CONFIGURATION



FIGURE 2

Deschutes County File 247-15-000222-LR



PARCEL A – 1906 U.S. LAND GRANT
PARCEL B – 1907 DEED
PARCEL C – 1907 U.S. LAND GRANT
PARCEL D – 1908 U.S. LAND GRANT

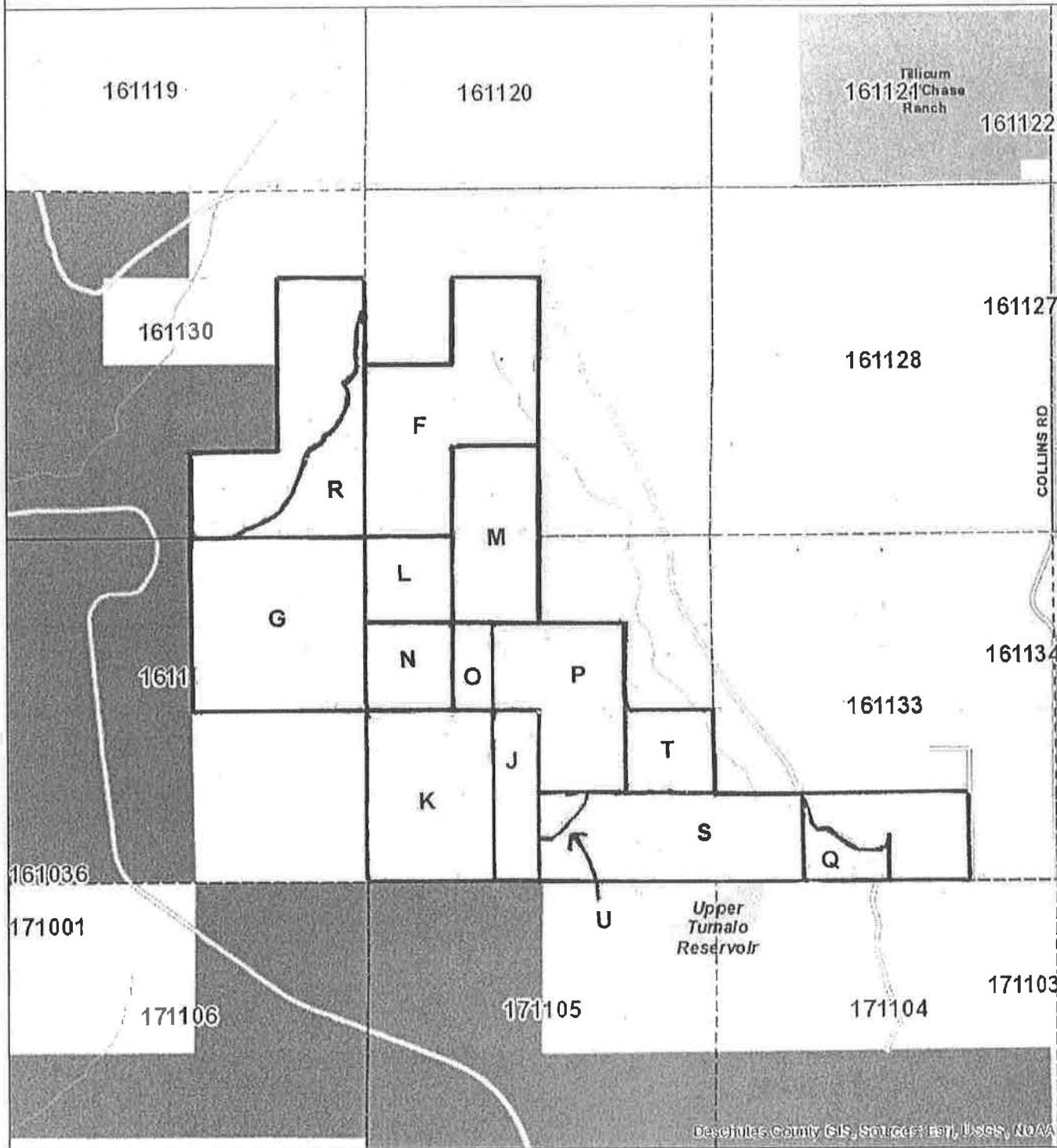
PARCEL E – 1908 U.S. LAND GRANT
PARCEL F – 1909 U.S. LAND GRANT
PARCEL G – 1910 U.S. LAND GRANT
PARCEL H – 1912 U.S. LAND GRANT



Deschutes County GIS, Sources: B71, USGS, NOAA

FIGURE 3

Deschutes County File 247-15-000222-LR



PARCEL J – 1912 DEED
 PARCEL K – REMAINDER
 PARCEL L – 1912 DEED
 PARCEL M – REMAINDER

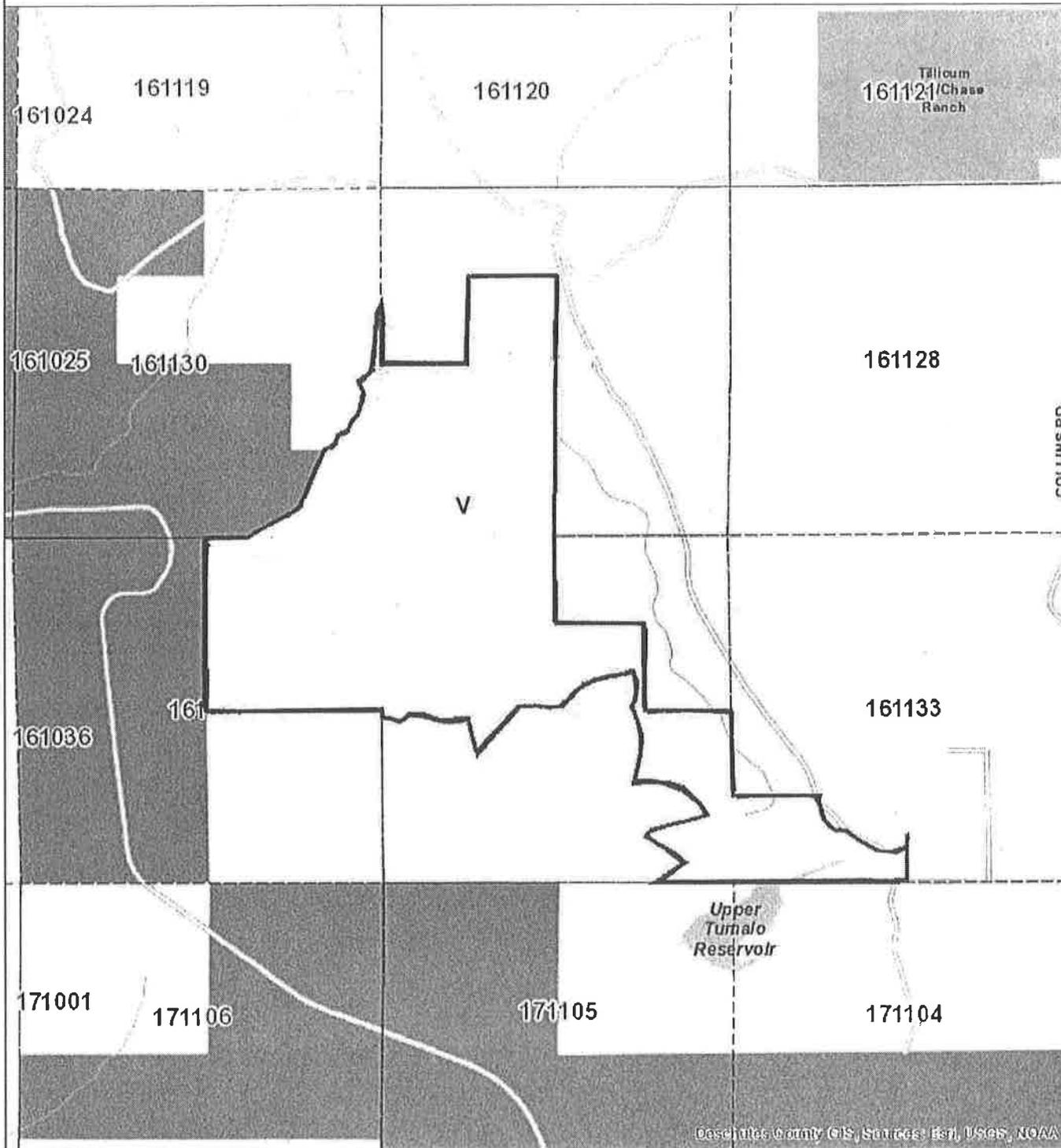
PARCEL N – 1912 DEED
 PARCEL O – 1913 DEED
 PARCEL P – REMAINDER
 PARCEL Q – 1913 DEED

PARCEL R – 1913 DEED
 PARCEL S – 1913 DEED
 PARCEL T – REMAINDER
 PARCEL U – REMAINDER

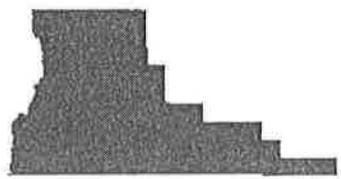


FIGURE 4

Deschutes County File 247-15-000222-LR



Deschutes County GIS, Sources: Esri, USGS, NOAA

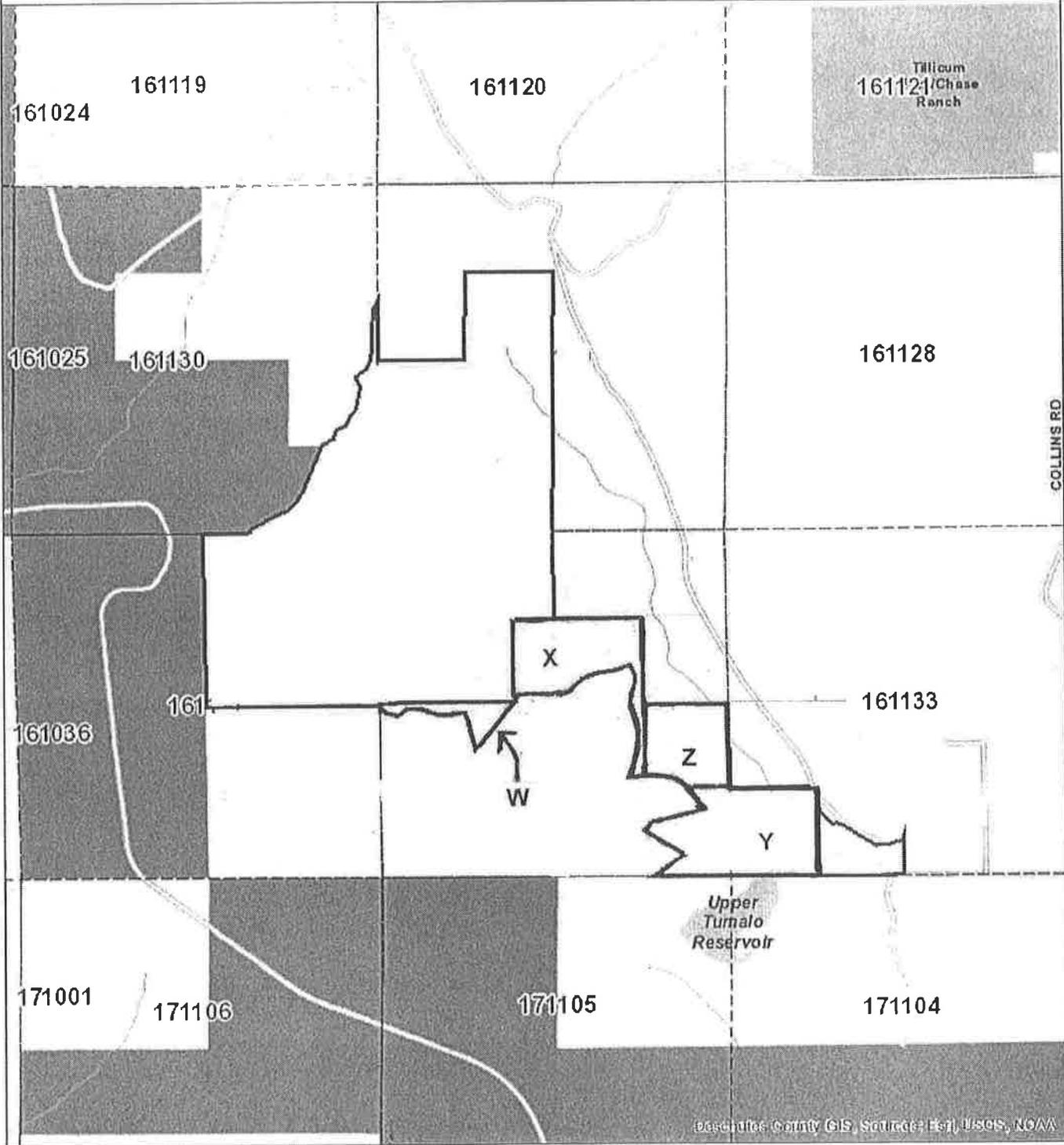


PARCEL V - 1988 DEED

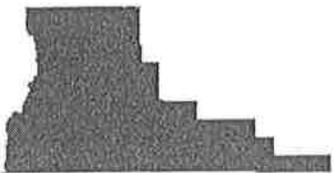


FIGURE 5

Deschutes County File 247-15-000222-LR



Deschutes County GIS, Source: Esri, USGS, NOAA

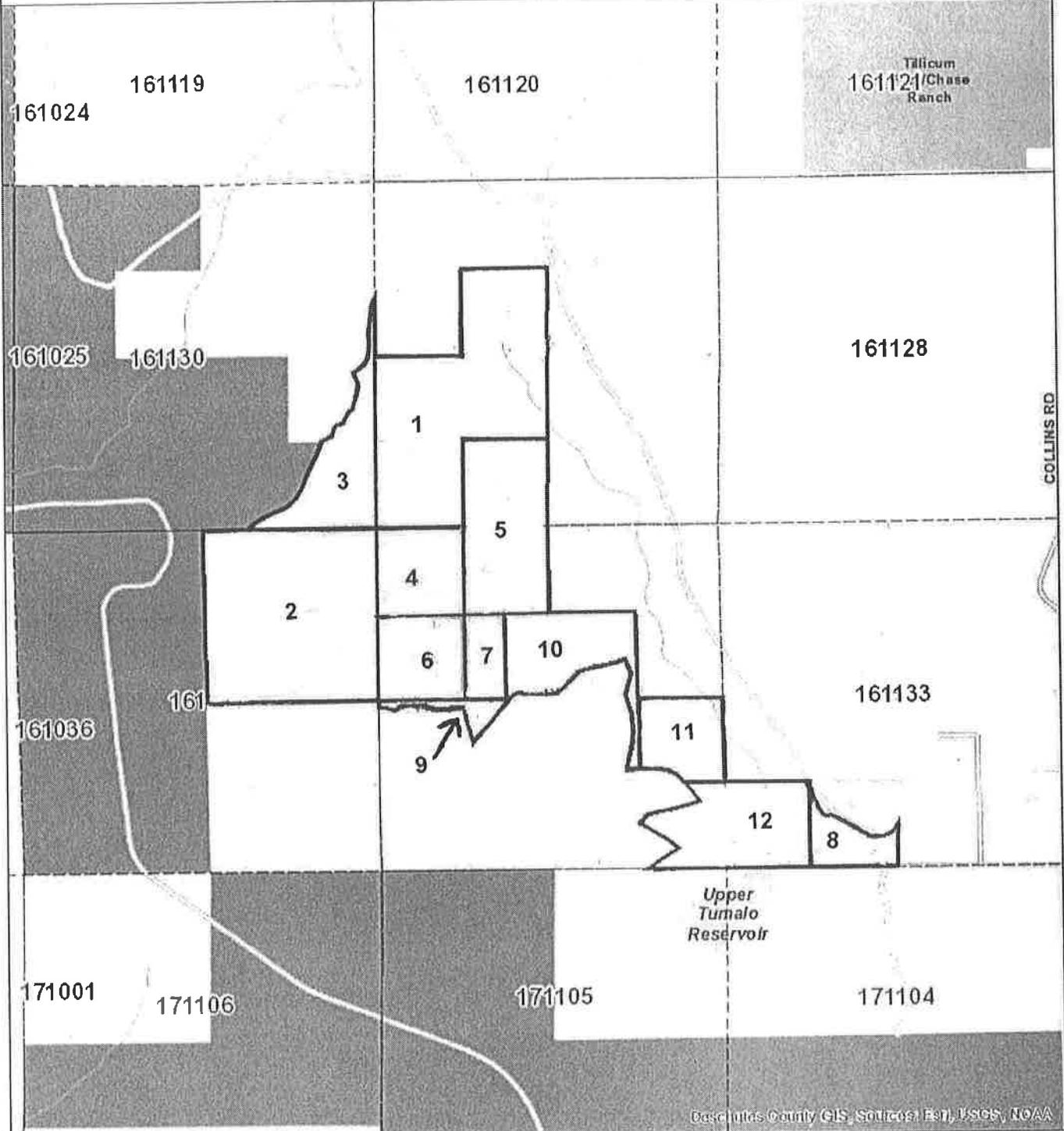


PARCEL W – REMAINDER
PARCEL X – REMAINDER
PARCEL Y – REMAINDER
PARCEL Z – REMAINDER

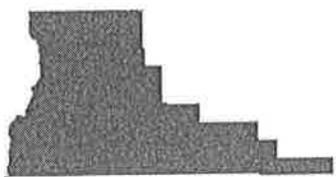


FIGURE 6

Deschutes County File 247-15-000222-LR



Deschutes County GIS, Sources: Esri, USGS, NOAA



LEGAL LOTS OF RECORD = 8



DECISION OF DESCHUTES COUNTY HEARINGS OFFICER

FILE NUMBERS: 247-15-000-222-LR, 247-15-00430-A

**APPLICANT/
PROPERTY OWNER:** Tumalo Irrigation District
64697 Cook Avenue
Bend, Oregon 97701

**APPLICANT'S
ATTORNEY:** Liz Fancher
644 N.W. Broadway Street
Bend, Oregon 97703

APPELLANT: Central Oregon LandWatch
1539 N.W. Vicksburg Avenue
Bend, Oregon 97703

PROPOSAL: Appellant appeals from an administrative determination that a 755-acre property zoned OS&C, FP, EFU-TRB, LM, WA, and SBMH consists of eight lots of record and four areas not considered lots of record.

STAFF REVIEWER: Cynthia Smidt, Associate Planner

HEARING DATE: September 8, 2015

RECORD CLOSED: October 2, 2015

I. APPLICABLE STANDARDS AND CRITERIA:

A. Title 17 of the Deschutes County Code, the Subdivision/Partition Ordinance

*** Section 17.08.030, Definitions Generally**

B. 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 18.08, Basic Provisions

*** Section 18.08.010, Compliance**

C. 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 22.20, Review of Land Use Action Applications
 - * Section 22.20.040, Final Action in Land Use Actions
- 3. Chapter 22.28, Land Use Action Decisions
 - * Section 22.28.040, Reapplication Limited
- 4. Chapter 22.32, Appeals
 - * Section 22.32.010, Who May Appeal
 - * Section 22.32.015, Filing Appeals
 - * Section 22.32.020, Notice of Appeal
 - * Section 22.32.027, Scope of Review
 - * Section 22.32.030, Hearing on Appeal

D. Oregon Revised Statutes

- 1. Chapter 92, Subdivisions and Partitions
 - * ORS 92.010, Definitions for ORS 92.010 to 92.192
 - * ORS 92.017, When Lawfully Created Lot or Parcel Remains Discrete Lot or Parcel
- 2. Chapter 197, Comprehensive Land Use Planning
 - * ORS 197.015, Definitions for Chapters 195, 196 and 197
- 3. Chapter 215, County Planning; Zoning; Housing Codes
 - * ORS 215.010, Definitions
 - * ORS 215.427, Final Action on Permit or Zone Change Application

II. FINDINGS OF FACT:

- A. **Location:** The subject property does not have an assigned address. It is identified as Tax Lot 7891 on Deschutes County Assessor's Map 16-11 and is located between Bend and Sisters.¹
- B. **Zoning and Plan Designation:** The majority of the subject property is zoned Open Space and Conservation (OS&C). Some areas on the property are zoned Flood Plain (FP), Exclusive Farm Use – Tumalo/Redmond/Bend Subzone (EFU-TRB), and Forest (F-1 and F-2). Portions of the property are subject to three combining zones -- Wildlife Area Combining Zone (WA) to protect portions of the Tumalo Deer Winter Range. Sensitive Bird and Mammal Habitat (SBMH) to protect raptor nest sites, and Landscape

¹ As noted in the administrative decision, the applicant's lot-of-record verification request included only part of Tax Lot 7891, but the decision included the entire tax lot.

Management (LM) to protect scenic views.

- C. **Site Description:** The subject property is approximately 755 acres in size,² and irregular in shape. The administrative decision concluded the property includes eight lots of record and four areas that are not lots of record. The record indicates the eight verified lots of record range in size from 20 acres to 160 acres.³
- D. **Surrounding Zoning and Land Uses:** The subject property is surrounded by sparsely developed rural land. To the west are large tracts of public land zoned Forest (F-1). To the north are large tracts of public and private land zoned F-1 and F-2. To the east is land zoned OS&C, EFU-TRB, and Multiple Use Agriculture (MUA-10). To the south is land zoned OS&C and F-1.
- E. **Procedural History:** Tumalo Irrigation District (hereafter "TID" or "applicant") acquired the subject property from the State of Oregon in 1988. In 2004, the applicant requested a lot-of-record verification for the subject property. By an administrative decision dated March 23, 2005 (LR-04-37), the county determined that Tax Lot 7891 did not constitute a lot of record. In September of 2005, the county granted approval of three lot line adjustments affecting the subject property (LL-05-71, LL-05-89, and LL-05-101). In those decisions the county again stated Tax Lot 7891 was not a lot of record by itself, but rather was part of a lot of record consisting of Tax Lot 7891 owned by TID, and four tax lots owned by the State of Oregon: Tax Lot 8400 on Assessor's Map 16-11; Tax Lot 2100 on Assessor's Map 17-11; Tax Lot 600 on Assessor's Map 17.11-04A; and Tax Lot 400 on Assessor's Map 16-11-33.⁴

On April 22, 2015, the applicant submitted the subject application seeking lot-of-record verification for five separate lots, and including new information not in the record of the 2005 lot-of-record application. The application was deemed complete on May 23, 2015. Under Section 22.20.040 of the county's land use procedures ordinance, the application is not subject to the 150-day period for issuance of final local land use decision because it involves a lot-of-record determination. On July 27, 2015, the Planning Division issued an administrative decision determining that the subject property includes eight lots of record and four additional areas not recognized as lots of record.

On August 7, 2015, Central Oregon LandWatch (hereafter "LandWatch" or "appellant") filed an appeal of the administrative decision. On September 8, 2015, the Hearings Officer held a public hearing on the appeal. At the hearing, the Hearings Officer received testimony and evidence, left the written evidentiary record open through September 29, 2015, and allowed the applicant through October 6, 2015 to submit final argument

² Appellant states the property has 930 acres. However, assessor's data in the record shows the property is 754.78 acres in size.

³ The minimum lot size in the OS&C and FP Zones is 80 acres. Figure 6 of the administrative decision depicts the twelve units of land identified in the administrative decision, including the eight units recognized as lots of record (Lots 1-8) and the four units not recognized as lots of record (Lots 9-12). Figure 6 indicates only three of the verified lots of record – Lots 1, 2 and 5) are at least 80 acres in size.

⁴ The requested lot line adjustments also included Tax Lot 500 on Assessor's Map 17-11-04A which the county found was a lot of record.

pursuant to ORS 197.763. The applicant submitted its final argument on October 2, 2015, and the record closed on that date.

- F. **Proposal:** Appellant appeals from the administrative decision determining that the subject property includes eight lots of record and four areas that are not lots of record.
- G. **Public Agency Comments:** The record indicates the Planning Division did not send notice of the applicant's proposal or the appeal to any public or private agencies.
- H. **Public Notice and Comments:** The Planning Division mailed individual written notice of the appeal hearing to all parties to the administrative proceeding. The record indicates this notice was mailed to six parties. In addition, notice of the appeal 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 eleven letters from the public in response to these notices. In addition, five members of the public testified at the hearing. Public comments are addressed in the findings below.

III. CONCLUSIONS OF LAW:

A. Preliminary Issue.

FINDINGS: As discussed in the Findings of Fact above, in 2005 the applicant requested a lot-of-record determination and the county found the subject property did not include any lots of record. Opponents argue the county should not consider the subject application in light of its 2005 decision.

Section 22.28.040 of the land use procedures ordinance states in relevant part:

- A. **If a specific application is denied on its merits, reapplication for substantially the same proposal may be made at any time after the date of the final decision denying the initial application.**
- B. **Notwithstanding DCC 22.28.040(A), a final decision bars any reapplication for a nonconforming use verification or for a determination on whether an approval has been initiated. A lot of record determination shall be subject to reapplication under DCC 22.28.040(A) only if the applicant presents new factual evidence not submitted with the prior application. (Emphasis added.)**

The applicant's burden of proof includes new evidence consisting of land conveyances that were not part of the record, or considered in the decision, for the 2005 lot-of-record determination. Therefore, the Hearings Officer finds that under Section 22.28.040(B) the county may consider the subject lot-of-record verification request and is not bound by the 2005 determination.

B. Title 22 of the Deschutes County Code, the Development Procedures Ordinance

1. Chapter 22.32, Appeals

a. **Section 22.32.010, Who May Appeal**

A. **The following may file an appeal:**

1. **A party: . . .**

FINDINGS: The Hearings Officer finds appellant is entitled to appeal because it was a party to the administrative proceedings, having submitted written testimony therein.

b. **Section 22.32.015, Filing Appeals**

A. **To file an appeal, an appellant must file a completed notice of appeal on a form prescribed by the Planning Division and an appeal fee.**

FINDINGS: Appellant submitted a completed notice of appeal form and narrative describing the bases of the appeal. The record indicates appellant paid the required appeal fee.

B. **Unless a request for reconsideration has been filed, the notice of appeal and appeal fee must be received at the offices of the Deschutes County Community Development Department no later than 5:00 PM on the twelfth day following mailing of the decision. If a decision has been modified on reconsideration, an appeal must be filed no later than 5:00 PM on the twelfth day following mailing of the decision as modified. Notices of Appeal may not be received by facsimile machine.**

FINDINGS: Appellant filed its notice of appeal on August 7, 2015, within twelve days of issuance of the administrative decision on July 27, 2015.⁵

c. **Section 22.32.020, Notice of Appeal**

Every notice of appeal shall include:

A. **A statement raising any issue relied upon for appeal with sufficient specificity to afford the Hearings Body an adequate opportunity to respond to and resolve each issue in dispute.**

FINDINGS: The narrative attached to appellant's notice of appeal states in relevant part:

"County Staff erred in determining that there are eight separate lots of record on the subject property. There is also no basis for TID's claim of five separate lots of record. The ownership history of the subject lands does not support a finding that there are any lots of record on the subject property.

ORS 92.017 does not act retroactively to resurrect historical conveyances of the

⁵ The administrative decision is dated June 27, 2015. However, the record indicates the correct date is July 27, 2015.

subject lands in the early 1900s, but concerns the rights acquired by the current landowner. The State of Oregon in 1988 only conveyed a single parcel to the Applicant TID.

Further, patent deeds meet neither definition of 'lot' or 'parcel' and thus cannot be lots of record under DCC 18.040.030.

This conveyance also did not transfer the full bundle of rights to the property to TID but imposed use restrictions and retained reversionary rights. TID has no right to seek division of the land into parcels as lots of record.

Appellant reserves the right to raise further appeal issues before the Hearings Officer."

The Hearings Officer finds this statement is sufficient to identify the bases for the appeal. .

d. Section 22.32.027, Scope of Review

- A. Before Hearings Officer or Planning Commission. The review on appeal before the Hearings Officer or Planning Commission shall be de novo.**

FINDINGS: The Hearings Officer finds *de novo* review means I must consider both the record made during the administrative proceedings and the record on appeal.

e. Section 22.32.030, Hearing on Appeal

- A. The appellant and all other parties to the decision below shall be mailed notice of the hearing on appeal at least 10 days prior to any de novo hearing or deadline for submission of written arguments.**
- B. Except as otherwise provided in DCC 22.32, the appeal shall be heard as provided in DCC 22.24. The applicant shall proceed first in all de novo appeals.**
- C. The order of Hearings Body shall be provided as provided in DCC 22.24.020.**
- D. The record of the proceeding from which the appeal is taken shall be a part of the record on appeal.**

* * *

FINDINGS: The record indicates notice of the appeal hearing was mailed to all parties to the administrative proceedings at least ten days prior to the hearing. The appeal hearing was conducted in accordance with the procedures set forth in Chapter 22.24 of the procedures ordinance, and the record in this appeal includes the record made during the administrative proceedings. Therefore, the Hearings Officer finds the hearing complied with this section.

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

FINDINGS: The applicant requested verification of five lots of record on a portion of Tax Lot 7891. As discussed in the Findings of Fact above, the administrative decision analyzed Tax Lot 7891 in its entirety and concluded it is comprised of eight lots of record and four additional areas not considered lots of record. The county analyzed the entire tax lot because of what it characterized as “the overlap of historic transactions” reviewed in the decision. Neither appellant nor the applicant objected to or appealed the administrative decision’s expansion of the property subject to the lot-of-record verification.

1. 1988 Deed. Appellant and other opponents argue the county cannot approve TID’s lot-of-record verification request because such verification will permit development of the subject property in a manner inconsistent with the 1988 deed by which TID obtained the subject property and the provisions of the WA Zone establishing protections for wintering deer habitat. A copy of the deed is included in the record and is identified as Document Number 88-20572, recorded at Volume 170, Page 0581, of the Deschutes County deed records. The deed states in relevant part:

“The State of Oregon . . . Grantor, releases and quitclaims to Tumalo Irrigation District . . . Grantee, all right, title, and interest in and to the following described real property . . . so long as said property is held in public ownership and used as a Winter feeding area for wildlife satisfactory to the Oregon Department of Fish and Wildlife. When said property is no longer owned by Tumalo Irrigation District or another public body, or is no longer used for public purpose including use as a Winter feeding area for wildlife satisfactory to the Oregon Department of Fish and Wildlife, the interest of the Grantee, or its assigns, shall automatically terminate and revert to the Grantor.”

The true consideration of this conveyance is other good and valuable consideration promised, including a commitment by Tumalo Irrigation District to involve local residents and the community before making decisions on use and management of the land or granting easements.

This instrument will not allow use of the property described in this instrument in violation of applicable land use laws and regulations. Before signing and accepting this instrument, the person acquiring fee title to the property should check with the appropriate city or county planning department to verify approved uses.” (Emphasis added.)

The Hearings Officer finds the above-underscored deed restrictions relate to ownership and use of the subject property.⁶ However, deed restrictions are not enforceable by the county unless they are required by a condition of land use approval which is not the case here. These restrictions, and related reversionary clauses, are only enforceable by the parties to the transaction. Moreover, the provisions of the WA Zone apply to development and divisions of land within that zone and not to lot-of-record determinations.

⁶ The Hearings Officer notes the 1988 deed’s legal description expressly reserves to the state all minerals on the property and the right to make use thereof, including “prospecting for, exploring for, mining, extracting, reinjecting, storing, drilling for, and removing such minerals, materials and geothermal resources.” Any such mining activity would require land use approval.

Appellant also argues the administrative decision erred in finding any lots of record on the subject property because the 1988 deed conveyed the property by a single metes-and-bounds description, set forth in Exhibit A to the deed. The primary question in this appeal is the effect of the 1988 deed. In order to address that question, the Hearings Officer must examine the relevant county land use regulations and prior decisions interpreting them, applicable statutory provisions, and relevant case law.

2. Ordinance Provisions. Chapter 18.08 of the Deschutes County Code, Basic Provisions, states in Section 18.080.010:

- A. A lot may be used and a structure or part of a structure may be constructed, reconstructed, altered, occupied or used only as DCC Title 18 permits. No new structure shall be constructed on any lot of less area than the minimum for the zone in which it is located, except as provided by DCC Title 18 and ORS 215.203, et. seq.**

Title 18 does not expressly require lot-of-record verification as a prerequisite to development. Nevertheless, the Hearings Officer is aware the county has established such a requirement through policies and practices. Specifically, the county: (1) does not approve or recommend approval of a land use application without first determining that the subject property consists of one or more lots of record; (2) requires an applicant for land use approval to demonstrate the property consists of one or more lots of record; and (3) if there is a question about the property's lot-of-record status, requires an applicant to submit a lot-of-record verification application prior to, or with, an application for development approval under Title 18 or an application for approval of a subdivision, partition, or lot line adjustment under Title 17, the county's subdivision/partition ordinance.

Both Titles 17 and 18 address lots of record, but with different terminology. Section 18.04.030 defines "lot of record" in relevant part as follows:

- A. A lot or parcel at least 5,000 square feet in area and at least 50 feet wide, which conformed to all zoning and subdivision or partition requirements, if any, in effect on the date the lot or parcel was created, and which was created by any of the following means:**
- 1. By partitioning land as defined in ORS 92;**
 - 2. By a subdivision plat, as defined in ORS 92, filed with the Deschutes County Surveyor and recorded with the Deschutes County Clerk;**
 - 3. By deed or contract, dated and signed by the parties to the transaction, containing a separate legal description of the lot or parcel, and recorded in Deschutes County if recording of the instrument was required on the date of the conveyance. If such instrument contains more than one legal description, only one lot of record shall be recognized unless the legal descriptions describe lots subject to a recorded subdivision or town plat;**
 - 4. By a town plat filed with the Deschutes County Clerk and recorded**

in the Deschutes County Record of Plats; or

5. **By the subdividing or partitioning of adjacent or surrounding land, leaving a remainder lot or parcel.** (Emphasis added.)

Section 17.08.030 includes the following definition for purposes of subdivisions and partitions:

“Lawfully Established Unit of Land” means:

1. **A lot or parcel created pursuant to ORS 92.010 to 92.190, or the provisions of this code; or**
2. **Another unit of land created:**
 - A. **In compliance with all applicable planning, zoning, and subdivision or partition ordinances and regulations; or**
 - B. **By deed or land sales contract, if there were no applicable planning, zoning or subdivision or partition ordinances or regulations.**

Both definitions recognize as legal lots those units of land created by subdivisions, partitions, and conveyances.⁷ The Hearings Officer is aware that by policy and practice, the county has recognized additional categories of lots of record not expressly included in the definition in Section 18.04.030. Exhibit “A” to the applicant’s September 22, 2015 post-hearing submission is a June 13, 1990 memorandum from former principal planner Kevin Harrison stating a legal lot of record includes:

- a lot or parcel for which the county has issued a building or septic permit; and
- a lot or parcel that was “developed” prior to the county’s involvement in the building permit process – i.e., prior to 1972 for septic permits, and prior to 1975 for building permits.

In addition, the Hearings Officer is aware the county has recognized another lot-of-record category through policy and practice: a “remainder” lot or parcel created through *conveyances* of all surrounding land recorded before the effective date of the county’s subdivision and partition ordinances.⁸ *E.g., Korish (A-10-3, LR-10-2).*

Finally, both Titles 17 and 18 address lot line adjustments in their “partition” definitions with identical language in Sections 17.08.030 and 18.04.030, respectively, as follows:

“Partition land” means to divide land into two or three parcels of land within a calendar year [but] does not include . . . an adjustment of a property line by the

⁷ The Hearings Officer is aware the county has interpreted the term “created” for purposes of both the legal lot provisions to signify the point in time when a unit of land was subdivided or partitioned, or when it *first* was described *by itself* in a conveyance.

⁸ Those dates are 1970 for PL-2, the first subdivision ordinance, and April 5, 1977 for PL-7, the first partition ordinance.

relocation of a common boundary where an additional unit of land is not created and where the existing unit of land reduced in size by the adjustment complies with any applicable zoning ordinance.

Section 17.08.030 also defines "property line adjustment" as "the relocation of a common property line between two abutting properties."

In his aforementioned 1990 memorandum, Kevin Harrison stated the county's policy with respect to lot line adjustments as follows:

"A policy dated March 19, 1984, deals with Lot Line Adjustments between two legal lots which are both substandard in size. I believe the policy states that Lot Line Adjustments are OK as long as there is no net change in either lot, and which involves no more than 10% of the largest lot. I believe the first part of the policy is reasonable and defensible (no lot is made more non-conforming), the second is not (if there is no net change, why should we care?)."

As you recall, there was some controversy regarding the distinction between Lot Line Adjustments and consolidations. I would like to put that discussion on the back burner, do some more research, and bring it back some time in the future."

However, as the applicant notes in its September 22, 2015 post-hearing submission, 2005 House Bill 2755, effective January 1, 2006, amended the definition of "property line adjustment" in ORS 92.010 to include the "elimination" of a common property line between abutting properties.

Based on the foregoing discussion, the Hearings Officer finds the primary distinction between the legal lot provisions in Titles 17 and 18 is that the lot-of-record definition in Title 18 addresses the *developability* of property – i.e., it establishes a minimum lot size of 5,000 square feet, a minimum width of 50 feet, and a requirement that separately-described lots or parcels created by conveyance be deemed consolidated unless the lots are described by reference to a recorded subdivision or town plat.

3. Administrative Decision. The administrative decision contains a detailed recitation of the sequential land conveyance history of Tax Lot 7891, illustrated in six figures included in the decision. Figure 6 depicts the boundaries of the verified lots of record and areas not constituting lots of record. The decision includes the following relevant analysis:

"Based on the sequential conveyances of land, staff finds the subject property (tax lot 7891) wholly contains eight separate legal lots of record, five of which the applicant requested verification. The eight legal lots of record are shown on Figure 6 as Parcels 1 through 8, with Parcels 1, 2, 4, 5, and 6 being the five that the applicant requested verification. The noted legal lots of record are all at least 5,000 square feet in area and 50 feet wide. In addition, the sequential land conveyances for the eight legal lots of record occurred prior to the County's first subdivision ordinance and zoning ordinance (1970 and 1972, respectively). Since the applicant is not seeking to divide the subject property, the procedures set forth in the current county subdivision ordinance, Title 17, are not applicable."

Two legal lots of record, Parcels 1 and 2 on Figure 6 were established with discrete boundaries in federal conveyances from 1909 and 1910, respectively. These parcels have remained unchanged since first established. Although the two parcels were included in a single deed from 1913, the transaction did not eradicate the parcels' legally established boundaries (see comments below). Parcels 3 and 8 on Figure 6 were first established with discrete boundaries through two separate federal conveyances but were changed through transactions with the State of Oregon in 1914 and 1913, respectively. Both subsequent conveyances separated the parcels, leaving remnants not part of the subject property. Parcels 4, 5, 6, and 7 were first established with discrete boundaries through different federal conveyances but were changed through additional subsequent conveyances between 1912 and 1914. Some land transactions separated parcels and thus left a remnant of the parent parcels, such as Parcel 5, but were not altered further. Some remainder parcels were involved in additional land transactions such as Parcel 7.

There are four units of land – Parcels 9, 10, 11, and 12 – shown on Figure 6 that are not recognized as separate legal lots of record. As stated previously, a 1988 conveyance of Parcel V (Fig. 4) separated four units of land – Parcels K, P, T, and S (Fig. 3) and thus created remnant parcels – Parcels W, X, Y, and Z shown on Figure 5. Parcels W, X, Y, and Z are not recognized as separate legal lots of record because the partition and zoning ordinances were in effect at the time of the 1988 conveyance. These parcels are portions of the legal lots identified as Parcels K, P, T, and S (Fig. 3).

Most of the parcels reviewed here were included in subsequent deeds that described adjacent lands together in a single deed. Including the parcels in a single deed does not eradicate the boundary lines that legally established those properties in the past. Evidence was not found that indicated the subject legal lots of record were consolidated through a property line adjustment approval or platted as part of a subdivision or partition. In the decision LR-10-2 (A-10-3) and in LR-92-43, LR-92-44, LR-92-46, and LR-92-47, Deschutes County Hearings Officers found that the mere inclusion in a single deed of multiple parcels lawfully created by conveyances did not result in the eradication of the parcels' previous legally established boundary lines.

Furthermore, the remnant parcels reviewed here were first established as separate larger parcels with legally established boundaries, and were surrounded by legally established boundaries of other parcels. Although the remainder parcels left behind do not meet the strict definition contained in DCC 18.040.030(A)(5) because the adjacent or surrounding lands have not been subdivided or partitioned, once altered by subsequent conveyances the remnants become legal remainder parcels. In decision LR-10-2 (A-10-3), the County Hearings Officer articulated that remainder lots are surrounded by legally created lots. Staff relies on this determination to identify remainder parcels created by deed prior to partition and subdivision requirements.”

The administrative decision found the lots of record created by these conveyances remained separate and distinct units of land after the effective dates of the county's first subdivision and

partition ordinances based on ORS 92.017 which states:

A lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law.

4. Effect of ORS 92.017. The parties disagree as to whether ORS 92.017 applies to this case. Appellant argues the statute does not apply to parcels created by deed because the terms "lot" and "parcel" used in ORS Chapter 92 are terms of art meaning units of land created by subdividing or partitioning, respectively, and not by conveyance. ORS 92.010 defines "lot" and "parcel" as follows:

"Lot" means a unit of land created by a subdivision of land.

"Parcel" means a unit of land created by a partitioning of land.

Appellant also notes the definition of "parcel" in ORS 215.010, unlike the definition in Chapter 92, includes a unit of land created by a deed or land sales contract. Appellant argues that because the "parcel" definition in ORS 215.010 was included in the same 1985 legislation (House Bill 2381) that adopted ORS 92.017, the clear legislative intent was to distinguish between "parcels" for purposes of Chapters 92 and 215, and therefore the legislature did not intend "parcels" subject to ORS 92.017 to include units of land created by conveyances.

The applicant responds that ORS 92.017 applies to "historic lots created by deeds," relying primarily on two decisions interpreting the statute: *Kishpaugh v. Clackamas County*, 24 Or LUBA 164 (1992), and *Thomas v. Wasco County*, 58 Or LUBA 452 (2009). Each of those decisions is addressed in the findings below.

Kishpaugh. The question in *Kishpaugh* was whether ORS 92.017 prevented the county from refusing to allow separate development of two units of land created by 1970 and 1971 land sale contracts, each of which created a parcel smaller than the 10-acre minimum lot size in the applicable zone adopted in 1979. The contracts separately conveyed the two properties (Tax Lots 404 and 405) to the same parties. Because the two properties were in contiguous ownership at the time the minimum lot size was adopted, the county declined to recognize each lot as "separately developable" on the basis of a provision of its zoning code that stated:

"Contiguous lots under the same ownership when initially zoned shall be combined, for the purposes of this Ordinance, when any of these lots do not satisfy the lot size requirement of the initial district. A lot or parcel which is a separate legal lot or parcel prior to the adoption of this provision shall remain a separate legal lot regardless of ownership."

After an extensive review of the statute's legislative history, LUBA held:

"The text of ORS 92.017, and its legislative history, make it clear that the functions of ORS 92.017 were (1) to prevent local governments from refusing to recognize lawful divisions of land such that lots and parcels could not be sold to third parties, and (2) to establish that the property lines established by such land divisions remain inviolate, absent the employment of a specific process to

eliminate such property lines.

* * *

*Nothing in either the text of ORS 92.017 or its legislative history suggests that all lawfully created lots and parcels must be recognized by local governments as being separately developable. In fact, the legislative history * * * makes it reasonably clear that the developability of such lots and parcels is to be determined with reference to planning and zoning standards. Accordingly, the county's determination that tax lots 404 and 405 are not separately developable * * * does not offend ORS 92.017."*

Thomas. In *Thomas*, the petitioner appealed from the county's legislative adoption of an amendment to its zoning ordinance. That provision stated certain contiguous lots and parcels nonconforming in size and "consolidated onto a single deed at any time" are thereby deemed "consolidated for development purposes." The petitioner argued the ordinance violated ORS 92.017. LUBA adhered to its holding in *Kishpaugh*, but held the ordinance at issue in *Thomas* did violate ORS 92.017, based on the following reasoning:

"We agree with petitioner that, while the county almost certainly has a legitimate planning interest in encouraging the consolidation of substandard size lots for development purposes, the method it has employed in adopting WCZO 13.040(B) appears to employ an arbitrary and illegitimate means to achieve that purpose. The code provisions at issue in Kishpaugh and Campbell did not turn on deeds or the particular language of deeds, and the circumstances presented in those cases involved substandard size properties that were in common ownership at the time of the county's decision. In contrast, under WCZO 13.040(B), consolidation of properties for development purposes is based on whether those properties were at one time transferred on a single deed, and whether or not properties must be consolidated for development purposes depends in part on the specific language of those deeds. Further, WCZO 13.040(B) applies whether or not the affected properties are now separately owned. There are, it seems to us, several problems with the county's approach under WCZO 13.040(B).

First, the deeds to which WCZO 13.040(B) will be applied are likely to have been written at a time when there was no general understanding that transferring more than one property in a single deed or failure to use separate headings or certain words in a deed that conveys more than one property would later result in a requirement that the properties transferred be developed together rather than separately. We agree with petitioner that placing dispositive significance on the presence or absence of separate headings in a deed, for example, appears to be arbitrary. We do not understand why the county believes that a deed that transferred five properties with separate metes and bounds property descriptions, but no separate headings, should result in all five properties being consolidated for development purposes but a deed that is identical except for the inclusion of separate headings escapes consolidation.

Although it is not clear, the distinctions the county draws between deeds with

separate headings and those without, and between deeds with separate property descriptions and those without, may be an attempt to discern and give effect to what the county presumes is the grantor's intent. The county may presume that if the deed includes separate headings, for example, the grantor intended that each property be separately developable, but if not, the grantor intended that all the transferred properties be consolidated for development purposes. However, if that is the basis for the distinctions the county has codified in WCZO 13.040(B), that basis also seems arbitrary and illegitimate. Nothing in the record or the county's brief explains why the county believes that giving effect to the grantor's presumed intent in transferring property has anything to do with furthering a legitimate land use planning objective. The effect of the grantor's intent in transferring property is a matter of real estate law, and there is no obvious connection to any county land use planning objective. Further, the grantor's intent in transferring property by deed is a question of fact in any particular case, and that can be finally resolved only in a judicial court. In most cases, the grantor's actual intent, if any, in transferring multiple contiguous properties regarding whether or not those properties should be 'consolidated' for development purposes will not be evident from the face of the deed, and judicial interpretation would be necessary to reach a final determination regarding intent. Finally, in any case, it is highly unlikely in any circumstance where WCZO 13.040(B) would be applied that the grantor formed any intent, one way or the other, regarding the future development of the properties transferred. For these reasons, if the distinctions drawn by WCZO 13.040(B) are based on the county's attempt to give effect to the grantor's presumed intent, that approach appears to have no relation to a legitimate planning objective. [Footnote omitted.]

In sum, the county's apparent objective in encouraging the consolidation of substandard size lots for development purposes almost certainly serves a legitimate planning objective. There are a number of methods that the county can adopt to further that objective that are not based on deeds or the specific language of deeds. A relatively straightforward way would be to adopt code language that simply prohibits development of substandard size lots or parcels, with whatever exceptions the county deems appropriate. However, if the county continues to base its approach for consolidation of substandard size properties on the examination of deeds, the county must identify some legal basis for the distinction it draws, such that future development rights do not hinge on apparently arbitrary differences in the wording or form of deeds." (Emphasis added.)

In his concurring opinion in *Thomas*, LUBA Board Member Holston stated in relevant part:

"I believe it is extremely doubtful that counties ever had the authority to adopt local laws that dictated that parcels, which under Oregon real property law exist as legal separate units of land, do not qualify as separate units of land in that county. If counties ever had the authority to override the state's real property laws, it is clear that under ORS 92.017 they no longer have that authority.

To simplify, WCZO 13.040(B) requires that contiguous substandard parcels that were created by deed before 1974 must be 'considered one property for

*development purposes' if those contiguous substandard parcels were subsequently transferred by a single deed. See n 1. WCZO 13.040(B)(2)(b) creates an exception to that rule where '[a]ll of the deeds listing the properties included separate metes and bounds descriptions with a separate heading * * *.' For all practical purposes, the county has adopted the very kind of real property law that ORS 92.017 was adopted to prohibit. * * * Whether a single deed that conveys more than one substandard parcel has separate metes and bounds descriptions and separate headings might have something to do with whether the deed is effective to convey separate parcels, but it has absolutely nothing to do with whether those parcels should be developed separately or together.' (Emphasis added.)*

Analysis. The Hearings Officer finds that contrary to appellant's argument, LUBA's *Kishpaugh* and *Thomas* decisions make clear ORS 92.017 protects units of land lawfully created by conveyances. In other words, such units of land remain discrete lots or parcels under the statute unless their boundaries are vacated or further divided "as provided by law."

The remaining question is whether the boundaries of the eight verified lots of record were vacated "as provided by law." There is no dispute the boundaries of these units of land were not vacated by subsequent subdivisions or partitions.⁹ Nor does the record indicate the boundaries were vacated by lot line adjustments as the three aforementioned lot line adjustments did not eliminate any lot lines.¹⁰

Appellant argues the boundaries of the verified lots of record were vacated by the recording of the 1988 deed from the State of Oregon to TID which described the transferred property by a single metes-and-bounds description. Appellant asserts the language of the deed reflects the grantor's intent that the property be developed, if at all, as a single parcel.

The Hearings Officer finds there are several problems with appellant's argument. First, as appellant acknowledges, LUBA's *Thomas* decision holds the grantor's intent with respect to a *transfer* of land is not relevant in determining whether a unit or units of land created thereby are separately *developable* under a county's land use regulations. Nevertheless, appellant argues the county's administrative decision erred in not concluding from "the plain language" of the 1988 deed that the state *intended* to convey – and TID to have -- only a single unit of land, and therefore the county must honor that intent by not recognizing multiple lots of record within the subject property. Appellant's September 8, 2015 submission contains a lengthy discussion of how grantor intent should be determined, and concludes with the assertion that ORS 92.017 "was not enacted to contradict the unambiguous terms of deeds" such as the 1988 deed. I find appellant in effect argues the county should adopt as a matter of policy and practice the very

⁹ In *Weyerhaeuser Real Estate Development Co. v. Polk County*, 246 Or App 548 (2011), the Oregon Court of Appeals held that a partition served to vacate subdivision lot lines because when the partition was approved in 1983 the county had authority to eliminate subdivision lot lines through replatting and partition approval. With respect to the effect of ORS 92.017, the court held that ORS 92.017 did not have the effect of restoring lots that had been vacated when the lots were consolidated by a partition.

¹⁰ The applicant argues, and the Hearings Officer agrees, that these lot line adjustments could not have eliminated any lot lines inasmuch as in 2005, state law did not allow lot lines to be eliminated or lots consolidated through lot line adjustments. Such consolidation was not permitted until ORS Chapter 92 was amended by 2005 House Bill 2755 which took effect January 1, 2006.

type of land use regulation found in *Thomas* to violate ORS 92.017 – i.e., a requirement that units of land be deemed consolidated for purposes of development based on the presence or absence of certain language in a conveyance and the grantor's intent presumed therefrom.¹¹

Second, even assuming grantor intent is relevant in determining whether a conveyance served to vacate the boundaries of lawfully created units of land, appellant has not demonstrated the 1988 deed in fact reflects the state's intent to prohibit recognition or development of multiple lots of record within the subject property. The description of the property through a single metes-and-bounds description suggests only that the grantor intended to *transfer* a single unit of land. And the aforementioned deed restrictions suggest the grantor intended for the transferred property to be used for wintering deer habitat. But neither appellant nor opponents have identified any language in the deed that suggests the state intended that the transferred property could not be recognized and used as multiple units of land.

Finally, appellant argues that as a matter of law, execution and recording of a deed serves to vacate previously existing lot or parcel boundaries, relying on *dicta* in LUBA's decision in *Oregon Natural Desert Association v. Harney County*, 65 Or LUBA 246 (2012). The Hearings Officer finds appellant's reliance on that decision is misplaced. The issue in that case was whether the county erred in approving a dwelling on an EFU-zoned parcel that the petitioner argued was part of a larger tract with which it was consolidated as a result of a previous approval of a lot-of-record dwelling. LUBA held that while a county can require lot consolidation as a condition of dwelling approval, such dwelling approval does not *itself* serve to eliminate lot lines. LUBA did not cite or make any reference to its decision in *Thomas*.

5. Conclusion. Based on the foregoing discussion, the Hearings Officer finds ORS 92.017 applies to and protects historic units of land lawfully created by conveyance(s) that predate the county's land use regulations. I further find there is no merit to appellant's argument that because of its language and presumed grantor intent, the 1988 deed had the legal effect of vacating the boundaries of the eight lots of record verified by the county's decision.

IV. DECISION:

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearings Officer hereby **AFFIRMS** the administrative decision on appeal.

Dated this 12th day of November, 2015. Mailed this 12th day of November, 2015.



Karen H. Green, Hearings Officer

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

¹¹ The Hearings Officer finds I need not decide in this case whether that portion of Paragraph (A)(3) of the lot-of-record definition in Section 18.04.030 relating to specific deed language violates ORS 92.017.



DESCHUTES COUNTY
PLANNING DIVISION
117 NW Lafayette Avenue, Bend OR 97701
Phone: (541)388-6575 FAX: (541)385-1764 <http://newberry.deschutes.org>
APPEAL APPLICATION FORM

DATE SUBMITTED: 11/23/15 FEE: \$2697
APPELLANT: CENTRAL OREGON LANDWATCH PHONE: (541) 420-8433
c/o PAUL DEWEY
MAILING ADDRESS: 1539 NW VICKSBURG AVE CITY: BEND ST: OR ZIP: 97703
LAND USE APPLICATION BEING APPEALED: 247-15-000-222-LR, 247-15-00430-A
PROPERTY DESCRIPTION: T 16 R 11 S _____ TAX LOT: 7891
APPELLANT'S SIGNATURE Paul Dewey DATE: 11/23/15

IT IS THE RESPONSIBILITY OF THE APPLICANT (APPELLANT) TO COMPLETE A NOTICE OF APPEAL AS SET FORTH IN CHAPTER 22.32 OF THE COUNTY CODE, "APPEALS."

EVERY NOTICE OF APPEAL SHALL INCLUDE:

See attached.

SCANNED
NOV 25 2015

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 Hearings Body's;
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 de novo review as provided in Section 22.32.027 of Title 22.

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.

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

NOTICE OF APPEAL

**CENTRAL OREGON LANDWATCH
APPEAL OF HEARINGS OFFICER DECISION IN
FILE NO. 247-15-000222-LR, 247-15-00430-A
NOVEMBER 23, 2015**

Central Oregon LandWatch appeals the attached Hearings Officer's decision to the Board of County Commissioners. This case concerns land conveyed in 1988 by the State of Oregon to Tumalo Irrigation District ("TID") for use and protection of Tumalo Reservoir and of surrounding lands for wildlife. Now, after 27 years, TID seeks to parcelize the area through recognition/verification of eight lots of record, some supposedly created nearly 100 years ago. The Hearings Officer decision finds that state law makes such parcels "immortal" in that they continue to exist even though the State of Oregon conveyed a single unit of land to TID, not any separate parcels, in 1988.

We believe the Hearings Officer erred in ruling on the following issues:

1. The County in 2005 already rejected the Applicant's request for a lot of record determination and found that the subject property did not include any lots of record. The Hearings Officer ruled that the current re-application is allowed because new factual evidence was submitted. Whatever new factual evidence was presented here is irrelevant since the 2005 County decision was a legal determination that the State's conveyance of all the land in a single deed in 1988 meant that whatever separate historic parcels that they may have been no longer existed. No new facts are presented on that 1988 conveyance.
2. The Hearings Officer also erred in determining that the 1988 deed's provisions calling for protection of wildlife are irrelevant to the lot of record determination, despite the resulting fragmentation of the land that would occur with the creation/verification of eight lots of record - - such lot of record verification being a key prerequisite to development.
3. A fundamental error of the Hearings Officer is her finding that ORS 92.017 applies to this case and that it applies to parcels created by deed. ORS 92.017 provides:

"A lot or parcel lawfully created shall remain a discrete lot or parcel, unless the lot or parcel lines are vacated or the lot or parcel is further divided, as provided by law."

The applicable definitions in ORS 92.010 define "lot" as a unit of land created by a subdivision of land and "parcel" as a unit of land created by a partitioning of land. They do not include parcels created by deed, as is, for example, specifically included in the definition of "parcel" in ORS 215.010. ORS 92.017 is not applicable here, as a matter of state law, notwithstanding any County interpretations of "parcel" or relevant policies.

4. The Hearings Officer also erred in her interpretation of LUBA's decisions in *Kishpaugh v. Clackamas County*, 24 Or LUBA 160 (1992), and *Thomas v. Wasco County*, 58 Or

LUBA 452 (2009), as holding that ORS 92.017 applies to historic lots created by deed. Parcels created by deed do not persist through time but arise and fall away based on private transactions, and it is not for the County to say that a deed conveyed something that it did not.

5. The Hearings Officer also failed to apply the holding in *Weyerhaeuser Real Estate Development Co. v. Polk County*, 63 Or LUBA 393, 399, *aff'd*, 246 Or App 548 (2011). That conveyance of a discrete lot or parcel cannot include within it other discrete lots or parcels.
6. The Hearings Officer further erred in failing to recognize that a deed may eliminate parcel boundaries and that a lot line adjustment or plat is not necessary to do so.
7. The Hearings Officer mistakenly characterizes the issue of “grantor intent,” to the extent that intent is relevant, the point is that deeds are presumed by law to express the intent of the parties at the time of execution, and a deed conveying a single parcel conveys a single parcel. There was no basis for County Staff to assume that a deed conveying one parcel actually conveyed multiple parcels.

For the above reasons, we believe the Board should review the lower decision of the Hearings Officer, though we do recognize that virtually all of the issues are matters of interpretation of state law and of decisions of LUBA and the Oregon Court of Appeals. If the Board grants review, *de novo* review is desired so that the County Board will have access to any relevant information it may require.

REVIEWED
LEGAL COUNSEL

For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Order Denying Review of Hearings Officer’s *
Decision in File Nos. 247-15-000222-LR/430- * ORDER NO. 2015-058
A/633-A *

WHEREAS, Central Oregon LandWatch appealed the Deschutes County Hearings Officer’s Decision on Application Nos. 247-15-000222-LR/430-A/633-A; and

WHEREAS, Section 22.32.027 of the Deschutes County Code allows the Board of County Commissioners (“Board”) discretion on whether to hear appeals of Hearings Officer’s decisions; and

WHEREAS, the Board has given due consideration as to whether to review this application on appeal; now, therefore,

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, HEREBY ORDERS as follows:

Section 1. The Board will not hear on appeal for application number 247-15-000222-LR (430-A, 633-A) pursuant to Title 22 of the Deschutes County Code and other applicable provisions of the County land use ordinances.

Section 2. Pursuant to DCC 22.32.015, there shall be a refund of the appeal in the amount of \$2,292.45.

Dated this _____ of _____, 2015

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

ANTHONY DEBONE, Chair

ALAN UNGER, Vice Chair

ATTEST:

Recording Secretary

TAMMY BANEY, Commissioner

REVIEWED
LEGAL COUNSEL

For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Order Accepting Review of Hearings Officer's Decision in File Nos. 247-15-000222-LR/430-A/633-A *
* ORDER NO. 2015-058
*

WHEREAS, Central Oregon LandWatch appealed the Deschutes County Hearings Officer's Decision on Application Nos. 247-15-000222-LR/430-A/633-A; and

WHEREAS, Section 22.32.027 of the Deschutes County Code allows the Board of County Commissioners ("Board") discretion on whether to hear appeals of Hearings Officer's decisions; and

WHEREAS, the Board has given due consideration as to whether to review this application on appeal; now, therefore,

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, HEREBY ORDERS as follows:

Section 1. The Board will hear the appeal for application number 247-15-000222-LR (430-A, 633-A) pursuant to Title 22 of the Deschutes County Code and other applicable provisions of the County land use ordinances.

Section 2. The appeal shall be heard *de novo*.

Section 3. Staff shall set a hearing date and cause notice to be given to persons or parties entitled to notice pursuant to DCC 22.32.030.

Dated this _____ of _____, 2015

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

ANTHONY DEBONE, Chair

ALAN UNGER, Vice Chair

ATTEST:

Recording Secretary

TAMMY BANEY, Commissioner

REVIEWED
LEGAL COUNSEL

For Recording Stamp Only

BEFORE THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON

An Order Accepting Review of Hearings Officer's *
Decision in File Nos. 247-15-000222-LR/430- * ORDER NO. 2015-058
A/633-A *

WHEREAS, Central Oregon LandWatch appealed the Deschutes County Hearings Officer's Decision on Application Nos. 247-15-000222-LR/430-A/633-A; and

WHEREAS, Section 22.32.027 of the Deschutes County Code allows the Board of County Commissioners ("Board") discretion on whether to hear appeals of Hearings Officer's decisions; and

WHEREAS, the Board has given due consideration as to whether to review this application on appeal; now, therefore,

THE BOARD OF COUNTY COMMISSIONERS OF DESCHUTES COUNTY, OREGON, HEREBY ORDERS as follows:

Section 1. The Board will hear the appeal for application number 247-15-000222-LR (430-A, 633-A) pursuant to Title 22 of the Deschutes County Code and other applicable provisions of the County land use ordinances.

Section 2. The appeal shall be on the record pursuant to DCC 22.32.030(E) that allows for written arguments from the parties based upon the record developed below but no new evidence and no "oral evidence, argument or comments other than staff comment."

Section 3. The deadline for submittal of written arguments shall be:

- _____, 2016 – written arguments from all parties;
- _____, 2016 – rebuttal arguments from the applicant.

///

Section 4. Staff shall mail notice to persons or parties entitled to notice pursuant to DCC 22.32.030(A) no later than January __, 2016

Dated this _____ of _____, 2015

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

ANTHONY DEBONE, Chair

ALAN UNGER, Vice Chair

ATTEST:

Recording Secretary

TAMMY BANEY, Commissioner