

KIMBLE RANCH



A

PLANNED UNIT DEVELOPMENT

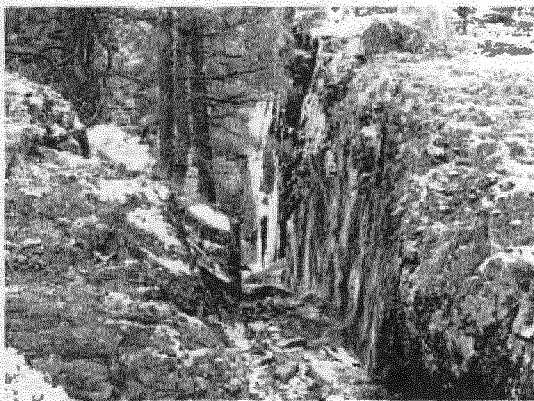
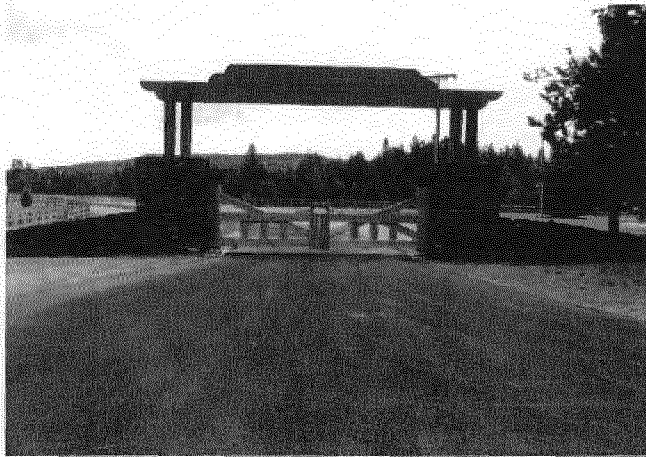


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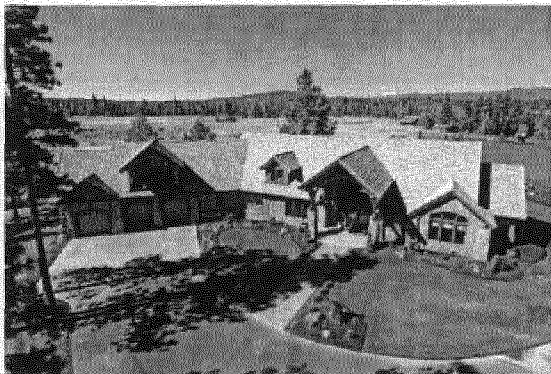
KIMBLE RANCH PROJECT SUMMARY

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

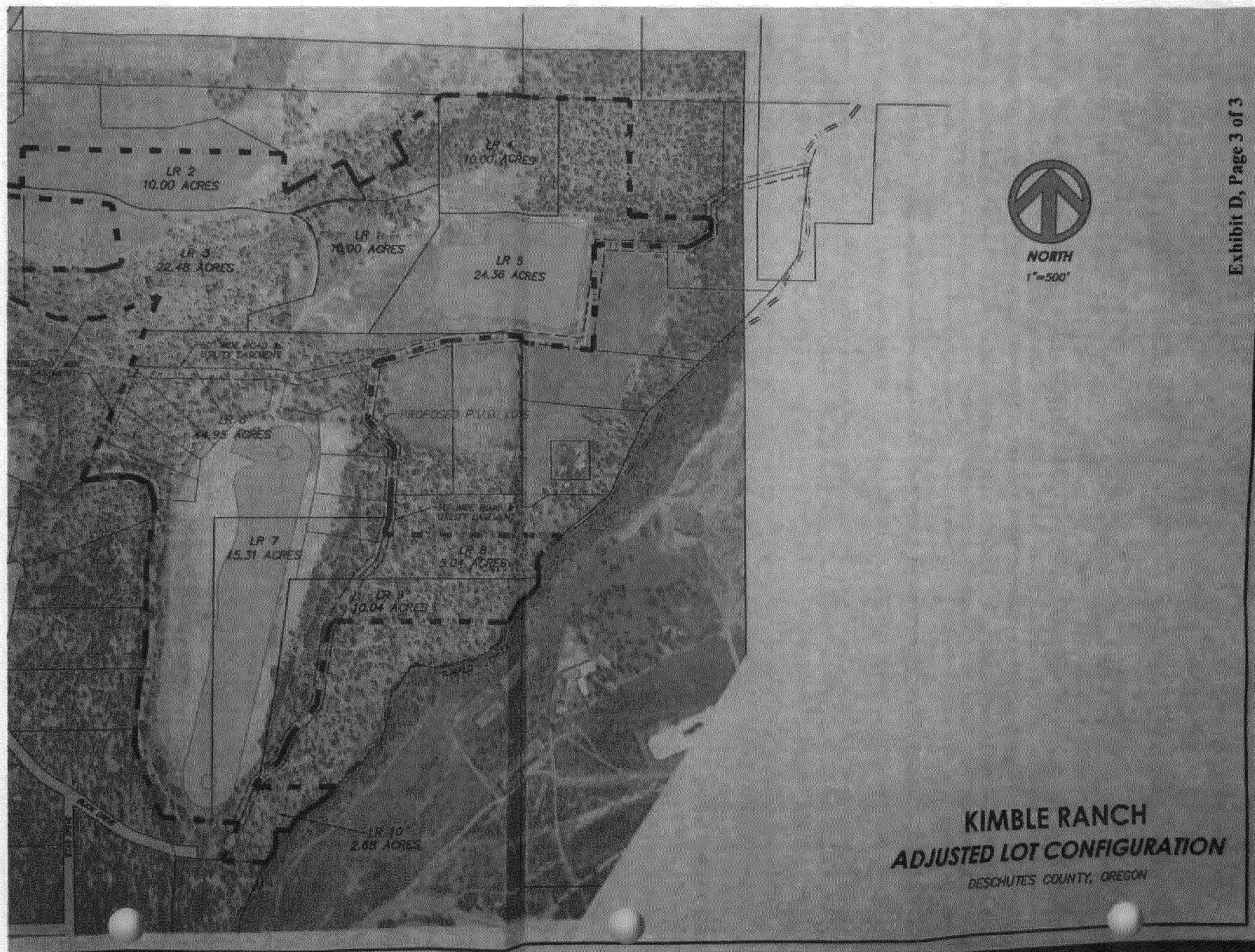


in size and will either front on the proposed lake or sit high atop the rim rock overlooking Tumalo Creek. Kimble Ranch will be a gated community with a focus on outdoor recreation. The homes will be built to exacting standards of quality and craftsmanship while retaining individuality and harmony with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

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



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



KIMBLE RANCH



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PLANNED UNIT DEVELOPMENT

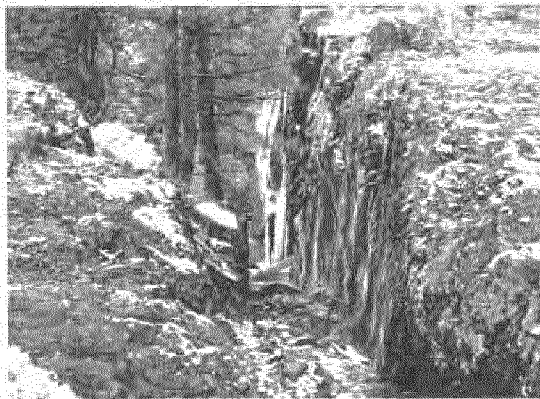


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LETTER OF RECOMMENDATION

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MORRIS
REAL ESTATE

DARRIN KELLEHER
Broker

486 S.W. BLUFF DRIVE
BEND, OR 97702
DIRECT (541) 322-2416
CELL (541) 788-0029
BUS. (541) 382-1123
FAX (541) 385-3253
darrin@bendproperty.com
www.kellehers.com

3-9-2011

Re; 2.0 acre, lakeside home sites (Kimble Ranch))

Harris Kimble

Harris,

As a follow up to our conversation on Tuesday, I thought I should drop you a note to confirm our thoughts in regards to Kimble Ranch. We are as excited as you are about this project and our ability to market it and its home sites successfully. We all know that the concept and land are stellar. In fact, I believe that by the time you have recorded the final plat, we can have have several reservations that will convert to sales. I suggest that we sit down in the near future and discuss final design and presentation. This would allow a reservation process to begin, and us to close the loop in regards to revenue projections. I have a strong opinion in regards to pricing and have polled my team as well. There are no comparable properties in our market, and likely wont be. With this said, these will be purchased by buyers that have the ability to choose the lifestyle. Obviously product will be limited and will draw a premium.

My suggestion is to back into a lot value. What is a 3500 sq. ft. home worth, gated, lakeside with a couple of acres? If all of the assumptions in regards to plat are complete, I believe that number is \$1,500,000.00 all day long. You know the build numbers. My assumption would be that leaves between \$500,000. -\$650,000. for the land price. With the work that we have discussed doing up front, and the plan being clear, this project will fall right into place. Even in a down market and very tough economy, this plat will have its success. Limited numbers and a rare product will work strongly in your favor.

Thanks again for your confidence in us. We are all ready to jump in with both feet and get started!


Darrin Kelleher
Broker

Each Office Is Independently Owned And Operated.



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MLS



**MORRIS
REAL ESTATE**

DARRIN KELLEHER
Broker

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3-9-2011

RE ; Land Values- (Kimble Ranch)

Level 1- Current Plat

Lot 820- 265,000.
Lot 821 \$270,000.
Lot 823 \$600,000.
Lot 824 \$300,000.
Lot 825 \$250,000.
Lot 826 \$700,000.
Value \$2,385,000.

Level 2- With Lakes

Lot 820- \$600,000.
Lot 821 \$600,000.
Lot 823 \$1,000,000.
Lot 824 \$500,000.
Lot 825 \$500,000.
Lot 826 \$1,000,000.
Value \$4,200,000.

Level 3- * 12 Private Lake Home sites

Lot 1 \$500,000
Lot 2 \$500,000
Lot 3 \$500,000
Lot 4 \$500,000
Lot 5 \$500,000
Lot 6 \$625,000
Lot 7 \$650,000
Lot 8 \$650,000.
Lot 9 \$650,000
Lot 10 \$650,000
Lot 11 \$700,000
Lot 12 \$1,000,000
Value \$7,425,000.

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PROJECT SUMMARY AND COST BREAKDOWNS

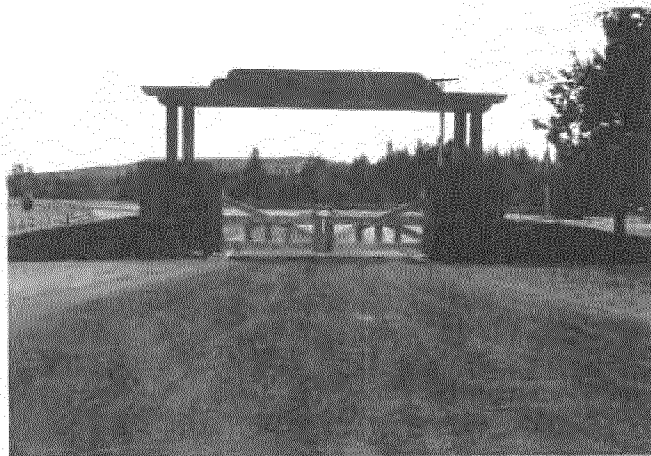
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KIMBLE RANCH PROJECT SUMMARY

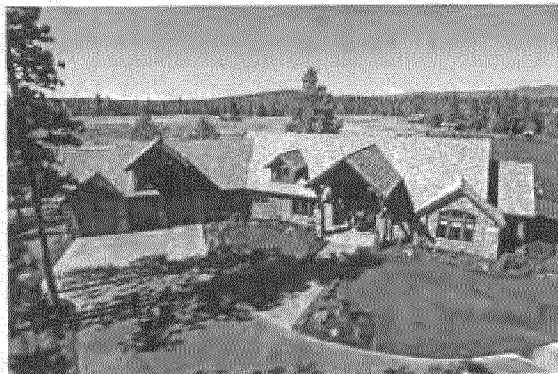
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private domestic water system. Water for the lake and the landscape irrigation will be provided for by the existing fifty-six acres of Tumalo Irrigation water rights.

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DEVELOPMENT COST BREAKDOWN

Payoff Land	\$350,000
Interest & Loan Fees	305,000
Lake Excavation & Grading	450,000
Surveying, Platting & Engineering	50,000
Lake Liner	480,000
Private Domestic Water System	125,000
Landscaping	300,000
Underground Power	150,000
Paving	200,000
Septic Approvals	20,000
Legal Fees	20,000
Permits	50,000
TOTAL DEVELOPMENT COST	\$2,500,000

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DEVELOPMENT DRAW ESTIMATE

<u>DESCRIPTION</u>	<u>AMOUNT</u>	<u>EST. SECURITY VALUE</u>
Payoff Land	\$350,000	
Interest & Loan Fees	305,000	
Mobilization	100,000	
Liner Deposit	200,000	
<u>Landscape Material</u>	<u>75,000</u>	
CLOSING DRAW	\$1,030,000	\$2,385,000 (Six lots – 93.14 Ac)
Lake Excavation & Grading	\$200,000	
Engineering, Surveying & Platting	20,000	
<u>Legal</u>	<u>5,000</u>	
1ST PROGRESS DRAW	\$225,000	
Lake Excavation & Grading	\$100,000	
Liner Installed	150,000	
PUD Applications	25,000	
<u>Landscape & Cover Liner</u>	<u>100,000</u>	
2ND PROGRESS DRAW	\$375,000	
DRAW TOTAL (Prior to PUD Appvl)	\$1,630,000	\$4,200,000 (Six Lots with lakes Completed)
Progress Draws for PUD Completion	\$870,000	
LOAN TOTAL	\$2,500,000	\$7,425,000 (Twelve Lots with lakes & PUD Completed)

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EXHIBITS

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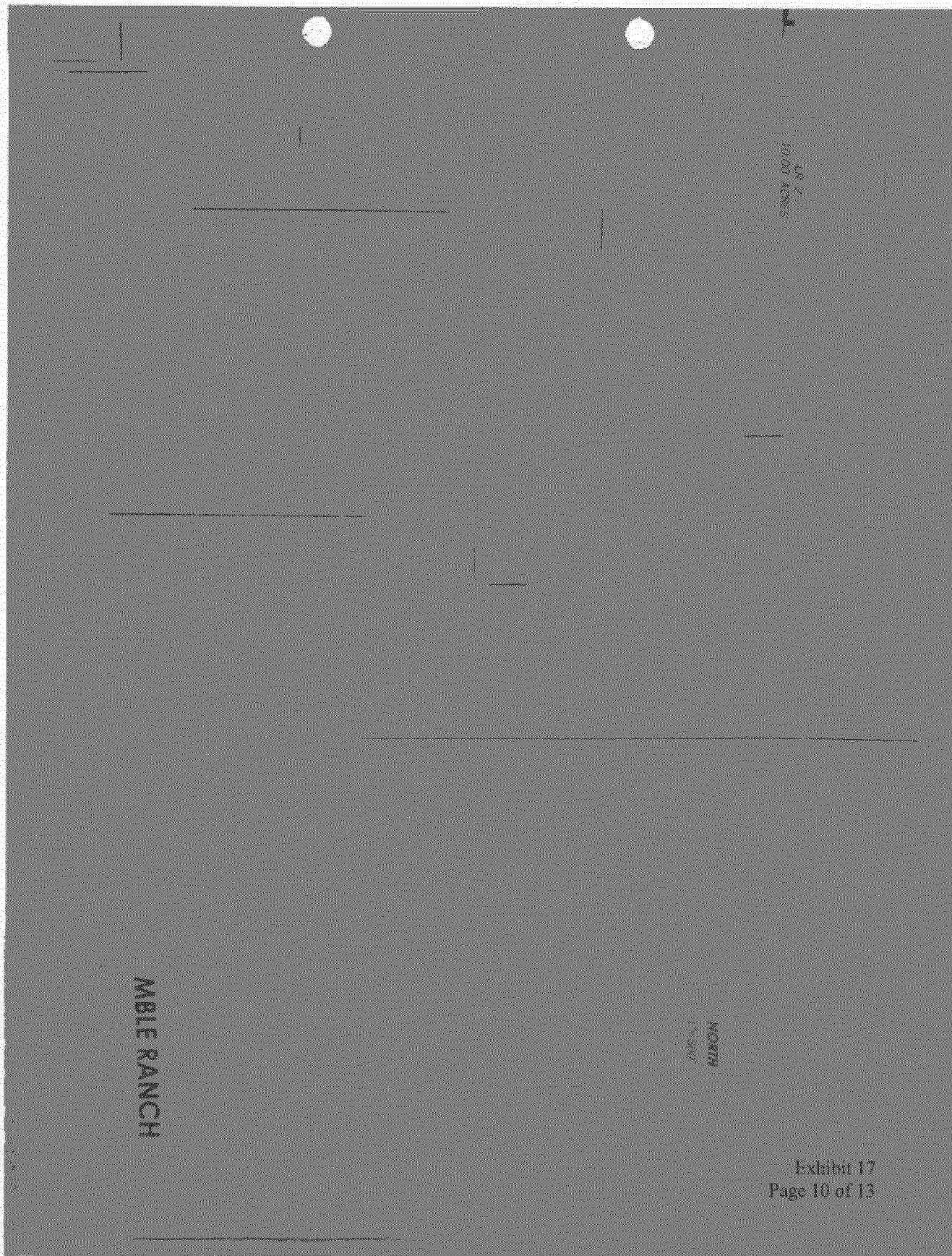


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KIMBLE RANCH
LOTS SECURED BY L

NORTH
1" = 500'



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CENTRAL OREGON'S NEWS LEADER

69°

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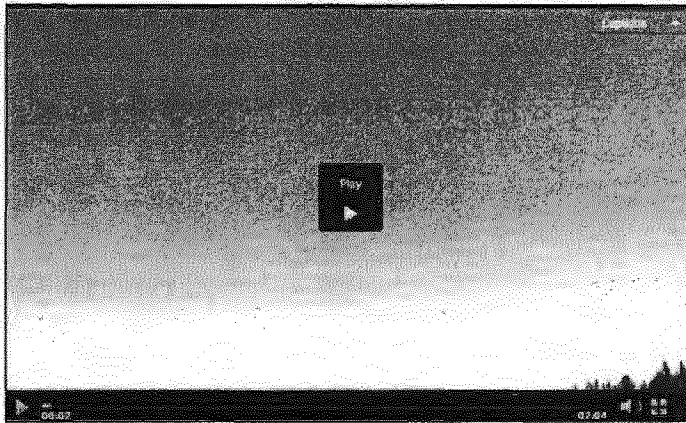
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Thursday, August 14, 2014 1:25 pm

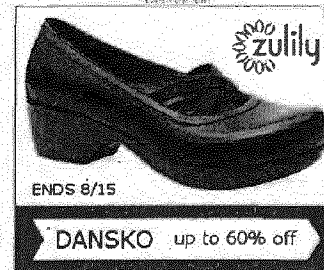
Tumalo water-ski lake plans debated

POSTED: 5:00 PM PDT June 4, 2014

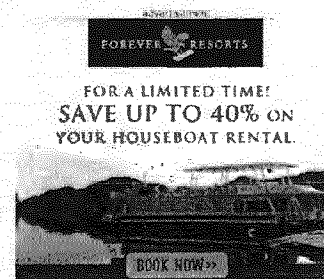
UPDATED: 10:18 PM PDT June 4, 2014

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NewsChannel 21's Katie Higgins reports on the dispute over work under way to turn a former construction dig site into a private water-skiing lake.

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Stn=4 BN		
\$60.00 \$11.00 \$10.00 \$6.00 \$16.00	\$103.00	
I, Nancy Blankenship, County Clerk for Deschutes County, Oregon, certify that the instrument identified herein was recorded in the Clerk records.		
Nancy Blankenship - County Clerk		

LINE OF CREDIT TRUST DEED

PARTIES:

GRANTOR: KC DEVELOPMENT GROUP LLC,
an Oregon limited liability company
63560 Johnson Road
Bend, OR 97701

TRUSTEE: Amerititle
15 Oregon St.
Bend, OR 97701

BENEFICIARY: CARLTON M. CADWELL
909 North Kellogg Street
Kennewick, WA 99336

RECITALS

This Trust Deed is a LINE OF CREDIT INSTRUMENT securing performance of the obligations in a Line of Credit Agreement and Promissory Note between Grantor and Beneficiary dated October 24, 2013 ("Note"). The maximum principal amount to be advanced pursuant to the Note is Four Million Two Hundred Thousand Dollars (\$4,200,000.00). The maximum principal amount may be exceeded by advances made pursuant to the credit instrument if the advances are used to complete construction of the improvements upon the Trust Property.

The term of the credit agreement commences on the date of this Trust Deed and ends thirty-six months after the Wells Fargo Effective Date as defined in the Note.

Grantor is the owner of real property described as follows:

See attached Exhibit "A"

including all appurtenances, buildings and future improvements. All of the real property is referred

LINE OF CREDIT TRUST DEED - 1 of 9
(10/23/13)

Return to:
AmeriTitle

to as "the Trust Property."

SUBJECT TO: Encumbrances of Record as of this Line of Credit Trust Deed recording date.

SECTION 1. LOAN

Beneficiary desires to lend to Grantor, and Grantor desires to borrow from Beneficiary, the sum of Four Million Two Hundred Thousand Dollars (\$4,200,000.00). The loan is evidenced by a Line of Credit Agreement and Promissory Note (the Note) dated October 24, 2013 between Grantor and Beneficiary. Grantor has agreed to deed to Trustee the Trust Property to secure punctual performance of all of Grantor's obligations under the Note and Agreement, any modifications, alterations, or extensions of the Note, under this Trust deed, and under any other indebtedness owing by Grantor to Beneficiary, and any future amounts which Beneficiary may loan to Grantor, together with interest.

Grantor grants, bargains, sells, conveys, assigns and transfers to the Trustee, in trust, for the benefit and security of Beneficiary with power of sale and right of entry and possession, all of Grantor's right, title, interest in the Trust Property together with all of the improvements now or hereinafter erected on the Trust Property and all easements; rights; appurtenances; rents; royalties; mineral, oil and gas rights and profits; water rights; and all fixtures now or hereinafter a part of the Trust Property. All replacements and additions shall also be covered by this Trustee. Grantor presently assigns the rents, revenues, income, issues and profits to the Trustee, its successors and its assigns, upon the terms set forth in this deed.

The Trust Property is conveyed to the Trustee and its successors and assigns for the benefit of Beneficiary and its successors and assigns forever.

However, if all of the obligations secured by this Trust Deed and the Trust Deed are paid, performed and satisfied in full, then the lien and the estate granted by this Trust Deed shall be reconveyed.

SECTION 2. PARTIAL RELEASE

Grantor plans to develop the Property secured by this Trust Deed. Upon agreement to sell individual lots, Grantor shall pay the net proceeds from the sale of each lot to Beneficiary to reduce the unpaid principal balance owing on the Note and Beneficiary shall release the individual lot from this Trust Deed. The term "Net Proceeds" shall include all sums received for the purchase of any lot, less only actual closing costs. Upon payment in full of the Note, Beneficiary shall release all remaining lots secured by this Trust Deed.

SECTION 3. GRANTOR'S COVENANTS AND WARRANTIES

3.1 Payment of the Note. Grantor shall make all payments of interest and principal and late fees, if any, for which provision is made in the Note, and in any renewals, extensions or modifications of the Note, and any note or notes given in renewal or replacement, promptly as such payments become due and payable and will pay the unpaid balance of the Note upon maturity.

LINE OF CREDIT TRUST DEED - 2 of 9
(10/23/13)

3.2 Warranty of Title. Grantor warrants that it holds good and merchantable title to the Trust Property subject to no liens or encumbrances other than those set out above. Grantor covenants that it will defend Beneficiary's and Trustee's rights under this Trust Deed against the adverse claims and demands of all persons.

3.3 Further Assurances.

3.3.1 Grantor shall execute, acknowledge and deliver from time to time such further documents as Beneficiary or Trustee may require to accomplish the purposes of this Trust Deed.

3.3.2 Grantor, immediately upon the execution and delivery of this Trust Deed, and thereafter from time to time, shall cause this Trust Deed and any supplemental security agreements to be recorded in such a manner and in such places that may be required by any present or future law in order to perfect, and continue perfecting, the lien of this Trust Deed.

3.3.3 Grantor shall pay all filing and recording fees, and all expenses incident to the execution, filing, recording and acknowledgement of this Trust Deed.

3.4 Trust Property. Grantor represents that the current use of the Trust Property and if developed, all improvements, are in compliance with all laws, ordinances, and regulations of all government authorities.

3.5 Taxes, Assessments, Liens & Claims.

3.5.1 Payment of Taxes and Assessments. Grantor shall pay when due all taxes, assessments and liens imposed against the Trust Property when due.

3.5.2 Evidence of Payment of Taxes or Assessments. Grantor shall furnish to Beneficiary evidence of payment of the taxes and assessments annually. Grantor authorizes the appropriate official to deliver to Trustee and Beneficiary at any time a written statement of the taxes and assessments against the Trust Property.

3.5.3 Protection of the Trust Property from Liens. Grantor shall not permit any lien prior to the trustee's title to be imposed upon the Trust Property, except liens for taxes or assessments assessed but not yet due.

3.5.4 Beneficiary's Right to Pay Taxes. In the event that Grantor shall allow the taxes or other assessments on the Trust Property to become delinquent or shall fail to pay any lien or encumbrance of any nature whatsoever imposed or permitted upon the Trust Property as they are imposed or become due, Beneficiary, without obligation to do so, shall have the right to pay the amount due and to add the amount plus all costs and attorney fees to the Note balance to bear interest at the rate provided in the Note.

3.5.5 Grantor's Right to Contest. As long as the Trustee's interest in the Trust Property is not jeopardized, Grantor may withhold payment of any taxes, assessments, claims or demands or may elect to contest liens if Grantor is, in good faith, conducting appropriate

proceedings to contest its obligation to pay. If the Trust Property is subject to a lien which is not discharged within 30 days from the date the notice of claim of lien is filed, Grantor shall deposit with Beneficiary cash, a sufficient surety bond or security reasonably satisfactory to Beneficiary in an amount adequate to provide for discharge of the lien plus any interest, costs, attorney fees or other charges that could accrue as a result of foreclosure or sale. In any contest, Grantor shall, at Grantor's expense, defend itself, Trustee and Beneficiary, and shall satisfy any adverse judgment before enforcement against the Trust Property.

3.6 Insurance.

3.6.1 Property Insurance. Grantor shall procure and maintain policies of insurance against loss by fire, hazards included within the term "extended coverage" and any other hazards for which Beneficiary reasonably requires insurance. The coverage endorsement shall include all buildings and improvements. Loss payable shall be made to Beneficiary. The amount of insurance shall be the replacement cost or the amount of principal and interest owed on the Note, whichever is greater.

3.6.2 Insurance Companies, Policies and Certificates. Both the insurance company providing the policy and the form of the policy must be acceptable to Beneficiary. Grantor shall deliver to Beneficiary a certificate of coverage from the insurer issuing the policy containing a stipulation that coverage will not be canceled or diminished without a minimum of ten (10) days advance written notice to Beneficiary. Grantor shall deliver to Beneficiary at least ten (10) days prior to the expiration of any insurance policy required by this paragraph a certificate showing the placement of a renewal or substitute policy of insurance.

3.6.3 Notice of Loss. In the event of loss, Grantor shall immediately notify Beneficiary, which may make a proof of loss if it is not made promptly by Grantor.

3.6.4 Insurance Proceeds. Insurance proceeds shall be paid directly to Grantor and Beneficiary. If Beneficiary, by reason of such insurance, receives any amount for loss or damage, if payment is sufficient for repair the payment shall be used for that purpose. If the amount is insufficient to repair or replace, and Grantor is unable to make up the difference to satisfactorily accomplish the repairs, then the insurance payment shall be retained by beneficiary and shall relieve indebtedness of the Grantor in the amount paid. If the payment is greater than the indebtedness owing, the overage shall be paid to the Grantor.

3.6.5 Liability Insurance. During the term of this Trust Deed, Grantor shall maintain public liability and property damage insurance with a limit of not less than \$1,000,000.00. The insurance shall be on an occurrence basis and shall be primary with respect to all other insurance covering any of the insured risks. The policy shall cover all risks arising directly or indirectly out of Grantor's activity on or any condition of the Trust Property. The policy shall protect Grantor, Trustee and Beneficiary against claims of third persons. The policy shall be written in such form, with such terms and by such insurance companies reasonably acceptable to Beneficiary. Grantor shall deliver to Beneficiary certificates of coverage with a stipulation that coverage will not be canceled or diminished without at least ten (10) days' written notice to Beneficiary.

3.7 Use, Maintenance and Alteration.

3.7.1 Duty to Maintain. Grantor shall maintain the Trust Property in good condition and repair and promptly perform all repairs and maintenance necessary to preserve its value.

3.7.2 Waste, Nuisance. Grantor shall not conduct or permit any nuisance on the Trust Property nor commit or suffer any strip of waste. Grantor shall keep the Trust Property free of all hazardous substances. Grantor shall not remove trees unless prior written permission from Beneficiary is obtained.

3.7.3 Removal of Improvements. Grantor shall not demolish or remove any improvements on the Trust Property without the prior written consent of Beneficiary. Grantor may make alterations.

3.7.4 Beneficiaries' Right to Enter and Inspect. Grantor shall permit Beneficiary and its agents to enter upon the Trust Property at all reasonable times to inspect the Trust Property.

3.7.5 Compliance with Government Regulations. Grantor shall comply with all laws, ordinances, and regulations of all governmental authorities applicable to the Trust Property or the use or occupancy of the Trust Property.

3.8 Eminent Domain. If any part of the Trust Property is condemned, Beneficiary shall be entitled to its pro rata share.

3.9 Hazardous Substances. Grantor represents and warrants that: (1) the premises and the improvements, and, to the best of Grantor's knowledge, the surrounding areas, are not currently and have never been subject to hazardous or toxic substances or wastes or their effects; and (2) there are no claims, litigation, administrative or other proceedings, whether actual or threatened, or judgments or orders, relating to any hazardous or toxic substances or wastes, discharges, emissions or other forms of pollution relating in any way to the premises or the improvements.

SECTION 4. **EVENTS OF DEFAULT.**

The following shall constitute events of default:

4.1 Nonpayment. Failure of Grantor to make any payment required by the Note when due. Failure to make any payment for taxes, insurance premiums or for reserves for such payments, or any other payment necessary to prevent filing of or discharge of any lien within three (3) days after written notice by Beneficiary (or Beneficiary's agents) of any such nonpayment.

4.2 Breach of Other Covenant. Failure of Grantor to perform any obligation contained in this Trust Deed within fifteen (15) days after notice from Beneficiary (or Beneficiary's representative) specifying the nature of the default or, if the default cannot be cured within fifteen (15) days, failure within such time to commence and pursue with reasonable diligence curative

action. No notice of default and opportunity to cure shall be required if during the preceding twelve (12) calendar months Beneficiary has already sent a notice to Grantor concerning default in performance of the same obligation.

4.3 Sale or Transfer of Possession. The sale of the Trust Property or transfer of possession in any manner by Grantor, whether by deed, contract of sale, lease or similar agreement, without the prior written consent of Beneficiary, which shall not be unreasonably withheld. Prior to requesting consent, Grantor shall provide a credit report and financial information on any proposed transferee.

4.4 Misinformation. Falsity in any material respect of any representations or warranties made by Grantor to Beneficiary.

SECTION 5. REMEDIES IN CASE OF DEFAULT.

If an event of default shall occur, Beneficiary or Trustee, as the case may be, may exercise any of the following rights and remedies, in addition to any other remedies which may be available under the laws of the State of Oregon:

5.1 Acceleration. Beneficiary may declare all sums secured by this Trust Deed, including all interest and late fees or prepayment penalties, if any, to be immediately due and payable.

5.2 Receiver. Beneficiary may have a receiver of the Trust Property appointed. Beneficiary shall be entitled to the appointment of a receiver as a matter of right whether or not the apparent value of the Trust Property exceeds the amount of the indebtedness secured by this Trust Deed. Employment by Trustee or Beneficiary shall not disqualify a person from serving as receiver. Grantor waives all defenses and consents to the appointment of a receiver at Beneficiary's option.

5.3 Possession. Either through a receiver or in person take possession of all or any part of the Trust Property, and Grantor shall peaceably surrender the same.

5.4 Foreclosure. Beneficiary may obtain a decree foreclosing Grantor's interest in all or any part of the Trust Property.

5.5 Fixtures and Personal Property. With respect to any fixtures or personal property subject to a security interest in favor of Beneficiary, Beneficiary may exercise any and all of the rights and remedies of a secured party under the Uniform Commercial Code.

5.6 Abandon Security. Beneficiary may abandon any security described in this Trust Deed or any other security instrument.

5.7 Power of Sale. Beneficiary may direct Trustee, and Trustee shall be empowered, to foreclose the Trust Property by advertisement and exercise of the power of sale under applicable law.

5.8 Expenditures by Beneficiary. If Grantor shall fail to comply with any provision of this

deed, Beneficiary may at its option on Grantor's behalf take the required action, and any amount that it expends in so doing shall be added to the indebtedness. Amounts so added shall be payable on demand with interest at the rate of the Note from the date of expenditure. Beneficiary shall not, by taking the required action, cure the default so as to bar it from any remedy that it otherwise would have had.

5.9 Additional Remedies. Beneficiary may exercise any other remedy provided by law.

5.10 Cumulative Remedies. Election to pursue one remedy shall not exclude resort to any other remedy, and, unless the context otherwise requires, all remedies under this Trust Deed are cumulative and not exclusive. An election to cure shall neither prejudice the right to declare a default nor constitute a waiver of the breached term or any available remedies. No delay or omission in exercising any right or remedy shall impair any other right to remedy or shall be construed to be a waiver of the default.

SECTION 6. APPLICATION OF PROCEEDS.

All proceeds realized from the exercise of the rights and remedies under this Trust Deed shall be applied as follows:

6.1 Costs and Expenses. To pay all costs of exercising such rights and remedies including, but not limited to, the costs of any sale, the costs and expenses of any receiver, the cost of a policy of title insurance and the cost of any survey.

6.2 Indebtedness. To pay all other amounts owed by Grantor, payment of which is secured by this Trust Deed.

6.3 Surplus. The surplus, if any, shall be paid to the person or persons legally entitled.

SECTION 7. GENERAL PROVISIONS.

7.1 Reconveyance upon Payment. Upon written request of Beneficiary stating that all sums secured by this Deed have been paid, surrender of this Trust Deed and the Note to Trustee for cancellation and retention and payment of its fees, Trustee shall reconvey, without warranty, the Trust Property.

7.2 Trust Deed Binding on Successors and Assigns. This Trust Deed shall be binding on and inure to the benefit of the successors and assigns of Grantor, Trustee and Beneficiary.

7.3 Indemnity. Grantor shall hold Beneficiary and Trustee harmless from any and all loss and expense, including but not limited to attorney fees and court costs, in any suit, action, proceeding, or appeal brought against Trustee or Beneficiary by a third party resulting from or attributable to Beneficiary's ownership of the Note or Trustee's interest under this Trust Deed.

7.4 Notice. Any notice under this Trust Deed shall be in writing. Any notice to be given or document to be delivered under this Trust Deed shall be effective when either delivered in person or

deposited as registered or certified mail, postage prepared, addressed to the party at the address stated in this Trust Deed; however, any notice pursuant to exercise of the Trustee's power of sale in the event of default shall be sufficient if such notice complies with all provisions of Oregon law applicable to exercise of such powers of sale. Any party may by notice to the others designate a different address.

7.5 Attorneys Representation. The law firm of Francis Hansen & Martin LLP has represented Eric Cadwell a member of Grantor in the negotiation and drafting of this Trust Deed. The law firm of Hurley Re, PC has represented Harris Kimble, the other member of Grantor in the negotiation and drafting of this Trust Deed. Beneficiary is advised to consult with an attorney on his behalf.

7.6 Substitute Trustee. Beneficiary may from time to time remove Trustee and appoint a Successor Trustee.

7.7 Expenses and Attorney Fees. In the event that Beneficiary or Trustee shall take any action, judicial or otherwise, to enforce the Note or any provision of this Trust Deed or if Beneficiary or Trustee shall be required to appear in any proceedings to protect and maintain the priority of Trustee's title to the Trust Property, Trustee or Beneficiary (or both) shall be entitled to recover from Grantor all expenses which it may reasonably incur in taking such action, including but not limited to costs incurred in searching records, the cost of title reports and surveyor's reports, and its attorney fees, whether incurred in a suit, action, appeal from a judgment, or in connection with nonjudicial action. Grantor shall reimburse Beneficiary or Trustee (or both) for expenses so incurred on demand with interest from the date of expenditure until repaid at a rate equal to the Note.

7.8 Beneficiary's Right to Cure. If Grantor fails to perform any obligation required of it under this Trust Deed, Beneficiary may, without notice, take any steps necessary to remedy such failure. Grantor shall reimburse Beneficiary for all amounts expended in so doing on demand with interest at a rate equal to the Note from the date of expenditure until repaid. Such action by Beneficiary shall not constitute a waiver of the default or any other right or remedy which Beneficiary may have on account of Grantor's default.

7.9 Applicable Law. This Trust Deed shall be governed by the laws of the State of Oregon.

7.10 Time of Essence. Time is of the essence in this Trust Deed

7.11 Headings. The headings to the sections and paragraphs of this Trust Deed are included only for the convenience of the parties and shall not have the effect of defining, diminishing or enlarging the rights of the parties or affecting the construction or interpretation of any portion of this Trust Deed.

7.12 Severability. If any provision of this Trust Deed shall be held to be invalid, illegal or unenforceable, such invalidity, illegality or unenforceability shall not affect any other provisions of this Trust Deed. This Trust Deed shall be construed as if such invalid, illegal or unenforceable provision had never been contained in this Trust Deed.

EXHIBIT A

Page 1 of 3

LR - 8

Order No. 149419

Page 4

LEGAL DESCRIPTION

A parcel of land located in a portion of Section 13, Township 17 South, Range 11 East, Willamette Meridian, Deschutes County, Oregon, being a portion of those lands described in Volume 235, Page 768, Deschutes County Deed Records, and being more particular described as follows:

Beginning at the southeast corner of the Northwest Quarter of said Section 13; thence along the south line of said Northwest Quarter North 89°52'12" West a distance of 895.68 feet to the centerline of a 60 foot wide Road and Utility Easement; thence along said centerline the following four (4) courses:

North 30°19'53" East a distance of 6.71 feet;

North 45°19'53" East a distance of 140.51 feet;

North 15°21'35" East a distance of 115.54 feet;

North 17°39'06" East a distance of 22.08 feet to the most southerly corner of the parcel described in the deed recorded in Book 221, Page 796, Deed Records;

Thence along the south line of said parcel and along the south line of the parcel described in deed recorded in Book 221, Page 800, Deed Records, South 89°30'44" East a distance of 978.27 feet to the centerline of Tumalo Creek; thence southerly along the centerline of Tumalo Creek the following three (3) courses:

South 47°16'27" West a distance of 163.55 feet;

South 16°23'29" West a distance of 38.04 feet;

South 08°07'40" East a distance of 84.34 feet to a point on the south line of the Northeast Quarter of said Section 13;

Thence along said south line, North 89°52'12" West a distance of 104.22 feet to the point of beginning, the terminus of this description.

EXHIBIT A

Page 2 of 3

LR - 9

Order No. 149420
Page 5

LEGAL DESCRIPTION

A parcel of land located in the Northeast Quarter of the Southwest Quarter (NE1/4SW1/4), the Northwest Quarter of the Southeast Quarter (NW1/4SE1/4), and the Northwest Quarter of the Southwest Quarter (NW1/4SW1/4) of Section 13, Township 17 South, Range 11 East, Willamette Meridian, Deschutes County, Oregon, being a portion of those lands described in Volume 235, Page 768, Deschutes county Deed Records, and being more particular described as follows:

Beginning at the northeast corner of the Northwest Quarter of the Southwest Quarter (NW1/4SW1/4) of said Section 13; thence along the north line of the Southwest Quarter (SW1/4) of said Section 13, South 89°52'12" East a distance of 67.18 feet to the True Point of Beginning of this description; thence continuing along said north line, South 89°52'12" East a distance of 1252.12 feet to the center of said Section 13; thence along the north line of the Southeast Quarter (SE1/4) of said Section 13, South 89°52'12" East a distance of 104.22 feet to the centerline of Tumalo Creek;

Thence along said centerline the following four (4) courses:

South 10°24'13" West a distance of 39.17 feet;
South 41°11'03" West a distance of 62.05 feet;
South 61°41'31" West a distance of 82.32 feet;
South 35°16'06" West a distance of 128.61 feet to the north line of the parcel described in deed recorded in Volume 222, Page 91, Deed Records;

Thence leaving said centerline along said north line North 89°30'44" West a distance of 936.06 feet to the centerline of a 60 foot wide road and utility easement; thence along said centerline and along the westerly line of said parcel the following five (5) courses:

South 30°19'53" West a distance of 43.22 feet;
South 08°35'23" West a distance of 403.92 feet;
South 40°03'23" West a distance of 212.60 feet;
South 24°36'23" West a distance of 144.06 feet;
South 46°27'23" West a distance of 141.08 feet;

Thence leaving said centerline and westerly line, North 09°51'21" East a distance of 533.54 feet; thence North 06°57'39" East a distance of 530.21 feet to the True Point of Beginning, the terminus of this description.

EXHIBIT A

Page 3 of 3

LR - 10

Order No. 149421

Page 4

LEGAL DESCRIPTION

A parcel of land located in the Northeast Quarter of the Southwest Quarter (NE1/4 SW1/4), the East Half of the East Half of the Southwest Quarter of the Southwest Quarter (E1/2E1/2SW1/4SW1/4), and the East Half of the East Half of the Northwest Quarter of the Southwest Quarter (E1/2E1/2NW1/4SW1/4) of Section 13, Township 17 South, Range 11 East, Willamette Meridian, Deschutes County, Oregon, being a portion of those lands described in Volume 235, Page 768, Deschutes County Deed Records, and being more particular described as follows:

Beginning at the southeast corner of the Northwest Quarter of the Southwest Quarter (NW1/4 SW1/4) of said Section 13; thence along the east line of the East Half of the East Half of the Southwest Quarter of the Southwest Quarter (E1/2E1/2SW1/4SW1/4) of said Section 13, South 00°02'12" West a distance of 86.97 feet to the centerline of Tumalo Creek; thence along the centerline of Tumalo Creek the following two (2) courses:

South 28°27'59" West a distance of 76.99 feet;

South 53°59'11" West a distance of 22.55 feet to the northeast corner of that parcel described in deed recorded in Volume 167, Page 450, Deed Records;

Thence along the northerly line of said parcel, North 85°55'28" West a distance of 220.93 feet to the centerline of a 60 foot wide road and utility easement and the southeast corner of the parcel described in deed recorded in Volume 358, Page 244 Deed Records; thence along said centerline, North 22°55'23" East a distance of 211.17 feet to the northeast corner of said parcel described in deed recorded in Volume 358, Page 244, Deed Records; thence continuing along said centerline, North 22°55'23" East a distance of 203.30 feet to the southwest corner of the parcel described in deed recorded in Volume 222, Page 91, Deed Records; thence along the southerly line of said parcel, South 89°31'42" East a distance of 422.86 feet to the centerline of Tumalo Creek; thence along said centerline the following seven (7) courses:

South 39°17'22" West a distance of 73.53 feet;

South 57°05'13" West a distance of 33.75 feet;

South 45°56'25" West a distance of 23.66 feet;

South 63°19'46" West a distance of 39.99 feet;

South 54°17'50" West a distance of 69.78 feet;

South 43°37'57" West a distance of 39.50 feet;

South 30°47'32" West a distance of 54.97 feet to the south line of the Northeast Quarter of the Southwest Quarter (NE1/4 SW1/4) of said Section 13;

Thence along said south line North 89°53'32" West a distance of 69.23 feet to the point of beginning, the terminus of this description.

DESCHUTES COUNTY OFFICIAL RECORDS
NANCY BLANKENSHIP, COUNTY CLERK

2013-48438



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11/25/2013 01:24:46 PM

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\$40.00 \$11.00 \$15.00 \$10.00 \$5.00

After recording return to:

CARLTON CADWELL
909 North Kellogg Street
Kennewick, WA 99336

MODIFICATION OF LINE OF CREDIT TRUST DEED

PARTIES:

GRANTOR: KC DEVELOPMENT GROUP LLC,
an Oregon limited liability company
63564 Johnson Rd
Bend, OR 97701

TRUSTEE: Amerititle
15 Oregon St.
Bend, OR 97701

BENEFICIARY: CARLTON M. CADWELL
909 North Kellogg Street
Kennewick, WA 99336

This Modification of Line of Credit Trust Deed dated October 24, 2013 is made and executed between KC DEVELOPMENT GROUP LLC, an Oregon limited liability company ("Grantor") and CARLTON CADWELL ("Beneficiary").

DEED OF TRUST. Beneficiary and Grantor have entered into a Line of Credit Trust Deed dated October 24, 2013, (the "Deed of Trust") which has been recorded in the Official Records of Deschutes County at Document No. 2013-044757.

CONSIDERATION. Grantor acknowledges that Beneficiary has provided adequate consideration for this modification.

MODIFICATION. Beneficiary and Grantor hereby modify the terms of the Deed of Trust to include additional real property as follows:

The real property covered by the Deed of Trust is described as follows:

See attached Exhibit "A"

MODIFICATION OF TRUST DEED - 1 of 9
(11/14/13)

CONTINUING VALIDITY. Except as expressly modified above, the terms of the original Deed of Trust shall remain unchanged and in full force and effect. Consent by Beneficiary to this Modification does not waive Beneficiary's right to require strict performance of the Deed of Trust as changed above nor obligate Beneficiary to make any future modifications. Nothing in this Modification shall constitute a satisfaction of the promissory note or other credit agreement secured by the Deed of Trust (the "Note"). It is the intention of Beneficiary to retain as liable all parties to the Deed of Trust and all parties, makers and endorser to the Note, including accommodation parties, unless a party is expressly released by Beneficiary in writing. Any maker or endorser, including accommodation makers, shall not be released by virtue of this Modification. If any person who signed the original Deed of Trust does not sign this Modification, then all persons signing below acknowledge that this Modification is given conditionally, based on the representation to Beneficiary that the non-signing person consents to the changes and provisions of this Modification or otherwise will not be released by it. This waiver applies not only to any initial extension or modification, but also to all such subsequent actions.

IN WITNESS WHEREOF, Grantor has caused this Modification of Trust Deed to be executed this 24 day of October, 2013.

GRANTOR:

BENEFICIARY

KC DEVELOPMENT GROUP LLC

CARLTON CADWELL

By:

Harris C. Kimble, Member

By:

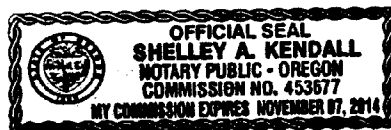
Eric Cadwell, Member/Manager

STATE OF OREGON)

) ss.

County of Deschutes)

This instrument was acknowledged before me on October 24, 2013 by Harris C. Kimble, Member of KC DEVELOPMENT GROUP LLC, an Oregon limited liability company.

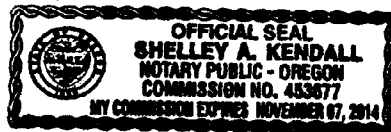


Shelley A. Kendall
Notary Public for Oregon

MODIFICATION OF TRUST DEED - 2 of 9
(10/22/13)

STATE OF OREGON)
) ss.
County of Deschutes)

This instrument was acknowledged before me on October 24, 2013 by
Eric Cadwell, Member and Manager of KC DEVELOPMENT GROUP LLC, an Oregon limited
liability company.

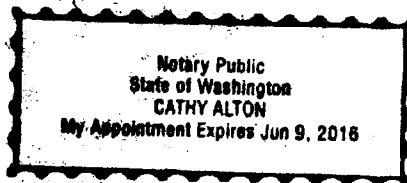


Shelley A. Kendall
Notary Public for Oregon

STATE OF Washington)
) ss.
County of Benton)

This instrument was acknowledged before me on October 23, 2013 by
CARLTON CADWELL.

Cathy Alton
Notary Public for Oregon Washington



MODIFICATION OF TRUST DEED - 3 of 9
(10/22/13)

EXHIBIT A

LEGAL DESCRIPTION

A parcel of land located in Sections 13 and 14, Township 17 South, Range 11 East, Willamette Meridian, Deschutes County, Oregon, being a portion of those lands described in Volume 235, Page 768, Deschutes County Deed Records, and being more particular described as follows:

Beginning at the North Quarter corner of said Section 13, from which the northwest corner of said Section 13 bears South 89°57'11" West a distance of 2625.39; thence along the north line of the northeast quarter of said Section 13, South 89°47'50" East a distance of 591.71 feet; thence leaving said north line, South 00°03'25" West a distance of 648.84 feet; thence South 89°47'50" East a distance of 454.57 feet; thence South 00°44'20" East a distance of 87.74 feet; thence South 59°07'40" West a distance of 152.05 feet; thence North 89°47'50" West a distance of 520.24 feet; thence South 00°15'50" West a distance of 580.85 feet; thence North 84°33'35" West a distance of 401.64 feet; thence North 00°16'25" East a distance of 29.81 feet to the centerline of a 60 foot wide road and utility easement; thence along said centerline eight (8) courses:

South 86°25'08" West a distance of 415.77 feet;
South 72°40'52" West a distance of 329.65 feet;
South 76°41'24" West a distance of 74.15 feet;
South 07°21'14" West a distance of 313.32 feet;
South 44°18'46" East a distance of 208.94 feet;
South 05°22'46" West a distance of 230.63 feet;
South 03°06'11" West a distance of 147.80 feet;
South 17°39'06" West a distance of 89.16 feet to the most southerly corner of the parcel described in the deed recorded in Book 221, Page 796, Deschutes County Deed Records;

thence leaving said centerline along the south line of said parcel and along the south line of the parcel described in deed recorded in Book 221, Page 800, Deschutes County Deed Records, South 89°30'44" East a distance of 978.27 feet to the centerline of Tumalo Creek; thence along the centerline of Tumalo Creek the following seven (7) courses:

South 47°16'27" West a distance of 163.55 feet;
South 16°23'29" West a distance of 38.04 feet;
South 08°06'29" East a distance of 84.34 feet;
South 10°24'13" West a distance of 39.17 feet;
South 41°11'03" West a distance of 62.05 feet;
South 61°41'31" West a distance of 82.32 feet;
South 35°16'06" West a distance of 128.61 feet to the north line of the parcel described in deed recorded in Volume 222, Page 91, Deed Records;

October 23, 2013

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thence leaving said centerline along said north line North 89°30'44" West a distance of 936.06 feet to the centerline of a 60 foot wide road and utility easement; thence along said centerline and along the westerly line of said parcel the following six (6) courses:

South 30°19'53" West a distance of 43.22 feet;
South 08°35'23" West a distance of 403.92 feet;
South 40°03'23" West a distance of 212.60 feet;
South 24°36'23" West a distance of 144.06 feet;
South 46°27'23" West a distance of 166.22 feet;
South 22°55'23" West a distance of 20.94 feet;

thence leaving said centerline along the southerly line of said Volume 222, Page 91, South 89°31'42" East a distance of 422.86 feet to the centerline of Tumalo Creek; thence along the centerline of Tumalo Creek the following seven (7) courses:

South 39°17'22" West a distance of 73.53 feet;
South 57°05'13" West a distance of 33.75 feet;
South 45°56'25" West a distance of 23.66 feet;
South 63°19'46" West a distance of 39.99 feet;
South 54°17'50" West a distance of 69.78 feet;
South 43°37'57" West a distance of 39.50 feet;
South 30°47'32" West a distance of 54.97 feet to the south line of the Northeast Quarter of the Southwest Quarter (NE1/4 SW1/4) of said Section 13;

thence leaving said centerline along said south line North 89°53'32" West a distance of 69.23 feet to the southeast corner of the Northwest Quarter of the Southwest Quarter (NW1/4 SW1/4) of said Section 13; thence along the east line of the East Half of the East Half of the Southwest Quarter of the Southwest Quarter (E1/2E1/2SW1/4SW1/4) of said Section 13, South 00°02'12" West a distance of 86.97 feet to the centerline of Tumalo Creek; thence along the centerline of Tumalo Creek the following two (2) courses:

South 28°27'59" West a distance of 76.99 feet;
South 53°59'11" West a distance of 22.55 feet to the northeast corner of that parcel described in deed recorded in Volume 167, Page 450, Deed Records;

thence along the northerly line of said parcel, North 85°55'28" West a distance of 220.93 feet to the centerline of a 60 foot wide road and utility easement and the southeast corner of the parcel described in deed recorded in Volume 358, Page 244, Deed Records; thence along said centerline, North 22°55'23" East a distance of 211.17 feet to the northeast corner of said parcel described in deed recorded in Volume 358, Page 244, Deed Records; thence leaving said centerline along the north line of said parcel, North 85°54'08" West a distance of 409.39 feet to the centerline of the Tumalo Irrigation Canal; thence along said centerline the following eight (8) courses:

North 20°47'32" West a distance of 405.22 feet;
North 04°53'56" East a distance of 281.65 feet;

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North 08°39'56" East a distance of 241.33 feet;
North 00°54'26" East a distance of 419.90 feet;
North 07°30'26" East a distance of 326.74 feet;
North 14°42'34" West a distance of 117.66 feet;
North 71°56'04" West a distance of 111.75 feet;
South 84°59'56" West a distance of 203.80 feet;

thence leaving said centerline, South 80°28'03" West a distance of 39.44 feet; thence North 21°50'14" East a distance of 1056.75 feet; thence South 69°29'01" West a distance of 337.80 feet; thence South 89°06'27" West a distance of 210.10 feet; thence North 65°06'54" West a distance of 208.57 feet; thence North 59°59'57" West a distance of 339.36 feet to a point on the southerly line of the first parcel described in deed recorded in Volume 152, Page 522, Deed Records; thence along the boundaries of said parcel the following four (4) courses:

South 89°55'06" East a distance of 690.20 feet;
North 73°18'12" East a distance of 126.78 feet;
North 09°00'03" West a distance of 320.02 feet;
North 86°02'23" West a distance of 1128.30 feet to the southeasterly right of way line of Johnson Road;

thence along said southeasterly right of way line, North 36°08'47" East a distance of 355.64 feet to the westerly most corner of that parcel described in Volume 1999, Page 50680, Deschutes County Official Records; thence along the southerly line of said parcel the following four (4) courses and one (1) curve:

South 42°43'43" East a distance of 247.04 feet;
212.40 feet along the arc of a non-tangent curve to the left with a radius of 285.00 feet, the chord of which bears South 64°06'23" East for a distance of 207.52 feet;
South 85°20'03" East a distance of 113.06 feet;
North 01°38'39" East a distance of 207.36 feet;
North 89°56'32" East a distance of 1345.65 feet to a point on the westerly line of the parcel described in deed recorded in Volume 152, Page 522, Deed Records;

thence along the westerly and southeasterly line of said parcel the following seven (7) courses:

South 01°19'10" East a distance of 211.35 feet;
North 57°35'56" East a distance of 111.60 feet;
North 61°34'56" East a distance of 250.00 feet;
South 28°25'04" East a distance of 150.00 feet;
North 61°34'56" East a distance of 300.00 feet;
North 28°25'04" West a distance of 150.00 feet;
North 47°43'56" East a distance of 354.60 feet to the north line of the Northwest Quarter (NW1/4) of said Section 13;

thence along said north line, North 89°57'11" East a distance of 444.56 feet to the point of beginning, the terminus of this description.

EXCEPTING THEREFROM a parcel of land containing 10.00 acres, more or less, located in the North Half of the Northwest Quarter (N1/2 NW1/4) of Section 13, Township 17 South, Range 11 East, Willamette Meridian, Deschutes County, Oregon, being a portion of those lands described in Volume 235, Page 768, Deschutes County Deed Records, and being more particular described as follows:

Commencing at the North Quarter (N1/4) corner of said Section 13; thence along the north-south centerline of said Section 13, South 00°05'07" West a distance of 1316.03 feet to the southeast corner of the Northeast Quarter of the Northwest Quarter (NE1/4 NW1/4) of said Section 13; thence along the south line of said (NE1/4 NW1/4), North 89°57'30" West a distance of 842.26 feet to the **True Point of Beginning** of this description; thence continuing along said south line, North 89°57'30" West a distance of 473.74 feet to the southeast corner of the Northwest Quarter of the Northwest Quarter (NW1/4 NW1/4) of said Section 13; thence along the south line of said (NW1/4 NW1/4), North 89°57'30" West a distance of 162.54 feet; thence leaving said south line, North 00°13'45" East a distance of 94.40 feet; thence North 72°05'43" East a distance of 357.92 feet; thence North 16°02'59" East a distance of 46.94 feet; thence 305.11 feet along the arc of a tangent curve to the left with a radius of 465.00 feet, the chord of which bears North 02°44'52" West for a distance of 299.67 feet; thence 148.21 feet along the arc of a compound curve to the left with a radius of 150.00 feet, the chord of which bears North 49°51'04" West for a distance of 142.25 feet; thence North 70°16'39" East a distance of 204.35 feet; thence North 81°59'32" East a distance of 71.80 feet; thence North 88°37'03" East a distance of 238.17 feet; thence North 75°52'41" East a distance of 163.13 feet; thence North 66°30'21" East a distance of 137.98 feet; thence South 00°08'01" East a distance of 161.69 feet; thence South 00°08'01" East a distance of 67.65 feet; thence South 32°49'32" West a distance of 703.57 feet to the True Point of Beginning, the terminus of this description.

ALSO EXCEPTING THEREFROM a parcel of land containing 10.00 acres, more or less, located in the Northeast Quarter of the Northwest Quarter (NE1/4 NW1/4) and the Northwest Quarter of the Northeast Quarter (NW1/4 NE1/4) of Section 13, Township 17 South, Range 11 East, Willamette Meridian, Deschutes County, Oregon, being a portion of those lands described in Volume 235, Page 768, Deschutes County Deed Records, and being more particular described as follows:

Beginning at the North Quarter (N1/4) corner of said Section 13; thence along the north line of said (NW1/4 NE1/4), South 89°47'50" East a distance of 200.00 feet; thence leaving said north line South 00°05'07" West a distance of 657.96 feet; thence North 89°48'56" West a distance of 662.00 feet; thence North 00°08'01" West a distance of 638.07 feet to a point on the southeasterly boundary line of those lands described in Volume 152, Page 522, Deschutes County Deed Records; thence along said southeasterly boundary line, North 47°43'56" East a distance of 26.90 feet to a point on the north line of the Northwest Quarter (NW1/4) of said Section 13; thence along said north line, North 89°57'11" East a distance of 444.56 feet to the point of beginning, the terminus of this description.

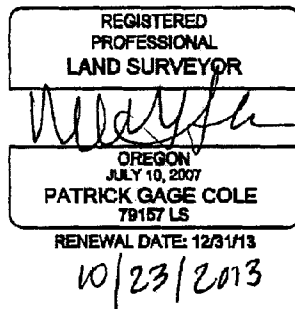
October 23, 2013

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ALSO EXCEPTING THEREFROM that portion dedicated to Deschutes County recorded January 24, 2003, in Volume 2003, Page 5375, Deschutes County Records.

The Basis of Bearings for this description is identical to the Central Oregon Coordinate System.

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



October 23, 2013

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DESCHUTES COUNTY OFFICIAL RECORDS
NANCY BLANKENSHIP, COUNTY CLERK

2014-34412



\$67.00

00887383201400344120070079

10/15/2014 10:21:55 AM

CL-CL Cnt=1 Str=4 SRB
\$35.00 \$11.00 \$21.00

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

IRRIGATION CONTRACT

(AMENDED WATER STORAGE EASEMENT AGREEMENT)

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

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

RECITALS

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

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

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

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

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

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

RECEIVED

OCT 17 2014

CAROL ANN ROBERT
CLERK

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

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

AGREEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18. KCDG and its successors shall require the purchasers/lessees at the time of purchase or lease of adjacent lots which are encumbered by this Water Storage Easement and detailed in Exhibit A to sign and record a document acknowledging that the purchaser/lessee has read and accepted this Agreement, and agrees as a successor in interest to be so bound by the responsibilities contained herein.

19. Parties, by signing below, represent and warrant they each have requisite authority to sign on behalf of the entities so bound.

TUMALO IRRIGATION DISTRICT

KC DEVELOPMENT GROUP, LLC

By Kenneth B. Rieck
Kenneth B. Rieck, Manager

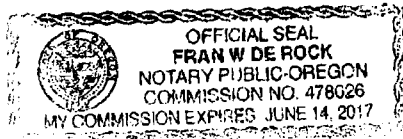
Dated: 10/14/14

By Eric Cadwell
Eric Cadwell, Managing Member

Dated: 10/14/14

STATE OF OREGON)
) ss.
County of Deschutes)

This instrument was acknowledged before me on October 14, 2014 by Kenneth B. Rieck as Manager and Secretary to the Board of Tumalo Irrigation District.



Fran W. De Rock
NOTARY PUBLIC FOR OREGON

STATE OF OREGON)
) ss.
County of Deschutes)

This instrument was acknowledged before me on October 14, 2014 by Eric Cadwell, as Managing Member of KC Development Group, LLC.



Monica L. Stringer
NOTARY PUBLIC FOR OREGON

C:\Users\Bill\AppData\Local\Microsoft\Windows\Temporary Internet Files\OLK8F72\KCDG - TID Irrigation Contract 10 10 14 (Permanent Transfer).docx

EXHIBIT "A", PAGE 1

IRRIGATION EASEMENT

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

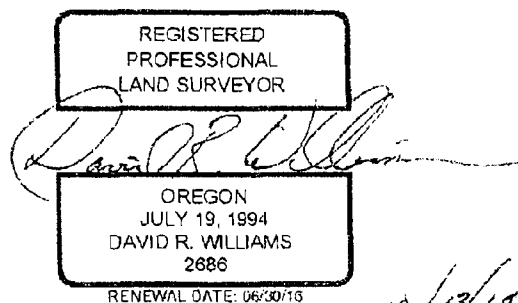
Commencing at the northeast corner of those lands described in Lot Line Adjustment Deed recorded in Volume 2013, Page 48433, Deschutes County Records, from which the South Quarter corner of said Section 13 bears North 89°47'50" West a distance of 344.08 feet; thence along the easterly line of said lands,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

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

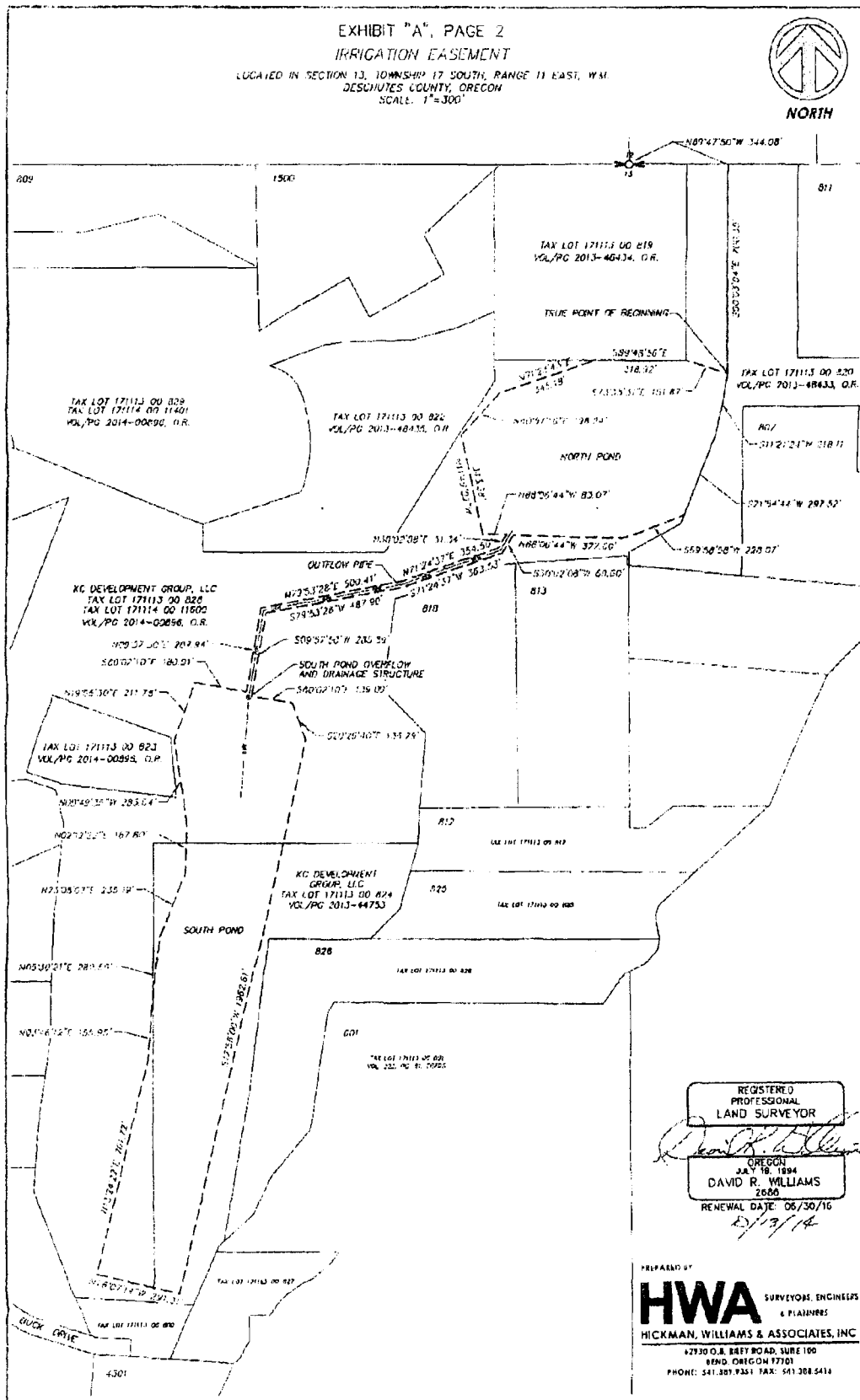
thence leaving said easterly line, South 69°58'58" West a distance of 228.07 feet; thence North 88°06'44" West a distance of 377.60 feet; thence South 30°02'08" West a distance of 69.60 feet; thence South 71°24'37" West a distance of 363.53 feet; thence South 79°53'28" West a distance of 487.90 feet;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

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

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



October 13, 2014
s:\land projects\041125 klippel ranch\docs\tid easement.docx



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

1341

96-602/1232 1

10/15/14

Date

Pay to the
Order of

Deschutes County Clerk

\$ 67.00

Sixty seven dollars 00/100

Dollars



Security
Features
Mark

BANK OF THE
CASCADES

www.boc.com 877-617-3400

For

KCDG LLC 21538.000

⑆123206024⑆ 14 02864 601341

DESCHUTES COUNTY RECORDING
www.deschutes.org/clerk

299004 4 SHIRLEYB
10/15/2014 10:25:33 AM
HURLEY RE PC

CL 67.00

CL

CLR # of Pages Recorded

?

35.00

Multiple Titles (etc.)

1

A&T/CLIS Fee

YES

11.00

AH Fee

YES

21.00

Non-Standard Fee

NO

Return to:

HURLEY RE PC

Official Record Number

2014-34412

Recording Date and Time

10/15/2014 10:21:55 AM

Total \$67.00

CHECK 1341 67.00

Amount Due 0.00

Thank You

Please retain this receipt.



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

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

GARVEY SCHUBERT BARER

A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

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

June 4, 2014

VIA EMAIL AND U.S. MAIL

Mr. Tim Grundeman
Deschutes County Code Enforcement
117 NW Lafayette Avenue
Bend, OR 97701

Re: Code Enforcement Complaint -- Unpermitted Lakes at Tax Lots 1711130000828 and 1711130000824

Dear Mr. Grundeman:

Our office represents Thomas and Dorbina Bishop, who live at 63382 Fawn Lane, Bend, Oregon, adjoining tax lot 1711130000828. We also represent Eugene Bishop, who has first hand knowledge of the information set forth here. This letter is a follow-up to our conversation this morning and provides the details of the complaint in support of the attached Deschutes County Code Enforcement Complaint Form about unpermitted activities at tax lots 1711130000828 and 1711130000824 (the "subject property"). See Attachment 1 (the former is highlighted in yellow and the latter in orange).

Eric Cadwell, Harris Kimble, and/or KC Development Group, LLC (collectively, "KCDG") own the subject property. This complaint is related to KCDG's construction of two lakes on the property without obtaining land use approvals. While the Bishops understand the County takes the position that it has no grading ordinance to limit excavation and grading on the site, and no control over water use at the subject property, the County does have land use ordinances that limit a private property owner's development without appropriate permits, and the associated public review process. The Bishops' due process and property rights are being violated because the County has not provided the public review process under its land use ordinance – Deschutes County Code Chapter 18.

KCDG is currently developing two large lakes. One lake, the northerly lake, has been filled with water. See Attachment 2.¹ KCDG has indicated that the northerly lake will be used as a recreational pond. The southerly, larger lake is currently being lined in preparation for filling with water. See

¹ Mr. and Mrs. Bishop are separately undertaking enforcement action for the unpermitted water use to fill the northerly lake with the Oregon Water Resources Department ("OWRD"). Janet Neuman of the Tonkon Torp law firm is focusing on the OWRD and other aspects of this matter for the Bishops.



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

Mr. Tim Grundeman

June 4, 2014

Page 2

Attachment 3. KCDG has indicated that the southerly lake will be used as a water ski lake. Both lakes are intended to serve KCDG's planned unit or cluster development. KCDG has not obtained the necessary land use approval for either lake or the planned or cluster development.

The lakes do not qualify as uses permitted outright under Deschutes County Code ("DCC") 18.60.020 because the lakes do not meet any of the listed uses identified in that code section. The lakes may qualify as conditional uses as recreation-oriented facilities, or as the County is aware of KCDG's intent, as part and parcel with KCDG's ultimate intent to apply for a planned or cluster development, subject to DCC 18.60.010 - .090.² The land use process is designed to require KCDG to obtain the necessary conditional use permit approval and to allow public review of the project. Further, the subject property is part of the Wildlife Area Combining Zone and Landscape Management Combining Zone that would further constrain KCDG's unpermitted development.

On behalf of the Bishops, this office requests that the County immediately stop work at the site and require KCDG to obtain necessary land use approvals, require the deconstruction of the lakes with complete remediation of the site under DCC Chapter 18.144, and obtain any monetary relief available to the County as a result of these violations. If the County allows the development to move forward, whereby KCDG would flout the land use process, the Bishops will treat the County's action as allowing the use.

Thank you for your prompt attention to this matter and your immediate action to stop KCDG from continued construction activities at the subject property.

Sincerely,

GARVEY SCHUBERT BARER

By

Jennifer Bragar

JB:tk

Enclosures

cc: Lori Furlong (by e-mail)
Laurie Craghead (by e-mail)
Jeremy Giffin (by e-mail)
Tumalo Irrigation District Board of Directors (by e-mail c/o Ken Rieck)
Ken Rieck, Manager of Tumalo Irrigation District (by e-mail)
Oregon Water Resources Department (by US mail)
Clients

PDX_DOCS:518323.1 [39124.00100]

² In our conversation today, you indicated that you are aware that KCDG intends to use the large lake for waterskiing as the centerpiece of a planned or cluster development.



Instructions: In order for your complaint to be accepted, you must fill in all questions completely and sign on the back of this form. It is important that you supply as much detail as possible. If you have any questions, call code enforcement at 541-385-1707.

Exhibit 17
Page 3 of 8

The top portion of this side is required and must be completed.

Complainant: (Your Name)

Name: Jennifer Bragar, Agent for Thomas Bishop, Dorbina Bishop and Eugene Bishop
Address: Garvey Schubert Barer, 121 SW Morrison, 11th Floor
City: Portland **State:** OR **Zip:** 97204
Daytime phone #: 503.228.3939

Can violation be seen from the road? () Yes () No If not, what is the best inspection point?

Is the Complainant a neighbor? (X) Yes () No
The complainant gives the Code Enforcement Technician permission to use their property for viewing the violation: (X) Yes () No If not, why: _____

Will you, the complainant, testify in court, should the need arise? (X) Yes () No
(Note: your complaint may not be accepted without your being available to testify.)

If you have photos, or other related information, that can be used as evidence of this violation, please submit them with this form. The submitted documentation will not be returned and will become part of the complaint file.

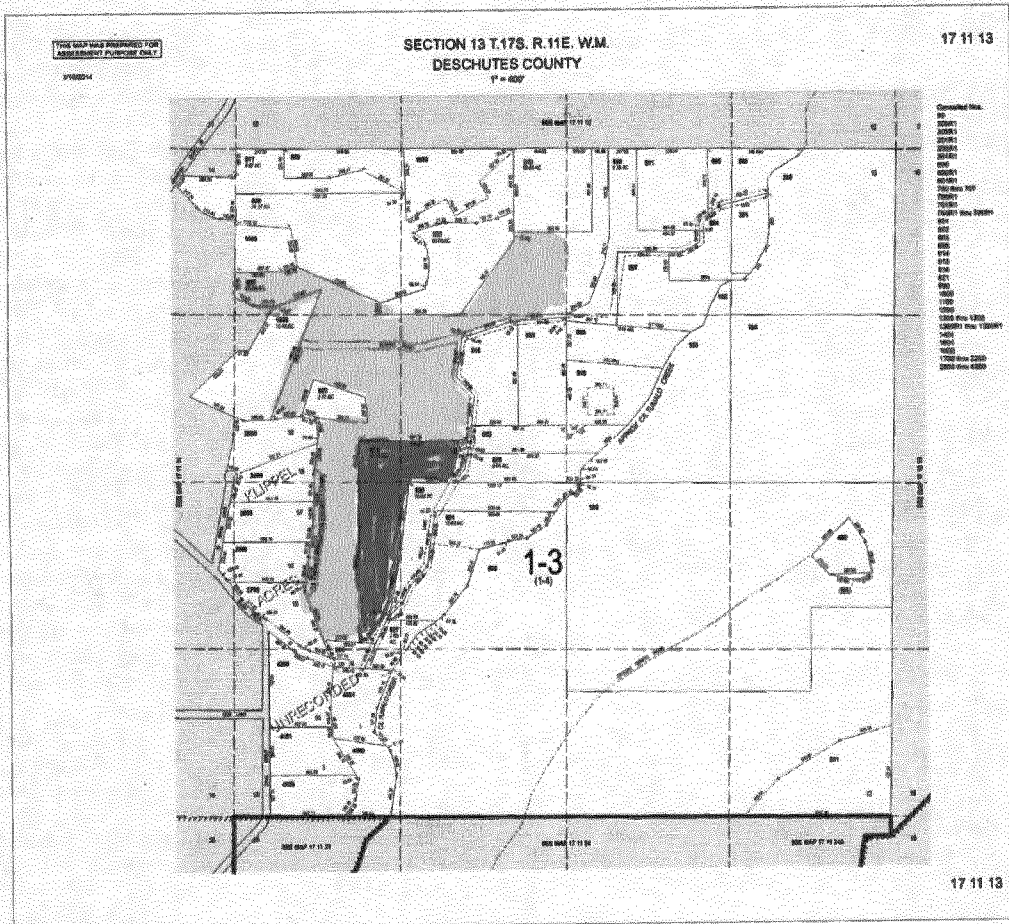
By signing below, I declare, under penalty of perjury, that all information submitted on and with this form is true and accurate to the best of my knowledge.

Jennifer Bragar June 4, 2014
COMPLAINANT For Thomas, Dorbina and Eugene Bishop DATE
Thank you for assisting in making Deschutes County a better place to live.

Your Code Enforcement Staff

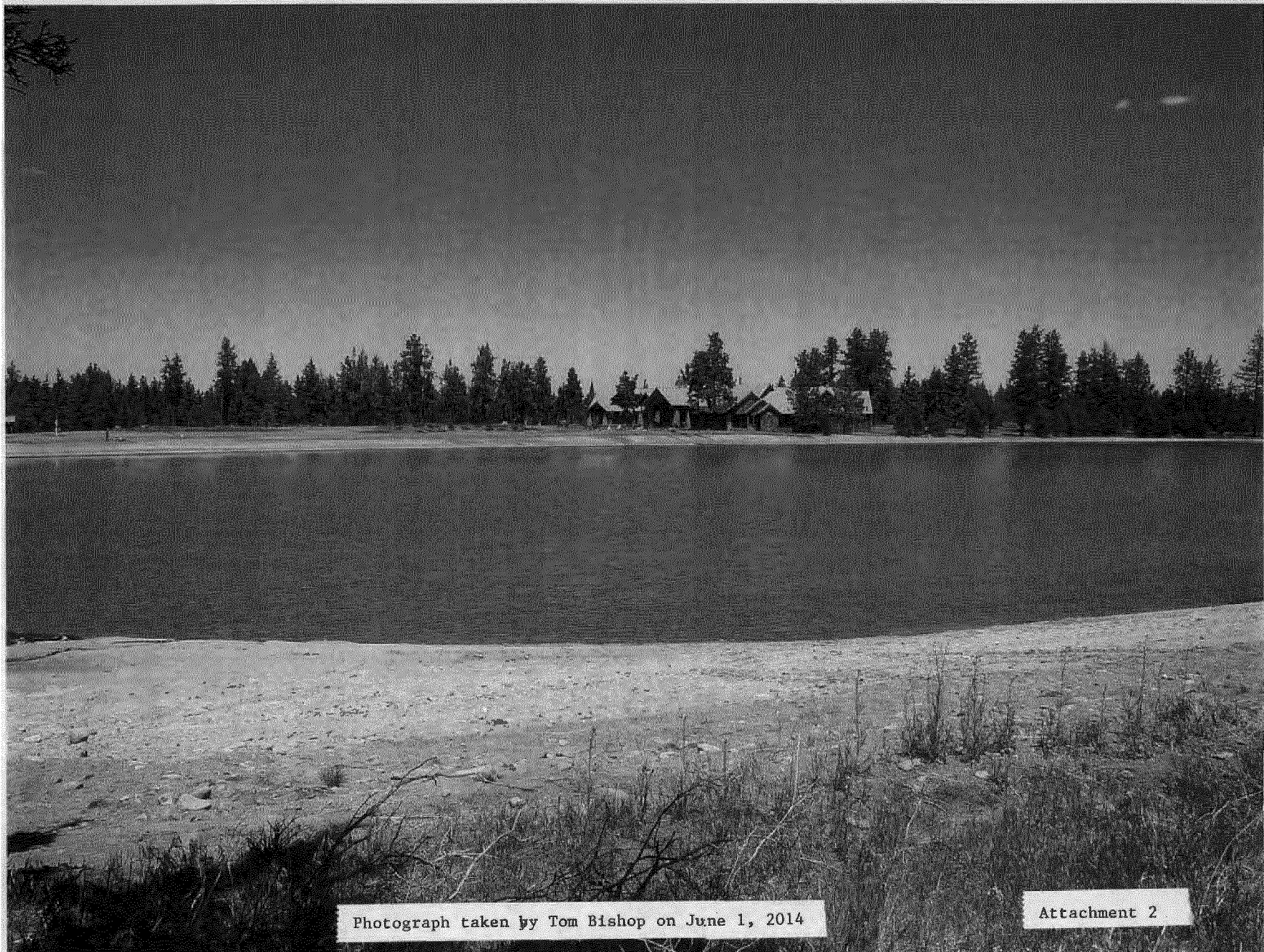
FOR OFFICE USE ONLY

Subdivision: _____ Lot: _____ Block: _____



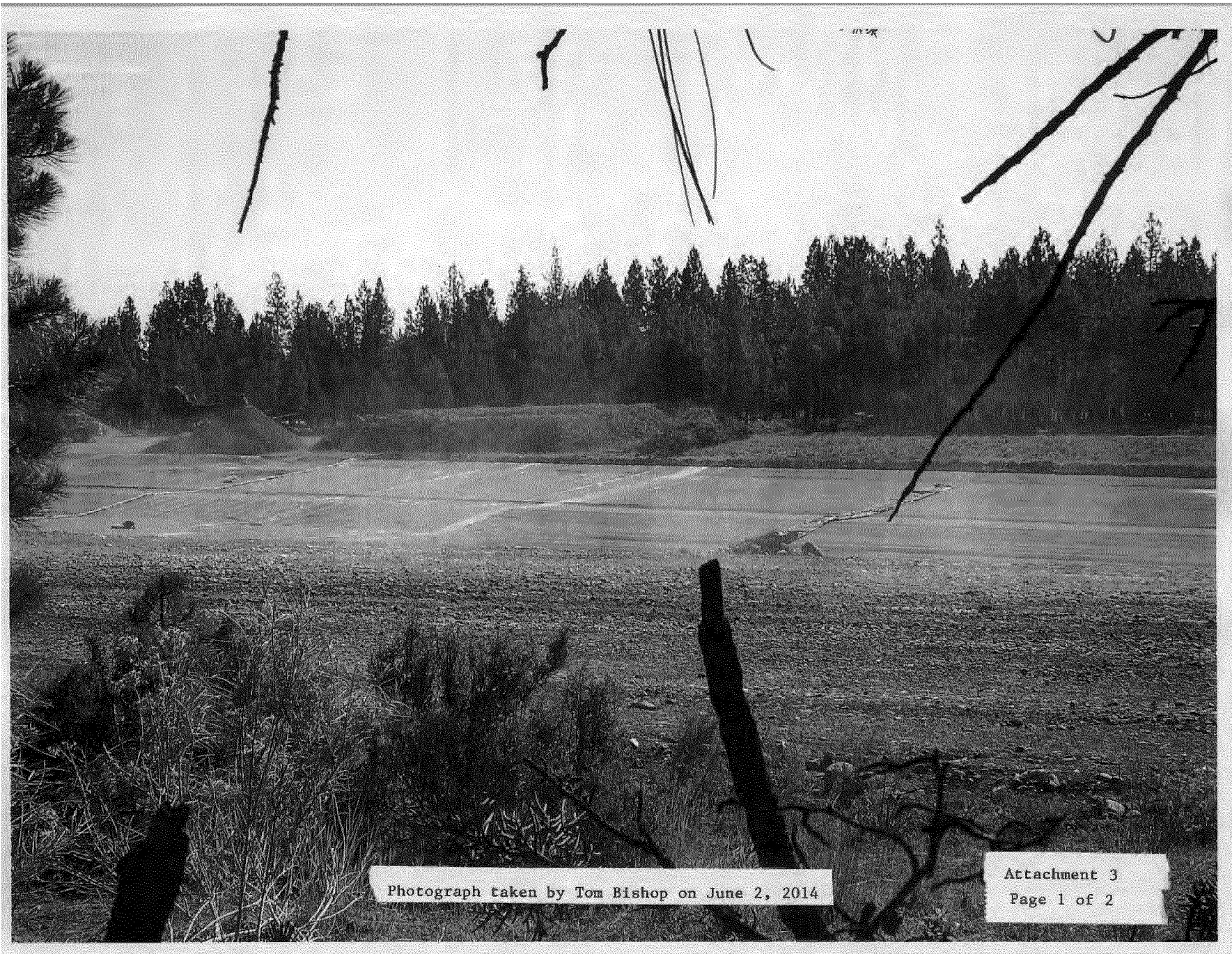
Deschutes County Property Information Report, page 6. (For Report Disclaimer see page 1)

Attachment 1



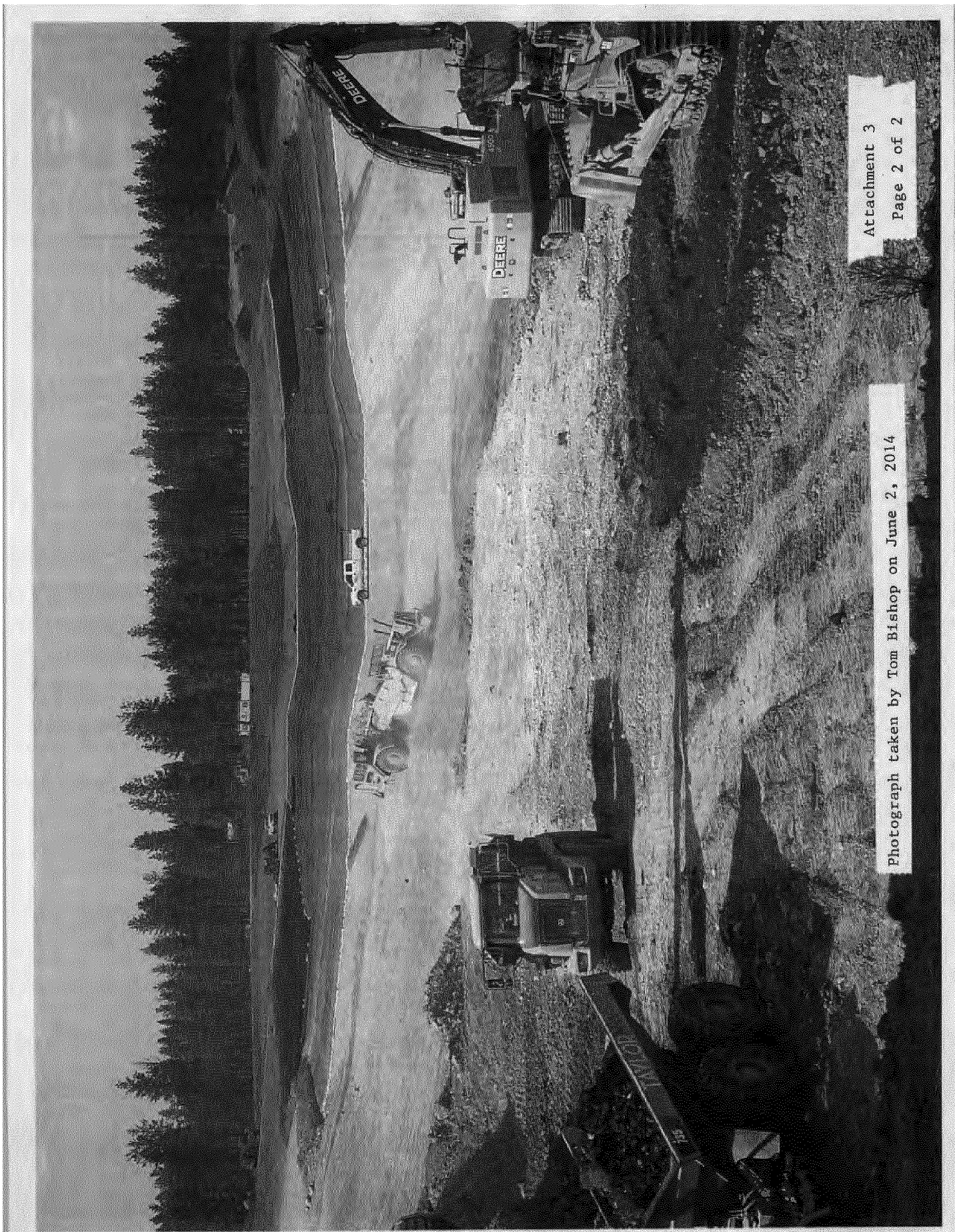
Photograph taken by Tom Bishop on June 1, 2014

Attachment 2



Photograph taken by Tom Bishop on June 2, 2014

Attachment 3
Page 1 of 2



Attachment 3
Page 2 of 2

Photograph taken by Tom Bishop on June 2, 2014





DESCHUTES COUNTY OFFICIAL RECORDS
NANCY BLANKENSHIP, COUNTY CLERK

2015-41261

\$143.00



010230052015004126100100

10/06/2015 02:48:53 PM

M-DT Cnt=1 Stn=4 SRB
\$85.00 \$11.00 \$21.00 \$10.00 \$5.00

After Recording Return To:
Carlton M. Cadwell
909 North Kellogg Street
Kennewick, WA 99336

[Space Above This Line For Recording Data]

DEED OF TRUST

DEFINITIONS

- A. **Security Instrument** means this document, which is dated October 24, 2013.
- B. **Borrower** is Harris Kimble and Nancy Kimble of 63570 Johnson Rd., Bend, OR 97703. **Borrower** is the Trustor under this **Security Instrument**.
- C. **Lender** is Carlton M. Cadwell of 909 N Kellogg, Kennewick, WA 99336. **Lender** is the beneficiary under this **Security Instrument**.
- D. **Trustee** is Western Title & Escrow Company of 360 SW Bond, Ste 100, Bend, OR 97702.
- E. **Property** means the property that is described in **Exhibit A** attached hereto and made a part hereof.
- F. **Loan** means the debt that **Borrower** owes **Lender** in the original principal amount of One Hundred Twenty Thousand and 00/100 dollars(\$120,000.00).
- G. **Applicable Law** means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.
- H. **Community Association Dues, Fees, and Assessments** means all dues, fees, assessments and other charges that are imposed on **Borrower** or the **Property** by a condominium association, homeowners association or similar organization.
- I. **Escrow Items** means those items that are described in **Section 3**.
- J. **Miscellaneous Proceeds** means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in **Section 5**) for: (i) damage to, or destruction of, the **Property**; (ii) condemnation or other taking of all or any part of the **Property**; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the **Property**.

Exhibit 21
Page 1 of 19

Exhibit 19
Page 1 of 19

K. *Periodic Payment* means the regularly scheduled amount due for (i) principal and interest under the *Loan*, plus (ii) any amounts under **Section 3** of this *Security Instrument*.

M. *Successor in Interest of Borrower* means any party that has taken title to the *Property*, whether or not that party has assumed *Borrower's* obligations under the *Loan* and/or this *Security Instrument*.

This *Security Instrument* secures to *Lender*: (i) the repayment of the *Loan*, and all renewals, extensions and modifications of the *Loan*; and (ii) the performance of *Borrower's* covenants and agreements under this *Security Instrument* and the *Loan*. For this purpose, *Borrower* irrevocably grants and conveys to *Trustee*, in trust, with power of sale, the *Property* described in **Exhibit A** attached hereto and made a part hereof located in Deschutes County, Oregon.

TOGETHER WITH all the improvements now or hereafter erected on the property, and all easements, appurtenances, and fixtures now or hereafter a part of the *Property*. All replacements and additions shall also be covered by this *Security Instrument*. All of the foregoing is referred to in this *Security Instrument* as the *Property*.

BORROWER COVENANTS that *Borrower* is lawfully of the estate hereby conveyed and has the right to grant and convey the *Property* and that the *Property* is unencumbered, except for encumbrances of record. *Borrower* warrants and will defend generally the title to the *Property* against all claims and demands, subject to any encumbrances of record.

THIS SECURITY INSTRUMENT combines uniform covenants for national use and non-uniform covenants with limited variations by jurisdiction to constitute a uniform security instrument covering real property.

Borrower and *Lender* covenant and agree as follows:

1. Payment of Principal, Interest, Escrow Items, Prepayment Charges, and Late Charges. *Borrower* shall pay when due the principal of, and interest on, the debt evidenced by the *Loan* and any prepayment charges and late charges due under the *Loan*. Upon receiving written notice from *Lender*, *Borrower* shall also pay funds for *Escrow Items* pursuant to **Section 3**. Payments due under the *Loan* and this *Security Instrument* shall be made in U.S. currency. However, if any check or other instrument received by *Lender* as payment under the *Loan* or this *Security Instrument* is returned to *Lender* unpaid, *Lender* may require that any or all subsequent payments due under the *Loan* and this *Security Instrument* be made in one or more of the following forms, as selected by *Lender*: (a) cash; (b) money order; or (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality, or entity.

Payments are deemed received by *Lender* when received at the location designated in the *Loan* or at such other location as may be designated by *Lender* in accordance with the notice provisions in **Section 13**. *Lender* may return any payment or partial payment if the payment or partial payments are insufficient to bring the *Loan* current. *Lender* may accept

any payment or partial payment insufficient to bring the *Loan* current, without waiver of any rights hereunder or prejudice to its rights to refuse such payment or partial payments in the future, but *Lender* is not obligated to apply such payments at the time such payments are accepted. If each *Periodic Payment* is applied as of its scheduled due date, then *Lender* need not pay interest on unapplied funds. *Lender* may hold such unapplied funds until *Borrower* makes payment to bring the *Loan* current. If *Borrower* does not do so within a reasonable period of time, *Lender* shall either apply such funds or return them to *Borrower*. If not applied earlier, such funds will be applied to the outstanding principal balance under the *Loan* immediately prior to foreclosure. No offset or claim which *Borrower* might have now or in the future against *Lender* shall relieve *Borrower* from making payments due under the *Loan* and this *Security Instrument* or performing the covenants and agreements secured by this *Security Instrument*.

2. Application of Payments or Proceeds. Except as otherwise described in this **Section 2**, all payments accepted and applied by *Lender* shall be applied in the following order of priority: (a) interest due under the *Loan*; (b) principal due under the *Loan*; (c) amounts due under **Section 3**. Such payments shall be applied to each *Periodic Payment* in the order in which it became due. Any remaining amounts shall be applied first to late charges, second to any other amounts due under this *Security Instrument*, and then to reduce the principal balance of the *Loan*.

If *Lender* receives a payment from *Borrower* for a delinquent *Periodic Payment* which includes a sufficient amount to pay any late charge due, the payment may be applied to the delinquent payment and the late charge. If more than one *Periodic Payment* is outstanding, *Lender* may apply any payment received from *Borrower* to the repayment of the *Periodic Payments* if, and to the extent that, each payment can be paid in full. To the extent that any excess exists after the payment is applied to the full payment of one or more *Periodic Payments*, such excess may be applied to any late charges due. Voluntary prepayments shall be applied first to any prepayment charges and then as described in the *Loan*.

Any application of payments, insurance proceeds, or *Miscellaneous Proceeds* to principal due under the *Loan* shall not extend or postpone the due date, or change the amount, of the *Periodic Payments*.

3. Funds for Escrow Items. Upon receiving written notice from *Lender*, *Borrower* shall pay to *Lender* on the day *Periodic Payments* are due under the *Loan*, until the *Loan* is paid in full, a sum (the *Funds*) to provide for payment of amounts due for: (a) taxes and assessments and other items which can attain priority over this *Security Instrument* as a lien or encumbrance on the *Property*; (b) leasehold payments or ground rents on the *Property*, if any; and (c) premiums for any and all insurance required by *Lender* under **Section 5**. These items are called *Escrow Items*. At origination or at any time during the term of the *Loan*, *Lender* may require that *Community Association Dues, Fees, and Assessments*, if any, be escrowed by *Borrower*, and such dues, fees and assessments shall be an *Escrow Item*. *Borrower* shall promptly furnish to *Lender* all notices of amounts to be paid under this *Section*. *Borrower* shall pay *Lender* the *Funds* for *Escrow Items* unless *Lender* waives *Borrower's* obligation to pay the *Funds* for any or all *Escrow Items*. *Lender* may waive

Borrower's obligation to pay to Lender Funds for any or all Escrow Items at any time. Any such waiver may only be in writing. In the event of such waiver, Borrower shall pay directly, when and where payable, the amounts due for any Escrow Items for which payment of Funds has been waived by Lender and, if Lender requires, shall furnish to Lender receipts evidencing such payment within such time period as Lender may require. Borrower's obligation to make such payments and to provide receipts shall for all purposes be deemed to be a covenant and agreement contained in this Security Instrument, as the phrase covenant and agreement is used in Section 8. If Borrower is obligated to pay Escrow Items directly, pursuant to a waiver, and Borrower fails to pay the amount due for an Escrow Item, Lender may exercise its rights under Section 8 and pay such amount and Borrower shall then be obligated under Section 8 to repay to Lender any such amount. Lender may revoke the waiver as to any or all Escrow Items at any time by a notice given in accordance with Section 15 and, upon such revocation, Borrower shall pay to Lender all Funds, and in such amounts, that are then required under this Section 3.

The Funds shall be held in an institution whose deposits are insured by a federal agency, instrumentality, or entity (including Lender, if Lender is an institution whose deposits are so insured) or in any Federal Home Loan Bank. Lender shall apply the Funds to pay the Escrow Items at the appropriate time in accordance with Applicable Law. Lender shall not charge Borrower for holding and applying the Funds, annually analyzing the escrow account, or verifying the Escrow Items, unless Lender pays Borrower interest on the Funds and Applicable Law permits Lender to make such a charge. Unless an agreement is made in writing or Applicable Law requires interest to be paid on the Funds, Lender shall not be required to pay Borrower any interest or earnings on the Funds. Lender shall give to Borrower, without charge, an annual accounting of the Funds. If there is a shortage of Funds held in escrow, Lender shall notify Borrower and Borrower shall pay to Lender the amount necessary to make up the shortage.

Upon payment in full of all sums secured by this Security Instrument, Lender shall promptly refund to Borrower any Funds held by Lender. Notwithstanding the foregoing, no payments by Borrower to Lender of Escrow Funds shall be necessary unless written notice is give by Lender to Borrower.

4. Charges; Liens. *Borrower shall pay all taxes, assessments, charges, fines, and impositions attributable to the Property which can attain priority over this Security Instrument, leasehold payments or ground rents on the Property, if any, and Community Association Dues, Fees, and Assessments, if any.*

Borrower shall promptly discharge any lien which has priority over this Security Instrument unless Borrower: (a) agrees in writing to the payment of the obligation secured by the lien in a manner acceptable to Lender, but only so long as Borrower is performing such agreement; (b) contests the lien in good faith by, or defends against enforcement of the lien in, legal proceedings which in Lender's opinion operate to prevent the enforcement of the lien while those proceedings are pending, but only until such proceedings are concluded; or (c) secures from the holder of the lien an agreement satisfactory to Lender subordinating the lien to this Security Instrument. If Lender determines that any part of the

Property is subject to a lien which can attain priority over this *Security Instrument*, *Lender* may give *Borrower* a notice identifying the lien. Within 10 days of the date on which that notice is given, *Borrower* shall satisfy the lien or take one or more of the actions set forth above in this **Section 4**.

Lender may require *Borrower* to pay a one-time charge for real estate tax verification and/or reporting service used by *Lender* in connection with this *Loan*.

5. Property Insurance. *Borrower* shall keep the improvements now existing or hereafter erected on the *Property* insured against loss by fire, hazards included within the term "extended coverage," and any other hazards including, but not limited to, earthquakes and floods, for which *Lender* requires insurance. This insurance shall be maintained in the amounts (including deductible levels) and for the periods that *Lender* requires. What *Lender* requires pursuant to the preceding sentences can change during the term of the *Loan*. The insurance carrier providing the insurance shall be chosen by *Borrower* subject to *Lender's* right to disapprove *Borrower's* choice, which right shall not be exercised unreasonably. *Lender* may require *Borrower* to pay, in connection with this *Loan*, either: (a) a one-time charge for flood zone determination, certification and tracking services; or (b) a one-time charge for flood zone determination and certification services and subsequent charges each time re-mappings or similar changes occur which reasonably might affect such determination or certification. *Borrower* shall also be responsible for the payment of any fees imposed by the Federal Emergency Management Agency in connection with the review of any flood zone determination resulting from an objection by *Borrower*.

If *Borrower* fails to maintain any of the coverages described above, *Lender* may obtain insurance coverage, at *Lender's* option and *Borrower's* expense. *Lender* is under no obligation to purchase any particular type or amount of coverage. Therefore, such coverage shall cover *Lender*, but might or might not protect *Borrower*, *Borrower's* equity in the *Property*, or the contents of the *Property*, against any risk, hazard or liability and might provide greater or lesser coverage than was previously in effect. *Borrower* acknowledges that the cost of the insurance coverage so obtained might significantly exceed the cost of insurance that *Borrower* could have obtained. Any amounts disbursed by *Lender* under this **Section 5** shall become additional debt of *Borrower* secured by this *Security Instrument*. These amounts shall bear interest at the *Loan* rate from the date of disbursement and shall be payable, with such interest, upon notice from *Lender* to *Borrower* requesting payment.

All insurance policies required by *Lender* and renewals of such policies shall be subject to *Lender's* right to disapprove such policies, shall include a standard mortgage clause, and shall name *Lender* as mortgagee and/or as an additional loss payee. *Lender* shall have the right to hold the policies and renewal certificates. If *Lender* requires, *Borrower* shall promptly give to *Lender* all receipts of paid premiums and renewal notices. If *Borrower* obtains any form of insurance coverage, not otherwise required by *Lender*, for damage to, or destruction of, the *Property*, such policy shall include a standard mortgage clause and shall name *Lender* as mortgagee and/or as an additional loss payee.

In the event of loss, *Borrower* shall give prompt notice to the insurance carrier and

Lender. Lender may make proof of loss if not made promptly by Borrower. Unless Lender and Borrower otherwise agree in writing, any insurance proceeds, whether or not the underlying insurance was required by Lender, shall be applied to restoration or repair of the Property, if the restoration or repair is economically feasible and Lender's security is not lessened. During such repair and restoration period, Lender shall have the right to hold such insurance proceeds until Lender has had an opportunity to inspect such Property to ensure the work has been completed to Lender's satisfaction, provided that such inspection shall be undertaken promptly. Lender may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work is completed. Unless an agreement is made in writing or Applicable Law requires interest to be paid on such insurance proceeds, Lender shall not be required to pay Borrower any interest or earnings on such proceeds. Fees for public adjusters, or other third parties, retained by Borrower shall not be paid out of the insurance proceeds and shall be the sole obligation of Borrower. If the restoration or repair is not economically feasible or Lender's security would be lessened, the insurance proceeds shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to Borrower. Such insurance proceeds shall be applied in the order provided for in Section 2.

If Borrower abandons the Property, Lender may file, negotiate and settle any available insurance claim and related matters. If Borrower does not respond within 30 days to a notice from Lender that the insurance carrier has offered to settle a claim, then Lender may negotiate and settle the claim. The 30-day period will begin when the notice is given. In either event, or if Lender acquires the Property under Section 20 or otherwise, Borrower hereby assigns to Lender (a) Borrower's rights to any insurance proceeds in an amount not to exceed the amounts unpaid under the Loan or this Security Instrument, and (b) any other of Borrower's rights (other than the right to any refund of unearned premiums paid by Borrower) under all insurance policies covering the Property, insofar as such rights are applicable to the coverage of the Property. Lender may use the insurance proceeds either to repair or restore the Property or to pay amounts unpaid under the Loan or this Security Instrument, whether or not then due.

6. Protective Advances. This Security Instrument secures any advances *Lender*, at his discretion, may make under **Section 8** of this Security Instrument to protect *Lender's* interest in the *Property* and rights under this Security Instrument.

7. Preservation, Maintenance and Protection of the Property; Inspections. *Borrower* shall not destroy, damage or impair the *Property*, allow the *Property* to deteriorate or commit waste on the *Property*. Whether or not *Borrower* is residing in the *Property*, *Borrower* shall maintain the *Property* in order to prevent the *Property* from deteriorating or decreasing in value due to its condition. Unless it is determined pursuant to **Section 5** that repair or restoration is not economically feasible, *Borrower* shall promptly repair the *Property* if damaged to avoid further deterioration or damage. If insurance or condemnation proceeds are paid in connection with damage to, or the taking of, the *Property*, *Borrower* shall be responsible for repairing or restoring the *Property* only if *Lender* has released proceeds for such purposes. *Lender* may disburse proceeds for the repairs and restoration in a single payment or in a series of progress payments as the work

is completed. If the insurance or condemnation proceeds are not sufficient to repair or restore the *Property*, *Borrower* is not relieved of *Borrower's* obligation for the completion of such repair or restoration.

Lender or its agent may make reasonable entries upon and inspections of the *Property*. If it has reasonable cause, *Lender* may inspect the interior of the improvements on the *Property*. *Lender* shall give *Borrower* notice at the time of or prior to such an interior inspection specifying such reasonable cause.

8. Protection of Lender's Interest in the Property and Rights Under this Security Instrument. If (a) *Borrower* fails to perform the *covenants and agreements* contained in this Security Instrument, (b) there is a legal proceeding that might significantly affect *Lender's* interest in the *Property* and/or rights under this Security Instrument (such as a proceeding in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over this Security Instrument or to enforce laws or regulations), or (c) *Borrower* has abandoned the *Property*, then *Lender* may do and pay for whatever is reasonable or appropriate to protect *Lender's* interest in the *Property* and rights under this Security Instrument, including protecting and/or assessing the value of the *Property*, and securing and/or repairing the *Property*. *Lender's* actions can include, but are not limited to: (i) paying any sums secured by a lien which has priority over this Security Instrument; (ii) appearing in court; and (iii) paying reasonable attorneys' fees to protect its interest in the *Property* and/or rights under this Security Instrument, including its secured position in a bankruptcy proceeding. Securing the *Property* includes, but is not limited to, entering the *Property* to make repairs, change locks, replace or board up doors and windows, drain water from pipes, eliminate building or other code violations or dangerous conditions, and have utilities turned on or off. Although *Lender* may take action under this **Section 8**, *Lender* does not have to do so and is not under any duty or obligation to do so. It is agreed that *Lender* incurs no liability for not taking any or all actions authorized under this **Section 8**.

Any amounts disbursed by *Lender* under this **Section 8** shall become additional debt of *Borrower* secured by this Security Instrument. These amounts shall bear interest at the *Loan* rate from the date of disbursement and shall be payable, with such interest, upon notice from *Lender* to *Borrower* requesting payment.

9. Assignment of Miscellaneous Proceeds; Forfeiture. All *Miscellaneous Proceeds* are hereby assigned to and shall be paid to *Lender*. If the *Property* is damaged, such *Miscellaneous Proceeds* shall be applied to restoration or repair of the *Property*, if the restoration or repair is economically feasible and *Lender's* security is not lessened. During such repair and restoration period, *Lender* shall have the right to hold such *Miscellaneous Proceeds* until *Lender* has had an opportunity to inspect such *Property* to ensure the work has been completed to *Lender's* satisfaction, provided that such inspection shall be undertaken promptly. *Lender* may pay for the repairs and restoration in a single disbursement or in a series of progress payments as the work is completed. Unless an agreement is made in writing or *Applicable Law* requires interest to be paid on such *Miscellaneous Proceeds*, *Lender* shall not be required to pay *Borrower* any interest or

earnings on such *Miscellaneous Proceeds*. If the restoration or repair is not economically feasible or *Lender's* security would be lessened, the *Miscellaneous Proceeds* shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to *Borrower*. Such *Miscellaneous Proceeds* shall be applied in the order provided for in **Section 2**.

In the event of a total taking, destruction, or loss in value of the *Property*, the *Miscellaneous Proceeds* shall be applied to the sums secured by this Security Instrument, whether or not then due, with the excess, if any, paid to *Borrower*. In the event of a partial taking, destruction, or loss in value of the *Property* in which the fair market value of the *Property* immediately before the partial taking, destruction, or loss in value is equal to or greater than the amount of the sums secured by this Security Instrument immediately before the partial taking, destruction, or loss in value, unless *Borrower* and *Lender* otherwise agree in writing, the sums secured by this Security Instrument shall be reduced by the amount of the *Miscellaneous Proceeds* multiplied by the following fraction: (a) the total amount of the sums secured immediately before the partial taking, destruction, or loss in value divided by (b) the fair market value of the *Property* immediately before the partial taking, destruction, or loss in value. Any balance shall be paid to *Borrower*.

In the event of a partial taking, destruction, or loss in value of the *Property* in which the fair market value of the *Property* immediately before the partial taking, destruction, or loss in value is less than the amount of the sums secured immediately before the partial taking, destruction, or loss in value, unless *Borrower* and *Lender* otherwise agree in writing, the *Miscellaneous Proceeds* shall be applied to the sums secured by this Security Instrument whether or not the sums are then due. If the *Property* is abandoned by *Borrower*, or if, after notice by *Lender* to *Borrower* that the *Opposing Party* (as defined in the next sentence) offers to make an award to settle a claim for damages, *Borrower* fails to respond to *Lender* within 30 days after the date the notice is given, *Lender* is authorized to collect and apply the *Miscellaneous Proceeds* either to restoration or repair of the *Property* or to the sums secured by this Security Instrument, whether or not then due. *Opposing Party* means the third party that owes *Borrower Miscellaneous Proceeds* or the party against whom *Borrower* has a right of action in regard to *Miscellaneous Proceeds*.

Borrower shall be in default if any action or proceeding, whether civil or criminal, is begun that, in *Lender's* judgment, could result in forfeiture of the *Property* or other material impairment of *Lender's* interest in the *Property* or rights under this Security Instrument. *Borrower* can cure such a default and, if acceleration has occurred, reinstate as provided in **Section 17**, by causing the action or proceeding to be dismissed with a ruling that, in *Lender's* judgment, precludes forfeiture of the *Property* or other material impairment of *Lender's* interest in the *Property* or rights under this Security Instrument. The proceeds of any award or claim for damages that are attributable to the impairment of *Lender's* interest in the *Property* are hereby assigned and shall be paid to *Lender*.

All *Miscellaneous Proceeds* that are not applied to restoration or repair of the *Property* shall be applied in the order provided for in **Section 2**.

10. Borrower Not Released; Forbearance By Lender Not a Waiver. Extension of the time for payment or modification of amortization of the sums secured by this Security Instrument granted by *Lender* to *Borrower* or any Successor in Interest of *Borrower* shall not operate to release the liability of *Borrower* or any *Successors in Interest of Borrower*. *Lender* shall not be required to commence proceedings against any *Successor in Interest of Borrower* or to refuse to extend time for payment or otherwise modify amortization of the sums secured by this Security Instrument by reason of any demand made by the original *Borrower* or any *Successors in Interest of Borrower*. Any forbearance by *Lender* in exercising any right or remedy including, without limitation, *Lender's* acceptance of payments from third persons, entities or *Successors in Interest of Borrower* or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy.

11. Joint and Several Liability; Co-signers; Successors and Assigns Bound. *Borrower* covenants and agrees that *Borrower's* obligations and liability shall be joint and several.

12. Loan Charges. If the *Loan* is subject to a law which sets maximum *loan* charges, and that law is finally interpreted so that the interest or other *loan* charges collected or to be collected in connection with the *Loan* exceed the permitted limits, then: (a) any such *loan* charge shall be reduced by the amount necessary to reduce the charge to the permitted limit; and (b) any sums already collected from *Borrower* which exceeded permitted limits will be refunded to *Borrower*. *Lender* may choose to make this refund by reducing the principal owed under the *Loan* or by making a direct payment to *Borrower*. If a refund reduces principal, the reduction will be treated as a partial prepayment without any prepayment charge (whether or not a prepayment charge is provided for under the *Loan*). *Borrower's* acceptance of any such refund made by direct payment to *Borrower* will constitute a waiver of any right of action *Borrower* might have arising out of such overcharge.

13. Notices. All notices given by *Borrower* or *Lender* in connection with this Security Instrument must be in writing. Any notice to *Borrower* in connection with this Security Instrument shall be deemed to have been given to *Borrower* when mailed by first class mail or when actually delivered to *Borrower's* notice address if sent by other means. Notice to any one *Borrower* shall constitute notice to all *Borrowers* unless *Applicable Law* expressly requires otherwise. The notice address shall be the addresses set forth in the Definition section above for *Borrower* and *Lender*. *Borrower* shall promptly notify *Lender* of *Borrower's* change of address. If *Lender* specifies a procedure for reporting *Borrower's* change of address, then *Borrower* shall only report a change of address through that specified procedure. There may be only one designated notice address under this Security Instrument at any one time. Any notice to *Lender* shall be given by delivering it or by mailing it by first class mail to *Lender's* address stated herein unless *Lender* has designated another address by notice to *Borrower*. Any notice in connection with this Security Instrument shall not be deemed to have been given to *Lender* until actually received by *Lender*. If any notice required by this Security Instrument is also required under *Applicable Law*, the *Applicable Law* requirement will satisfy the corresponding requirement under this Security Instrument.

14. Governing Law; Severability; Rules of Construction. This Security Instrument shall be governed by federal law and the law of the jurisdiction in which the *Property* is located. All rights and obligations contained in this Security Instrument are subject to any requirements and limitations of *Applicable Law*. *Applicable Law* might explicitly or implicitly allow the parties to agree by contract or it might be silent, but such silence shall not be construed as a prohibition against agreement by contract. In the event that any provision or clause of this Security Instrument or the *Loan* conflicts with *Applicable Law*, such conflict shall not affect other provisions of this Security Instrument or the *Loan* which can be given effect without the conflicting provision.

As used in this Security Instrument: (a) words of the masculine gender shall mean and include corresponding neuter words or words of the feminine gender; (b) words in the singular shall mean and include the plural and vice versa; and (c) the word "may" gives sole discretion without any obligation to take any action.

15. Borrower's Copy. *Borrower* shall be given one copy of this Security Instrument.

16. Transfer of the Property or a Beneficial Interest in Borrower. As used in this Section 16, *Interest in the Property* means any legal or beneficial interest in the *Property*, including, but not limited to, those beneficial interests transferred in a bond for deed, contract for deed, installment sales contract or escrow agreement, the intent of which is the transfer of title by *Borrower* at a future date to a purchaser. If all or any part of the *Property* or any Interest in the *Property* is sold or transferred without *Lender's* prior written consent, *Lender* may require immediate payment in full of all sums secured by this Security Instrument. However, this option shall not be exercised by *Lender* if such exercise is prohibited by *Applicable Law*.

If *Lender* exercises this option, *Lender* shall give *Borrower* notice of acceleration. The notice shall provide a period of not less than 30 days from the date the notice is given in accordance with Section 13 within which *Borrower* must pay all sums secured by this Security Instrument. If *Borrower* fails to pay these sums prior to the expiration of this period, *Lender* may invoke any remedies permitted by this Security Instrument without further notice or demand on *Borrower*.

17. Borrower's Right to Reinstate After Acceleration. If *Borrower* meets certain conditions, *Borrower* shall have the right to have enforcement of this Security Instrument discontinued at any time prior to the earliest of: (a) five days before sale of the *Property* pursuant to any power of sale contained in this Security Instrument; (b) such other period as *Applicable Law* might specify for the termination of *Borrower's* right to reinstate; or (c) entry of a judgment enforcing this Security Instrument. Those conditions are that *Borrower*: (a) pays *Lender* all sums which then would be due under this Security Instrument and the *Loan* as if no acceleration had occurred; (b) cures any default of any other covenants or agreements; (c) pays all expenses incurred in enforcing this Security Instrument, including, but not limited to, reasonable attorneys' fees, property inspection and valuation fees, and other fees incurred for the purpose of protecting *Lender's* interest

in the *Property* and rights under this Security Instrument; and (d) takes such action as *Lender* may reasonably require to assure that *Lender's* interest in the *Property* and rights under this Security Instrument, and *Borrower's* obligation to pay the sums secured by this Security Instrument, shall continue unchanged. *Lender* may require that *Borrower* pay such reinstatement sums and expenses in one or more of the following forms, as selected by *Lender*: (a) cash; (b) money order; (c) certified check, bank check, treasurer's check or cashier's check, provided any such check is drawn upon an institution whose deposits are insured by a federal agency, instrumentality or entity; or (d) Electronic Funds Transfer. Upon reinstatement by *Borrower*, this Security Instrument and obligations secured hereby shall remain fully effective as if no acceleration had occurred. However, this right to reinstate shall not apply in the case of acceleration under **Section 16**.

18. Notice of Grievance. Neither *Borrower* nor *Lender* may commence, join, or be joined to any judicial action (as either an individual litigant or the member of a class) that arises from the other party's actions pursuant to this Security Instrument or that alleges that the other party has breached any provision of, or any duty owed by reason of, this Security Instrument, until such *Borrower* or *Lender* has notified the other party (with such notice given in compliance with the requirements of **Section 13** of such alleged breach and afforded the other party hereto a reasonable period after the giving of such notice to take corrective action. If *Applicable Law* provides a time period which must elapse before certain action can be taken, that time period will be deemed to be reasonable for purposes of this paragraph. The notice of acceleration and opportunity to cure given to *Borrower* pursuant to **Section 20** and the notice of acceleration given to *Borrower* pursuant to **Section 16** shall be deemed to satisfy the notice and opportunity to take corrective action provisions of this **Section 18**.

19. Hazardous Substances. As used in this **Section 19**: (a) *Hazardous Substances* are those substances defined as toxic or hazardous substances, pollutants, or wastes by *Environmental Law* and the following substances: gasoline, kerosene, other flammable or toxic petroleum products, toxic pesticides and herbicides, volatile solvents, materials containing asbestos or formaldehyde, and radioactive materials; (b) *Environmental Law* means federal laws and laws of the jurisdiction where the *Property* is located that relate to health, safety or environmental protection; (c) *Environmental Cleanup* includes any response action, remedial action, or removal action, as defined in *Environmental Law*; and (d) an *Environmental Condition* means a condition that can cause, contribute to, or otherwise trigger an *Environmental Cleanup*.

Borrower shall not cause or permit the presence, use, disposal, storage, or release of any *Hazardous Substances*, or threaten to release any *Hazardous Substances*, on or in the *Property*. *Borrower* shall not do, nor allow anyone else to do, anything affecting the *Property* (a) that is in violation of any *Environmental Law*, (b) which creates an *Environmental Condition*, or (c) which, due to the presence, use, or release of a *Hazardous Substance*, creates a condition that adversely affects the value of the *Property*. The preceding two sentences shall not apply to the presence, use, or storage on the *Property* of small quantities of *Hazardous Substances* that are generally recognized to be appropriate to normal residential uses and to maintenance of the *Property* (including, but not limited to,

hazardous substances in consumer products).

Borrower shall promptly give *Lender* written notice of (a) any investigation, claim, demand, lawsuit or other action by any governmental or regulatory agency or private party involving the *Property* and any *Hazardous Substance* or *Environmental Law* of which *Borrower* has actual knowledge, (b) any *Environmental Condition*, including but not limited to, any spilling, leaking, discharge, release or threat of release of any *Hazardous Substance*, and (c) any condition caused by the presence, use or release of a *Hazardous Substance* which adversely affects the value of the *Property*. If *Borrower* learns, or is notified by any governmental or regulatory authority, or any private party, that any removal or other remediation of any *Hazardous Substance* affecting the *Property* is necessary, *Borrower* shall promptly take all necessary remedial actions in accordance with *Environmental Law*. Nothing herein shall create any obligation on *Lender* for an *Environmental Cleanup*.

Borrower and *Lender* further covenant and agree as follows:

20. Acceleration; Remedies. *Lender* shall give notice to *Borrower* prior to acceleration following *Borrower's* breach of any covenant or agreement in this Security Instrument (but not prior to acceleration under **Section 16** unless *Applicable Law* provides otherwise). The notice shall specify: (a) the default; (b) the action required to cure the default; (c) a date, not less than 30 days from the date the notice is given to *Borrower*, by which the default must be cured; and (d) that failure to cure the default on or before the date specified in the notice may result in acceleration of the sums secured by this Security Instrument and sale of the *Property*. The notice shall further inform *Borrower* of the right to reinstate after acceleration and the right to bring a court action to assert the non-existence of a default or any other defense of *Borrower* to acceleration and sale. If the default is not cured on or before the date specified in the notice, *Lender* at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale and any other remedies permitted by *Applicable Law*. *Lender* shall be entitled to collect all expenses incurred in pursuing the remedies provided in this **Section 20**, including, but not limited to, reasonable attorneys' fees and costs of title evidence.

If *Lender* invokes the power of sale, *Lender* shall execute or cause Trustee to execute a written notice of the occurrence of an event of default and of *Lender's* election to cause the *Property* to be sold and shall cause such notice to be recorded in each county in which any part of the *Property* is located. *Lender* or Trustee shall give notice of sale in the manner prescribed by *Applicable Law* to *Borrower* and to other persons prescribed by *Applicable Law*. After the time required by *Applicable Law*, Trustee, without demand on *Borrower*, shall sell the *Property* at public auction to the highest bidder at the time and place and under the terms designated in the notice of sale in one or more parcels and in any order Trustee determines. Trustee may postpone sale of all or any parcel of the *Property* by public announcement at the time and place of any previously scheduled sale. *Lender* or its designee may purchase the *Property* at any sale.

Trustee shall deliver to the purchaser Trustee's deed conveying the *Property* without any covenant or warranty, expressed or implied. The recitals in the Trustee's deed shall be prima facie evidence of the truth of the statements made therein. Trustee shall apply the

proceeds of the sale in the following order: (a) to all expenses of the sale, including, but not limited to, reasonable Trustee's and attorneys' fees; (b) to all sums secured by this Security Instrument; and (c) any excess to the person or persons legally entitled to it.

21. Re-conveyance. Upon payment of all sums secured by this Security Instrument, *Lender* shall request Trustee to re-convey the *Property* and shall surrender this Security Instrument and all *Loans* evidencing debt secured by this Security Instrument to Trustee. Trustee shall re-convey the *Property* without warranty to the person or persons legally entitled to it. Such person or persons shall pay any recordation costs. *Lender* may charge such person or persons a fee for re-conveying the *Property*, but only if the fee is paid to a third party (such as the Trustee) for services rendered and the charging of the fee is permitted under *Applicable Law*.

22. Substitute Trustee. *Lender* may from time to time remove Trustee and appoint a successor trustee to any Trustee appointed hereunder. Without conveyance of the *Property*, the successor trustee shall succeed to all the title, power and duties conferred upon Trustee herein and by *Applicable Law*.

23. Attorneys' Fees. As used in this Security Instrument, attorneys' fees shall include those awarded by an appellate court.

24. Required Evidence of Property Insurance.

WARNING

Unless you provide me with evidence of the insurance coverage as required by our contract or loan agreement, I may purchase insurance at your expense to protect my interest. This insurance may, but need not, also protect your interest. If the collateral becomes damaged, the coverage I purchase may not pay any claim you make or any claim made against you. You may later cancel this coverage by providing evidence that you have obtained property coverage elsewhere.

You are responsible for the cost of any insurance purchased by me. The cost of this insurance may be added to your contract or loan balance. If the cost is added to your contract or loan balance, the interest rate on the underlying contract or loan will apply to this added amount. The effective date of coverage may be the date your prior coverage lapsed or the date you failed to provide proof of coverage.

The coverage I purchase may be considerably more expensive than insurance you can obtain on your own and may not satisfy any need for property damage coverage or any mandatory liability insurance requirements imposed by *Applicable Law*.

BY SIGNING BELOW, *Borrower* accepts and agrees to the terms and covenants contained in this Security Instrument and in any Rider executed by *Borrower* and recorded with it.

Dated this 6th day of OCTOBER 2015.

[Signature]
Harris Kimble

Nancy Kimble
Nancy Kimble

STATE OF OREGON

COUNTY OF Deschutes

This instrument was acknowledged before me on 10/6/2015
(date) by Harris Kimble and Nancy Kimble.

[Signature]

Notary Public

Print Name: Veronica L. Woodall

My Commission Expires: 9-23-2018



Exhibit A
"Trust Property"

RESULTANT PARCEL LR 1 (ADJUSTED PER LL-13-46)

A parcel of land containing 10.00 acres, more or less, located in the North Half of the Northwest Quarter (N1/2 NW1/4) of Section 13, Township 17 South, Range 11 East, Willamette Meridian, Deschutes County, Oregon, being a portion of those lands described in Volume 235, Page 768, Deschutes County Deed Records, and being more particular described as follows:

Commencing at the North Quarter (N1/4) corner of said Section 13, from which the northwest corner of said Section 13 bears South 89°57'11" West a distance of 2625.39; thence along the north-south centerline of said Section 13, South 00°05'07" West a distance of 1316.03 feet; thence North 89°57'30" West a distance of 842.26 feet to the True Point of Beginning of this description; thence North 89°57'30" West a distance of 636.28 feet; thence North 00°13'45" East a distance of 94.40 feet; thence North 72°05'43" East a distance of 357.92 feet; thence North 16°02'59" East a distance of 46.94 feet; thence 305.11 feet along the arc of a tangent curve to the left with a radius of 465.00 feet, the chord of which bears North 02°44'52" West for a distance of 299.67 feet; thence 148.21 feet along the arc of a compound curve to the left with a radius of 150.00 feet, the chord of which bears North 49°51'04" West for a distance of 142.25 feet; thence North 70°16'39" East a distance of 204.35 feet; thence North 81°59'32" East a distance of 71.80 feet; thence North 88°37'03" East a distance of 238.17 feet; thence North 75°52'41" East a distance of 163.13 feet; thence North 66°30'21" East a distance of 137.98 feet; thence South 00°08'01" East a distance of 229.34 feet; thence South 32°49'32" West a distance of 703.57 feet to the True Point of Beginning, the terminus of this description.

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

LINE OF CREDIT AGREEMENT AND PROMISSORY NOTE

PARTIES:

BORROWER: **HARRIS and NANCY KIMBLE**
Husband and Wife
PO box 5014
Aloha, OR 97007
Email: harriskimble@aol.com
Facsimile: 541-382-2538

LENDER: **CARLTON M. CADWELL**
An Individual
909 North Kellogg Street
Kennewick, WA 99336

\$120,000.00

Date: OCTOBER 24, 2013

FOR VALUE RECEIVED, BORROWER promises to pay to the order of LENDER the principal sum of One Hundred Twenty Thousand Dollars (\$120,000.00), or so much thereof as may be disbursed to for the benefit of the BORROWER by LENDER. It is the intent of the BORROWER and LENDER to create this line of credit agreement ("Note") between BORROWER and LENDER whereby BORROWER may borrow \$5,000 per month for up to twelve months and \$2,5000 per month for up to twenty four months up to \$120,000 from LENDER subject to the terms of this Note for the sole purpose of providing living expenses to BORROWER during the Development Project as defined in a Development Agreement dated OCTOBER 24, 2013 ("Development Agreement"); provided, however, that LENDER's has the sole discretion to advance funds under this Note.

ADVANCES: BORROWER acknowledges LENDER will be using his own personal funds ("Personal Funds") to Fund this Loan. Funds will be advanced monthly upon request of BORROWER.

PERSONAL FUNDS: Interest on the Personal Funds shall bear interest at a rate equal to the then-current short term Applicable Federal Rate from the date the advances are made. BORROWER shall not be required to make monthly payments for advances of Personal Funds. The principal and interest of advances of Personal Funds shall be paid in full on or before the thirty six month anniversary or upon sale of two additional lots after payment in full of Line of Credit Agreement and Promissory Note dated OCTOBER 24, 2013 between KC Development Group LLC (BORROWER) and Carlton M. Cadwell (LENDER).

SECURITY: This obligation is to be secured by a first position in the Resultant Parcel LR 1 described in Exhibit A. The BORROWER and LENDER acknowledge that the a Trust Deed encumbering the Resultant Parcel LR 1, cannot occur until after the lot line adjustments are

LINE OF CREDIT PROMISSORY NOTE - 1 of 4

Exhibit 21
Page 16 of 19

Exhibit 19
Page 16 of 19

completed, however LENDER will be loaning money prior to the completion of the lot line adjustments. This Trust Deed shall be recorded immediately upon approval of lot line adjustments creating the Resultant Parcel LR 1. A default under the Trust Deed is a default under this Note.

DEFAULT: The BORROWER shall be in default of this Note on the occurrence of any of the following events: (i) the BORROWER shall fail to meet its obligation to make the required principal or interest payments; (ii) the BORROWER shall be dissolved or liquidated; (iii) the BORROWER shall make an assignment for the benefit of creditors or shall be unable to, or shall admit in writing their inability to pay their debts as they become due; (iv) the BORROWER shall commence any case, proceeding, or other action under any existing or future law of any jurisdiction relating to bankruptcy, insolvency, reorganization or relief of debtors, or any such action shall be commenced against the undersigned; (v) the BORROWER shall suffer a receiver to be appointed for it or for any of its property or shall suffer a garnishment, attachment, levy or execution.

REMEDIES: Upon default of this Note, LENDER may declare the entire amount due and owing to be immediately due and payable. LENDER may also use all remedies in law and in equity to enforce and collect the amount owed under this Note.

ATTORNEY FEES: The undersigned shall pay on demand any and all expenses, including reasonable attorney fees, incurred or paid by the holder of this Note without suit or action in attempting to collect funds due under this Note. If an action is instituted to collect this Note, the holder of the Note will be entitled to recover, at trial or on appeal, or in any bankruptcy proceeding, any sums that the court may adjudge reasonable as attorney fees, in addition to costs and necessary disbursements.

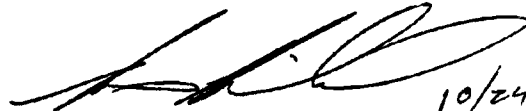
WAIVER: By signing this Note, the undersigned and any successors and assigns waive presentment for payment, notice of dishonor, protest, notice of protest, and diligence in collection, and consent that the time of payment on any part of this Note may be extended by the holder without otherwise modifying, altering, releasing, affecting, or limiting their liability.

GOVERNING LAW: This Note shall be governed by and construed in the State of Oregon and venue shall be in a Circuit Court in the County of Deschutes.

NONASSIGNABILITY: This Line of Credit Agreement and Promissory Note may not be assigned by either party without the written consent of the other Party.

DEVELOPMENT AGREEMENT: All terms not defined in this Note shall have the meaning as defined in the Development Agreement. This Note is subject to the conditions, terms and provisions of the Development Agreement. In the event the terms of this Note contradict the terms of the Development Agreement, the terms of this Note control.

BORROWER

By:  10/24/2013
HARRIS C. KIMBLE

By: 
NANCY KIMBLE

LINE OF CREDIT PROMISSORY NOTE - 3 of 4

Exhibit 21
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Exhibit 19
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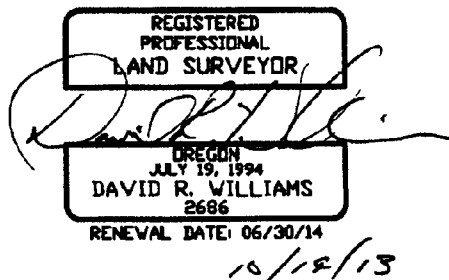
EXHIBIT A

LEGAL DESCRIPTION RESULTANT PARCEL LR 1

A parcel of land containing 10.00 acres, more or less, located in the North Half of the Northwest Quarter (N1/2 NW1/4) of Section 13, Township 17 South, Range 11 East, Willamette Meridian, Deschutes County, Oregon, being a portion of those lands described in Volume 235, Page 768, Deschutes County Deed Records, and being more particular described as follows:

Commencing at the North Quarter (N1/4) corner of said Section 13; thence along the north-south centerline of said Section 13, South 00°05'07" West a distance of 1316.03 feet to the southeast corner of the Northeast Quarter of the Northwest Quarter (NE1/4 NW1/4) of said Section 13; thence along the south line of said (NE1/4 NW1/4), North 89°57'30" West a distance of 842.26 feet to the **True Point of Beginning** of this description; thence continuing along said south line, North 89°57'30" West a distance of 473.74 feet to the southeast corner of the Northwest Quarter of the Northwest Quarter (NW1/4 NW1/4) of said Section 13; thence along the south line of said (NW1/4 NW1/4), North 89°57'30" West a distance of 162.54 feet; thence leaving said south line, North 00°13'45" East a distance of 94.40 feet; thence North 72°05'43" East a distance of 357.92 feet; thence North 16°02'59" East a distance of 46.94 feet; thence 305.11 feet along the arc of a tangent curve to the left with a radius of 465.00 feet, the chord of which bears North 02°44'52" West for a distance of 299.67 feet; thence 148.21 feet along the arc of a compound curve to the left with a radius of 150.00 feet, the chord of which bears North 49°51'04" West for a distance of 142.25 feet; thence North 70°16'39" East a distance of 204.35 feet; thence North 81°59'32" East a distance of 71.80 feet; thence North 88°37'03" East a distance of 238.17 feet; thence North 75°52'41" East a distance of 163.13 feet; thence North 66°30'21" East a distance of 137.98 feet; thence South 00°08'01" East a distance of 161.69 feet; thence South 00°08'01" East a distance of 67.65 feet; thence South 32°49'32" West a distance of 703.57 feet to the True Point of Beginning, the terminus of this description.

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



LINE OF CREDIT PROMISSORY NOTE - 4 of 4

Exhibit 21
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Exhibit 19
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After recording return to:
First American Title
895 SW Bluff Drive, Suite 100
Bend, OR 97702



After recording return to:
Carlton Cadwell and Lynda Cadwell
1361 Gage Boulevard
Richland, WA 99352

Until a change is requested all tax
statements shall be sent to the
following address:
Carlton Cadwell and Lynda Cadwell
1361 Gage Boulevard
Richland, WA 99352

File No.: 7061-2564352 (SJN)
Date: November 30, 2015

THIS SPACE RESERVED FOR RECORDER'S USE

Deschutes County Official Records **2015-050538**
D-D
Stn=4 BN **12/15/2015 03:16:20 PM**
\$15.00 \$11.00 \$10.00 \$6.00 \$21.00 **\$63.00**

I, Nancy Blankenship, County Clerk for Deschutes County, Oregon,
certify that the instrument identified herein was recorded in the Clerk
records.

Nancy Blankenship - County Clerk

STATUTORY WARRANTY DEED

Harris Kimble and Nancy Kimble, as tenants by the entirety, Grantor, conveys and warrants to
Carlton Cadwell and Lynda Cadwell, as tenants by the entirety, Grantee, the following described
real property free of liens and encumbrances, except as specifically set forth herein:

LEGAL DESCRIPTION: Real property in the County of Deschutes, State of Oregon, described as
follows:

See attached Exhibit A

Subject to:

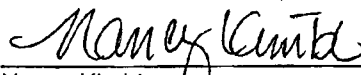
1. Covenants, conditions, restrictions and/or easements, if any, affecting title, which may appear in
the public record, including those shown on any recorded plat or survey.

The true consideration for this conveyance is **\$495,000.00**. (Here comply with requirements of ORS 93.030)

BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON TRANSFERRING FEE TITLE SHOULD INQUIRE ABOUT THE PERSON'S RIGHTS, IF ANY, UNDER ORS 195.300, 195.301 AND 195.305 TO 195.336 AND SECTIONS 5 TO 11, CHAPTER 424, OREGON LAWS 2007, SECTIONS 2 TO 9 AND 17, CHAPTER 855, OREGON LAWS 2009, AND SECTIONS 2 TO 7, CHAPTER 8, OREGON LAWS 2010. THIS INSTRUMENT DOES NOT ALLOW USE OF THE PROPERTY DESCRIBED IN THIS INSTRUMENT IN VIOLATION OF APPLICABLE LAND USE LAWS AND REGULATIONS. BEFORE SIGNING OR ACCEPTING THIS INSTRUMENT, THE PERSON ACQUIRING FEE TITLE TO THE PROPERTY SHOULD CHECK WITH THE APPROPRIATE CITY OR COUNTY PLANNING DEPARTMENT TO VERIFY THAT THE UNIT OF LAND BEING TRANSFERRED IS A LAWFULLY ESTABLISHED LOT OR PARCEL, AS DEFINED IN ORS 92.010 OR 215.010, TO VERIFY THE APPROVED USES OF THE LOT OR PARCEL, TO DETERMINE ANY LIMITS ON LAWSUITS AGAINST FARMING OR FOREST PRACTICES, AS DEFINED IN ORS 30.930, AND TO INQUIRE ABOUT THE RIGHTS OF NEIGHBORING PROPERTY OWNERS, IF ANY, UNDER ORS 195.300, 195.301 AND 195.305 TO 195.336 AND SECTIONS 5 TO 11, CHAPTER 424, OREGON LAWS 2007, SECTIONS 2 TO 9 AND 17, CHAPTER 855, OREGON LAWS 2009, AND SECTIONS 2 TO 7, CHAPTER 8, OREGON LAWS 2010.

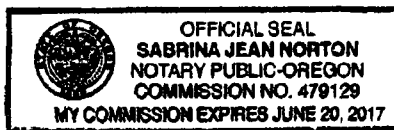
Dated this 11 day of December, 20 15.


Harris Kimble


Nancy Kimble

STATE OF Oregon)
)ss.
County of Deschutes)

This instrument was acknowledged before me on this 11 day of December, 2015
by **Harris Kimble and Nancy Kimble**.




Notary Public for Oregon

My commission expires: 06/20/2017

Exhibit "A"

Real property in the County of Deschutes, State of Oregon, described as follows:

A parcel of land located in the North Half of the Northwest Quarter (N1/2 NW1/4) of Section 13, Township 17 South, Range 11 East, Willamette Meridian, Deschutes County, Oregon, being a portion of those lands described in Volume 235, Page 768, Deschutes County Deed Records, and being more particularly described as follows:

Commencing at the North Quarter (N1/4) corner of said Section 13, from which the northwest corner of said Section 13 bears South 89°57'11" West a distance of 2625.39; thence along the north-south centerline of said Section 13, South 00°05'07" West a distance of 1316.03 feet; thence North 89°57'30" West a distance of 842.26 feet to the True Point of Beginning of this description; thence North 89°57'30" West a distance of 636.28 feet; thence North 00°13'45" East a distance of 94.40 feet; thence North 72°05'43" East a distance of 357.92 feet; thence North 16°02'59" East a distance of 46.94 feet; thence 305.11 feet along the arc of a tangent curve to the left with a radius of 465.00 feet, the chord of which bears North 02°44'52" West for a distance of 299.67 feet; thence 148.21 feet along the arc of a compound curve to the left with a radius of 150.00 feet, the chord of which bears North 49°51'04" West for a distance of 142.25 feet; thence North 70°16'39" East a distance of 204.35 feet; thence North 81°59'32" East a distance of 71.80 feet; thence North 88°37'03" East a distance of 238.17 feet; thence North 75°52'41" East a distance of 163.13 feet; thence North 66°30'21" East a distance of 137.98 feet; thence South 00°08'01" East a distance of 229.34 feet; thence South 32°49'32" West a distance of 703.57 feet to the True Point of Beginning, the terminus of this description.

Tax Parcel Number: 250396

rl_camp@mont.com

From: "Eric Caldwell" <caldwell@mont.com>
Date: Sunday, October 04, 2014 10:52 PM
To: "Buffy L. Thompson" <rl_camp@mont.com>; "Bill Meyer" <bmeyer@mont.com>;
Cc: "Jared K. Thompson" <jkthompson@mont.com>; "Richter, Peter C." <peter.richter@mont.com>
Attachments: Easement Survey.pdf; Klippel Water Proposal.docx
Subject: Klippel Water Easement Proposal

Rod and Bill,

Attached is a draft of the terms that we had offered to the Klippel Water board back in 2014 in exchange for formally recording the easement that Carl Klippel had surveyed and recorded back in 1975. Apparently our offer was not shared with the membership, which is unfortunate. We have also added an additional offer to encourage them to vote in favor of this proposal by offering to keep construction traffic off of this road during future development activity. We would rather spend money on improvements instead of attorneys, so this offer would not apply if we are forced to pursue a prescriptive easement.

Obviously, this road was always meant connect Buck and Palla by Carl Klippel when he created and recorded the roads, and is confirmed by over 40 years of documented use and recognized by Deschutes County on their master road atlas. The Klippel Water board president had also stated that she knew that an easement existed in her email to me on 5/5/14.

We are happy to be mindful of the Klippel Water wells by moving the road to the far south edge of the existing easement regardless of which way the easement is formalized. However, our attorney has already drafted the prescriptive easement paperwork to file in case the members do not approve this proposal. Hopefully you can encourage the members to do the right thing and formalize the road that has been there for 40+ years, and was always meant to be there. Once it is approved and recorded, we will plan on working with Rod as KWT's representative to properly move the road to its new location within the same 60' easement and ensure that the wells remain protected according to the requirements listed in the code we had provided.

Thank you again for your help.

Eric

Klippel Water users,

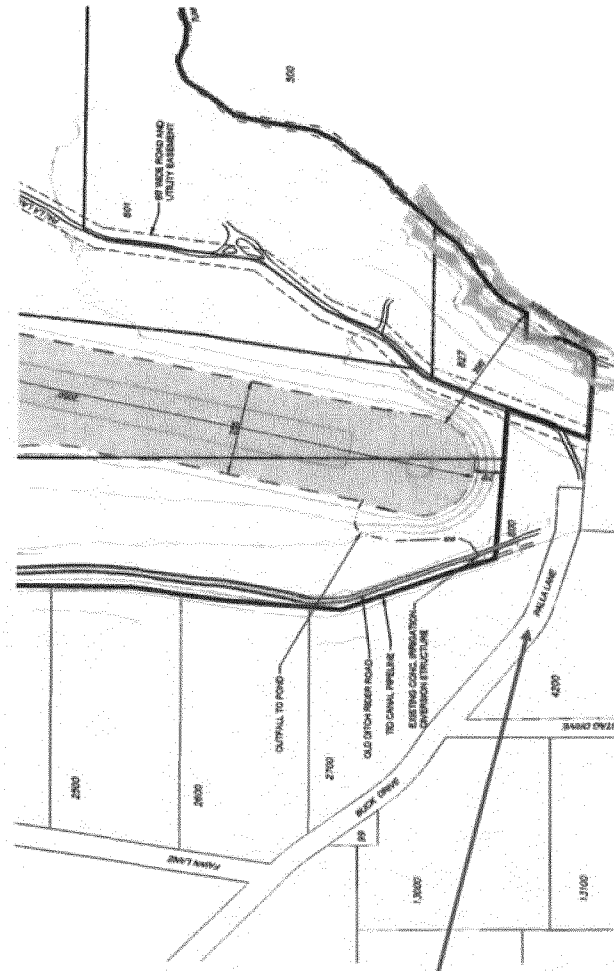
KCDG had proposed a solution to the Klippel Water board in 2014 to the formalization of the existing easement created by Carl Klippel in 1975 in an attempt to avoid having to pursue a Prescriptive Easement. Apparently this offer was not shared with the rest of the Klippel Water patrons. This offer is restated here.

In exchange for recording the easement shown on the Record of Survey recorded by Carl Klippel on 10/23/1975, we had offered:

- We will gate the entrance to Palla Ln where the road goes on to our property. This gate would be closed to the public, and access codes and remotes only available to those properties served by the road.
- Draft the easement wording to restrict the use to residents on Palla Ln and Klippel Rd and Emergency Vehicles
- Hold the paved road to the south edge of the 60' easement as far from the wells as possible, then turn to meet Palla Ln when the road is completely on our property. The road will likely be 20' wide, unless required otherwise by the county.
- Hire an engineer to evaluate the wells based on the code requirements for wells within 100ft of a road. We have already provided a copy of those requirements from the engineer.
- Share the cost of storm fencing to keep out looky-loos

In addition to the terms offered to the board in 2014, we will also offer the following only if the membership votes to approve the recording of the formalized easement:

- Agree to keep construction traffic off this road during future development



Extract of Applicant's Exhibit C

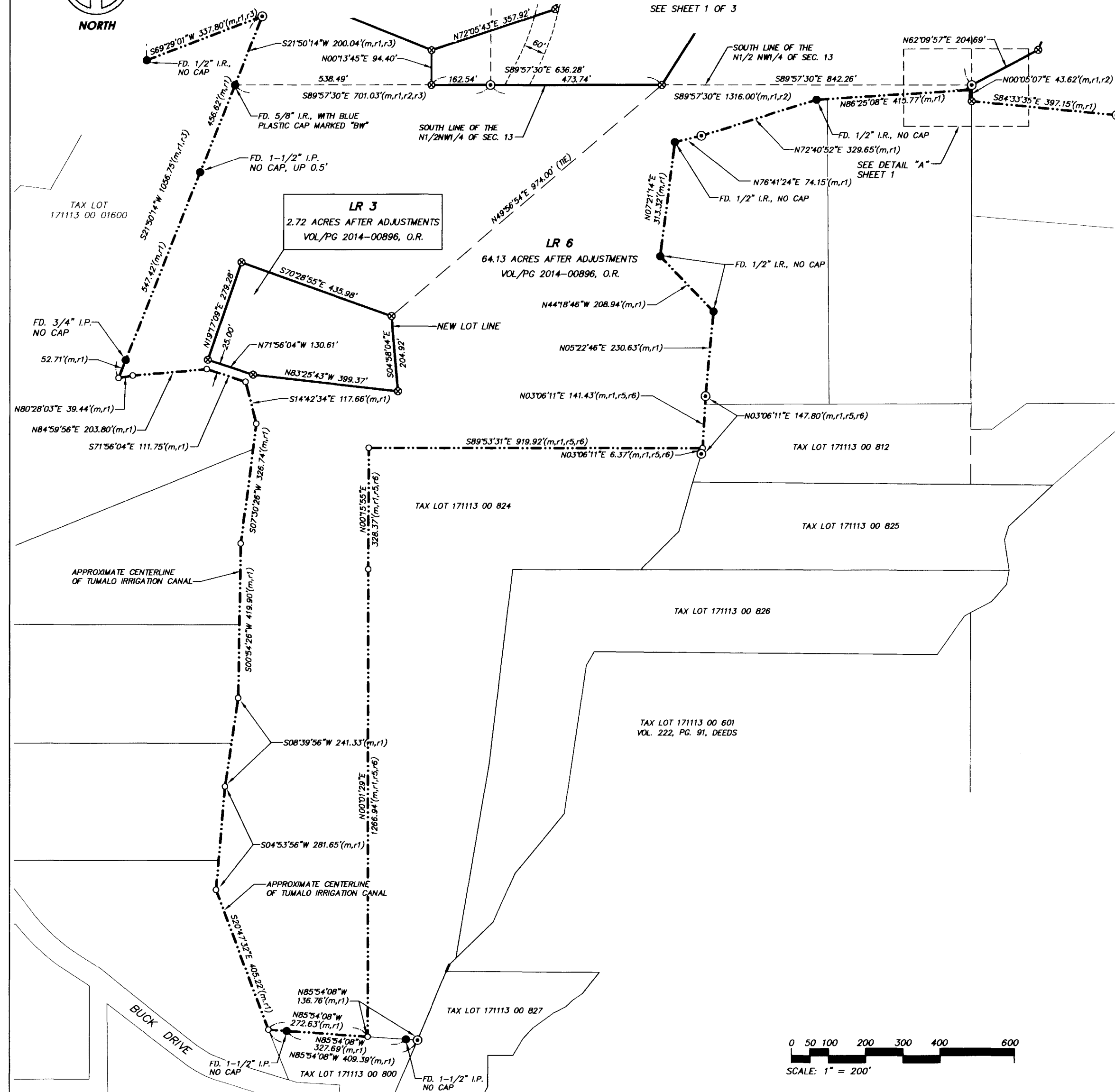


PROPERTY LINE ADJUSTMENT

LOCATED IN SECTIONS 13 AND 14, TOWNSHIP 17 SOUTH, RANGE 11 EAST, W.M., DESCHUTES COUNTY, OREGON

LL-13-46, LL-13-47,
LL-13-48, LL-13-49,
LL-13-51, LL-13-52

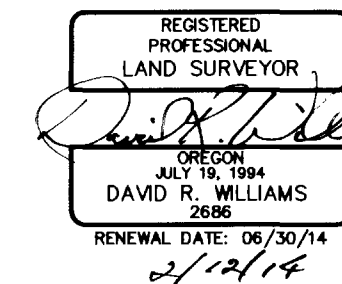
CS18657



LEGEND

- PROJECT BOUNDARY
- LOT LINE TO BE ABANDONED
- NEW LOT LINE
- SECTION LINE OR ALIQUOT LINE
- TAX LOT LINE
- EASEMENT SIDELINES
- FOUND 5/8" IRON ROD W/ YELLOW PLASTIC CAP MARKED "HWA"
- FOUND MONUMENT AS NOTED
- FOUND 5/8" IRON ROD W/ PLASTIC CAP MARKED "W&H", OF WHICH NO RECORD EXISTS
- SET 5/8" IRON ROD W/ YELLOW PLASTIC CAP MARKED "HWA"
- DIMENSION POINT, NOTHING FOUND OR SET
- (m) DENOTES MEASURED BEARING/DISTANCE
- (r) DENOTES RECORD BEARING/DISTANCE PER REFERENCES
- LR DENOTES LEGAL LOT OF RECORD PER DESCHUTES COUNTY LOT OF RECORD VERIFICATION NO. LR-05-B

NOTE: SEE SHEET 3 FOR LOT LINE ADJUSTMENT SEQUENCING AND ADJUSTMENT AREAS.



PREPARED BY
HWA SURVEYORS, ENGINEERS & PLANNERS
HICKMAN, WILLIAMS & ASSOCIATES, INC.
42930 O.B. RILEY ROAD, SUITE 100
BEND, OREGON 97701
PHONE: 541.389.9351 FAX: 541.388.5416

DESCHUTES COUNTY SURVEYOR
FILED 2/13/2014 BY: Vicki Oprie

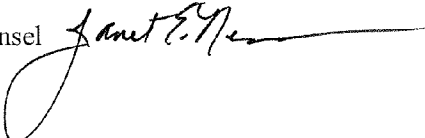
SHEET 2 OF 3

041125-LLA5 ROS.DWG

CS18657

MEMORANDUM

To: Jennifer Bragar
Garvey Shubert Barer

From: Janet E. Neuman, Senior Counsel 

Date: September 24, 2015

Subject: Status of Water Rights Proceedings Pertaining to the Tumalo Irrigation District
and KC Development Group, LLC

1. **Introduction.** The purpose of this Memorandum is to summarize the current status of proceedings before the Oregon Water Resources Department ("OWRD" or "the Department") pertaining to the requests by the Tumalo Irrigation District ("TID" or "the District") to transfer water to two private reservoirs constructed by KC Development Group, LLC ("KCDG")¹ on property adjacent to the home of our mutual clients, Thomas and Dorbina Bishop, at 63382 Fawn Lane in Bend. I am handling the OWRD matters on behalf of the Bishops, and I have prepared this update for your use in the ongoing Deschutes County Conditional Use Permit ("CUP") proceedings, in which TID and KCDG have applied for CUPs in conjunction with siting, constructing, and using the reservoirs for recreation in a Rural Residential zone, RR-10 designation.² After an extension request by TID and KCDG (collectively "Applicants"), these applications are now set for a hearing before a Deschutes County Hearings Officer on September 29, 2015.

2. **OWRD Decisions.** On June 11, 2014, TID submitted temporary transfer application T-11833 to OWRD. TID requested to temporarily "change the place of use" of 108 acre feet of water stored in the Upper Tumalo Reservoir ("UTR") under TID's water right certificate 76684 to KCDG's two newly-constructed and unpermitted reservoirs. On December 22, 2014, TID submitted permanent transfer application T-11951, in which TID requested to permanently "change the place of use" of 124.79 acre feet of water from UTR to the KCDG reservoirs.

TID delivered water to the KCDG facilities throughout the spring and summer of 2014, and into 2015, prior to any decision by OWRD on the transfer applications, and despite numerous written submissions to OWRD by our clients and others challenging the authority for and propriety of the transfer. The Bishops first raised objections to the transfer in May of 2014,

¹ KCDG is used to refer collectively to KC Development Group, LLC, and its principals, Harris Kimble and Eric Cadwell.

² The permit applications include: 247-15-000226-CU; 247-15-000227-CU; 247-15-000228-LM; 247-15-000383-MA; 247-15-000384-SP; and 247-15-000385-V).

before TID submitted its temporary transfer application. The Bishops and others continued to challenge the legality of TID's conduct during the pendency of both transfer applications, submitting several sets of written comments and a formal protest to OWRD.

On April 29, 2015, OWRD denied both of the District's transfer applications, declaring the transfers unlawful under ORS 540.570 and 540.580. The Department denied temporary transfer request T-11833 in Order No. 95-1018 and permanent transfer request T-11951 in Order No. 95-1026. Copies of the transfer denial Orders are included as Attachment A to this Memorandum. On June 26, 2015, TID filed Petitions for Reconsideration of both Orders, but OWRD did not take any action on the Petitions prior to the 60-day statutory deadline and both Petitions are thereby deemed denied under ORS 183.484.

On June 16, 2015, OWRD issued an "Enforcement Order and Limited License in Conjunction with Enforcement Order" ("Enforcement Order") restating that TID has no right to store water in the KCDG facilities. (*See* Exhibit 14.³) On August 14, 2015, the Bishops submitted a Petition for Reconsideration of the Enforcement Order challenging the temporary allowance of continued diversion of water into the KCDG lakes in order to protect the lakes' liners from damage. (Attachment B.) The Bishops' Petition is currently pending, and OWRD has until October 13, 2015 to rule on it.

The OWRD decisions and their implications for the CUP Proceeding are described in further detail below.

a. *Order 95-1018 Denying Temporary Transfer T-11833.*

The grounds for denying the temporary transfer were stated in the Department's Conclusions of Law in Order 95-1018 as follows:

- "1. The temporary transfer is expired and all uses of water must revert to the terms and conditions of Certificate R-76684. ORS 540.570(1).
2. The Department's actions to approve the District's temporary transfer must be compatible with acknowledged comprehensive plans. ORS 197.180; OAR 690-005-0025(3); OAR 690-005-0035.
3. The Department may not conditionally approve the temporary transfer because the proposed action is not authorized by ORS 540.570. OAR 690-005-0035(4).
4. The temporary transfer of a primary reservoir right is not authorized under ORS 540.570." Order 95-1018, p. 4.

³ The Enforcement Order is included in the September 29, 2015 Letter from Jennifer Bragar to Karen Green as Bishop Exhibit 14, and is not duplicated here.

The fourth Conclusion of Law is fatal to TID's request to move stored water to the KCDG reservoirs. OWRD found that ORS 540.570, which governs temporary transfers by irrigation districts, does not authorize changing the location of stored water but only authorizes changes in the locations where water is applied to land for irrigation. *Id.* at 6. The temporary transfer statute offers no legal authority for TID to move its stored water to a different location or for OWRD to allow such a change. *Id.*

Furthermore, the Department found that the temporary transfer attempt suffered from two additional defects. In discussing its first Conclusion of Law, the Department emphasized that the applicable statute, ORS 540.570(1), only allows temporary transfers for one irrigation season. *Id.* at 4. TID requested the temporary transfer on June 11, 2014, and the 2014 irrigation season ended on October 31, 2014. *Id.* at 3. Therefore, any temporary transfer—even if authorized and approved—would have expired on October 31st. *Id.* On that date, all use of water would have reverted as a matter of law to the terms and conditions of TID's Water Rights Certificate 76684, which allows TID to store water *only* in the Upper Tumalo Reservoir.

In the second and third Conclusions of Law, the Department further found that it could not have approved the temporary transfer in any event because the necessary land use approvals were not received. The LUCS originally submitted by TID in support of its temporary transfer application on August 18, 2014 was appealed, first to a Deschutes County Hearings Officer and then to the Board of County Commissioners for Deschutes County. *Id.* at 3. The Hearings Officer's decision was issued on December 15, 2014, and the Board issued its decision on April 8, 2015, both well after the end of the 2014 irrigation season. *Id.* Both decisions invalidated the LUCS submitted as part of the temporary transfer.

In summary, the Department denied T-11833 for the foundational reason that the statutes governing temporary transfers by irrigation districts do not authorize a change in place of storage. Even if such a transfer were allowed by the statute, denial was required because TID did not establish that the KCDG reservoirs are compatible with applicable land use regulations and because any temporary transfer expired on October 31, 2014.

b. Order 95-1026 Denying Permanent Transfer T-11951.

The Department's grounds for denying the permanent transfer were stated in the Conclusions of Law in Order 95-1026 as follows:

- "1. Land use approval is necessary for this proposed action. ORS 197.180; OAR 690-005-0025(3); OAR 690-005-0035.
2. The change proposed in Transfer Application T-11951 is not authorized by ORS 540.580." Order 95-1026, p. 3.

Consistent with its finding on the temporary transfer authority, the Department found that the statute authorizing permanent transfers by irrigation districts—ORS 540.580—does not allow changing the location of stored water. *Id.* at 3-4. Like the temporary transfer statute, the permanent transfer statute is limited to authorizing changes in the location where water is used on irrigated lands. *Id.* at 4. Neither ORS 540.580 nor ORS 540.570 offer any legal basis for TID to move its stored water to a different location or for OWRD to approve such a change.

The Department also found that TID's permanent transfer application did not include the required land use compatibility information, as no LUCS was submitted to the Department. *Id.* at 3. OWRD further found that the transfer was not exempt from the requirement of showing land use compatibility because: (1) it did not involve "irrigation water uses only" but instead involved a primary storage right; and (2) the District "modified or constructed reservoirs" to receive the water. *Id.* at 5. Therefore, even if movement of stored water were allowed under the applicable statute, the Department could not approve the transfer without a proper showing of land use compatibility. *Id.*

In summary, the Department denied permanent transfer T-11951 because a change in place of use of storage is not allowed under the applicable statutes, and because even if such a transfer were allowed, the receiving facilities and water use were not shown to be compatible with the governing local land use requirements.⁴

As a result of OWRD's denial of both the temporary and permanent transfer applications, TID cannot meet the Deschutes County Code ("DCC") provisions applicable to its conditional use applications. In addition to the fact that the KCDG reservoirs are privately developed facilities for private use—not District use—the construction and maintenance of the reservoirs does not qualify for a conditional use permit under DCC 18.60.030.W because the KCDG reservoirs are not authorized to hold TID water.⁵ Nor can TID meet the additional conditional use requirements of DCC 18.128.280.C.1 because the District cannot show that "[t]here is adequate water legally available to the site to maintain the water impoundment"⁶

⁴ Until the local land use process is completed, TID will not be able to submit the required land use compatibility information to OWRD for the KCDG reservoirs.

⁵ This code section provides for potential conditional use permits for "[s]urface mining of mineral and aggregate resources *in conjunction with the operation and maintenance of irrigation systems operated by an Irrigation District*, including, the excavation and mining for facilities, ponds, reservoirs, and the off-site use, storage, and sale of excavated material." (Emphasis added.)

⁶ The County's Amended Staff Report on the CUP applications incorrectly states on page 38 that "TID has submitted a Permanent Transfer Application to OWRD to permanently transfer this water into the reservoirs." Although TID's application in T-11951 was pending when the CUP application was initially

c. TID's Petitions for Reconsideration/New Transfer Applications

On June 26th, TID submitted two Petitions for Reconsideration to OWRD asking the agency to reconsider Orders 95-1018 and 95-1026 denying the temporary and permanent transfers, respectively. ORS 183.484(2) provides that "[i]f the agency does not otherwise act, a petition for rehearing or reconsideration shall be deemed denied the 60th day following the date the petition was filed" The 60-day period has passed without any action by OWRD on TID's Petitions. The petitions are thereby deemed denied and OWRD's decisions denying TID's temporary and permanent transfer applications, as described above in Sections 2(a) and (b), remain in effect.

d. Enforcement Order Following Transfer Denials.

As noted above, TID filled the KCDG reservoirs with water prior to OWRD's action on the transfer applications, beginning in the spring of 2014 before the submission of the temporary transfer application, and continuing through the summer and fall of 2014 and well into 2015. In the face of challenges from the Bishops and others, and without any approval from OWRD, the District moved water during the pendency of its transfer applications, knowing that its request to use the irrigation district transfer statutes to move stored water could be denied at any time. As a result of OWRD's Orders denying both the temporary and permanent transfer requests, TID clearly had no authority or approval for storing water in the KCDG facilities as of April 29, 2015, at the latest.

Yet even after the Department denied both transfers, TID continued to divert and hold water in the KCDG lakes. Water flowed into the KCDG facilities steadily between at least May 28th and June 9th and the Bishops so notified the Department, in writing and by phone. (See copies of a June 4th letter and a June 10th email from Janet E. Neuman to Mr. Douglas Woodcock at OWRD, Attachment C.) OWRD investigated the ongoing diversions. Department staff observed in a June 3rd field visit that the two KCDG facilities were nearly full, amounting to about 68 acre feet of water in the South Pond and about 57 acre feet of water in the North

filed on April 29, 2015, on that very same day OWRD denied the permanent transfer, as the Staff Report accurately notes elsewhere in the same paragraph on page 38. The Staff Report inexplicably tries to kick the can further down the road by recommending "a condition of approval requiring the applicant to submit proof of adequate water *prior to* any reservoir use or recreational use of the property." (Emphasis added.) The reservoirs are already filled with water and have already been used for recreation, even though, as described in the text above, the Applicants cannot satisfy this condition due to OWRD's finding that water storage on site is unauthorized, and they make no feasible showing about how they will legally obtain a right to store water.

Pond.⁷ On June 9, Department staff observed water continuing to flow into the South Pond at a rate of 0.73 cubic feet per second (cfs). On June 16, 2015, the Department issued its Enforcement Order pertaining to the ongoing diversion and storage of water by the Tumalo Irrigation District on the KCDG property. *See* Bishop Exhibit 14.

The June 16th Order states unequivocally that storing water in the KCDG facilities is not authorized. In the first Conclusion of Law, the Department said:

"Storage of water in the South Pond [the water ski lake] is *unauthorized* and storage of water in the North Pond beyond that amount needed to serve as a bulge for irrigation of 55 acres pursuant to water right 74146 and 74147 is *unauthorized*." *Id.* at 3. (Emphasis added.)

The Department ordered TID to "obtain authorization for storage of water in the North and South ponds by December 15, 2015." *Id.* at 4.

The Department further found that TID continued to unlawfully divert water from Tumalo Creek into the South Pond between June 3 and June 9. *Id.* at 3. The Department issued a Limited License in conjunction with its Enforcement Order to prevent further illegal diversions. The Order says that "[c]ontinued diversion of water . . . is unlawful unless diverted consistent with the following limited license terms." *Id.* at 4. The License allows for the possibility of short-term diversion of up to .5 cfs into the South Pond, but it does not thereby legalize the unpermitted storage on the KCDG property or change any of the terms of the District's water rights.

Paragraph 4 of the License refers to the possibility of an extension of the License beyond December 15, 2015, if "TID demonstrates to the satisfaction of the Department that it is actively *taking steps to legalize* the storage and maintenance of water in the North and South ponds . . ." (emphasis added). *Id.* at 4. This statement makes it clear that the License itself does not legalize the storage facilities.

⁷ OWRD staff observed that the North Pond contained approximately 35 acre feet more than could be held in the North Pond as a bulge-in-the-system ("BIS"). Bishop Exhibit 14, p. 2. The Department allows irrigators to hold a small amount of water on their property temporarily (less than 10 days) only to meet immediate irrigation needs. OREGON WATER RESOURCES DEPARTMENT, TECHNICAL OPERATIONS MANUAL §03.01, pp. 9-10. The Bishops' Petition for Reconsideration questions whether sufficient irrigation exists on the KCDG property to support even a nominal BIS.

Paragraph 6 of the License prohibits TID from diverting "any additional water, beyond what is currently authorized by existing water rights, into the Tumalo Feed Canal."⁸ *Id.* at 5. Paragraph 6 further provides that the District was required to demonstrate to the Department by June 30, 2015, "that they are not diverting more water than they would otherwise be entitled to if the two ponds did not exist." *Id.* In other words, the District cannot use the License—or the unauthorized existence of the KCDG ponds—to expand its water use and the District must comply with all of the limits of its existing water rights.

The Enforcement Order contains the Department's unequivocal decision that TID is not legally authorized to store District water in the KCDG ponds beyond a limited amount for a BIS associated with KCDG's irrigation rights. TID must obtain legal authorization from OWRD for use of these facilities by December 15, 2015 in order to legally store water on the KCDG property. Any such authorization from OWRD will also need to comply with the applicable land use compatibility requirements under OAR 690-005-0025 through 690-005-0035, as discussed by the Department in Orders 95-1018 and 95-1026. In the meantime, TID is allowed only minimal diversions (within the limits of the License) into the KCDG facilities, and only to cover the lake liners.

e. The Bishops' Petitions for Reconsideration of OWRD's Enforcement Order.

On August 14, 2015, the Bishops filed a Petition for Reconsideration of OWRD's June 16th Enforcement Order. (*See* Attachment B.) The Bishops seek reconsideration of the Order and License because the Department's factual findings are not supported by substantial evidence in the record and its legal conclusions are not consistent with Oregon law. In order to issue a Limited License in Conjunction with an Enforcement Order, ORS 537.143(4) requires the Department to find that

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

⁸ The Tumalo Feed Canal, which diverts water from Tumalo Creek, is used by the District to divert and carry water for several water rights, not just for the water stored in Upper Tumalo Reservoir under Certificate 76684.

As discussed in detail in Attachment B, the Department's findings on these three required statutory factors are not supported by substantial evidence. Briefly, the Bishops' Petitions made the following points.

First, at a minimum, TID certainly knew it was violating Oregon law when it first moved water into the lakes prior to submitting either a temporary transfer application or a notice of permanent transfer to the Department. Alternatively, TID knowingly violated Oregon law when it continued to pump water and fill the lakes after its transfer applications were denied. As such, the requirements of ORS 537.143(4)(a) were not met.

Second, the immediate hardship identified by the Director—damage to the liners—is not one that TID—the "water user"—would suffer. KCDG, not TID, owns the liners, and KCDG assumed the risk of damage to the liners by excavating the lakes and installing the liners before it had any actual permission to store water—indeed, at least one of the liners was installed before KCDG even had any agreement with TID to transfer water. Moreover, it is unclear from the Enforcement Order what, if anything, TID and KCDG could do in the time period specified in the order to "achieve compliance with the law."

Finally, KCDG's continued use of the water does not outweigh the public benefits of termination of the unauthorized use. The Department's decision to allow KCDG to continue using the water to cover its liners excludes all other members of TID from having access to the District's water. This is particularly egregious in a drought year like this one in which TID has reduced water deliveries to its patrons and scheduled an early end to the irrigation season, while continuing to deliver water to the KCDG lakes. If the Enforcement Order is allowed to stand, there will be no deterrence for KCDG, TID, or any other developer from building facilities first and asking for forgiveness later, and no incentive to engage in the required permitting process. By granting TID and KCDG the protection of a limited license and additional time, the Department is validating TID's and KCDG's reckless and illegal behavior and encouraging other developers to engage in similar conduct.⁹

The Bishops' Petition for Reconsideration is currently pending. OWRD has until October 13, 2015 to rule on the Petition.

⁹ The Bishops' Petition also demonstrated that the Enforcement Order is further deficient in that it contains terms that are unclear and arbitrary, while omitting other terms that are normally included in limited licenses and water storage permits. See Attachment B, pp. 9-11.

3. Conclusion

Neither TID nor KCDG obtained a reservoir permit or water right for the facilities constructed by KCDG on its private land. TID's attempt to move District water authorized for storage at Upper Tumalo Reservoir to the KCDG property under the irrigation district transfer statutes was denied by the Department because those statutes only allow changes in the location of irrigation, not changes in the location of a primary storage right, and because TID did not demonstrate that the water storage facilities comply with applicable local land use laws. TID's Petitions for Reconsideration of OWRD's decisions on the transfer applications have been denied by operation of law.

Neither TID nor KCDG has legal authority to store water in the KCDG reservoirs. Nothing in the Enforcement Order and Limited License provides the necessary authority; furthermore, a Petition for Reconsideration of the license's allowance of a temporary diversion to protect KCDG's lake liner is pending. Without a legal right to adequate water, these facilities cannot qualify for CUPs for use as recreational facilities or for surface mining in conjunction with the operation or maintenance of an irrigation system operated by an irrigation district.

cc: Thomas and Dorbina Bishop

037351/00001/6709517v1

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

In the Matter of Transfer Application)	FINAL ORDER DENYING A
T-11833, Deschutes County)	TEMPORARY CHANGE TO WATER
)	RIGHT CERTIFICATE 76684

Authority

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

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

Applicant

BO

Sent Certified Mail 04/30/2015

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Other

Deschutes County
Planning Division
Attn: Community Development
PO Box 6005
Bend, OR 97708-6005

Commenters and Interested Parties

See attached list.

Findings of Fact

1. On June 11, 2014, the Tumalo Irrigation District (TID) filed a transfer application proposing a change to a portion of Certificate 76684 pursuant to ORS 540.570. The Department assigned the application number T-11833.
2. Notice of the application for temporary transfer was published in the Department's weekly public notice on June 17, 2014, pursuant to ORS 540.570(4). Comments were filed in response to the notice. Several commenters objected to the proposed transfer on grounds

This order is a final order other than contested case subject to judicial review under ORS 183.484. A petition for judicial review of this order must be filed within the time specified by ORS 183.484(2).

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

3. The portion of the right proposed to be transferred is as follows:

Certificate: 76684 in the name of Tumalo Irrigation District (confirmed under T-8557; originally perfected under Permit R-2743)

Use: A primary reservoir right for storage of water for Multiple Purpose Uses

Priority Date: December 8, 1961

Quantity: 108 acre-feet

Source: Tumalo Creek, a tributary of the Deschutes River.

Authorized Point of Diversion for the off-channel reservoir is located:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
17 S	11 E	WM	23	SE NE	2080 FEET SOUTH AND 1310 FEET WEST FROM THE NE CORNER OF SECTION 23

The reservoir is located as follows:

Twp	Rng	Mer	Sec	Q-Q
16 S	11 E	WM	32	SE SE
16 S	11 E	WM	33	S ½ SW ¼
17 S	11 E	WM	4	NE NW
17 S	11 E	WM	4	W ½ NW ¼
17 S	11 E	WM	5	NE ¼

The primary storage (reservoir) right authorizes storage of 1100.00 acre-feet of water.

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

74146	74147	76106	74149	76520
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5. Transfer Application T-11833 proposes to change the location of a portion of the stored water to:

Twp	Rng	Mer	Sec	Q - Q	Tax lot	District Notice #
17 S	11 E	WM	13	NE NW	828	T14S.001
17 S	11 E	WM	13	NW NE	828	T14S.001
17 S	11 E	WM	13	NW SW	828	T14S.001
17 S	11 E	WM	13	NW SW	824	T14S.001
17 S	11 E	WM	13	SE NW	828	T14S.001
17 S	11 E	WM	13	SE NW	824	T14S.001
17 S	11 E	WM	13	SW NW	828	T14S.001
17 S	11 E	WM	13	SW NW	824	T14S.001
17 S	11 E	WM	13	NE SW	824	T14S.001

The subject property for the proposed transfer is approximately 79 acres in size and consists of two adjacent tax lots: tax lot 824 and tax lot 828. The property is developed with two man-made,

lined reservoirs. The larger reservoir is elongated in shape, located on tax lots 824 and 828, and has a capacity of approximately 67 acre-feet of water. The smaller reservoir, located on tax lot 828 has a capacity of 41 acre-feet of water. The reservoirs are approximately 22 acres in combined size.

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

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

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

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

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

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

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

Conclusions of Law

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

Opinion

A. The Temporary Transfer is Expired

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

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

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

Oregon's land use planning statutes (ORS 197.180) require state agencies to comply with statewide planning goals and comprehensive use plans when taking actions affecting land use. OAR Chapter 690 division 05 and the Water Resources Department's State Agency Coordination Program (SAC) govern the Department's actions that affect land use and provide the coordination procedures the Department must follow to assure that its actions are consistent with land use laws. OAR 690-005-0010; OAR 690-005-0020(1); OAR 690-005-0035.

The coordination procedure in division 5 applies to Department programs that are considered "land use programs" to which land use laws are applicable. OAR 690-005-0025. Water right transfers are land use programs "except for those":

- (a) Where existing and proposed water uses would be located entirely within lands zoned for exclusive farm use as provide in ORS 215.203 or within irrigation districts;
- (b) Which involve changes in place of use only;

(c) Which do not involve the placement or modification of structures including but not limited to water diversion, impoundment, or distribution facilities, water wells, and well houses; and

(d) Which involve irrigation water uses only.

OAR 690-005-0025(3).

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

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

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

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

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

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

C. ORS 540.570 Does Not Authorize Movement of Stored Water

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

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

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

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

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

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

(Emphasis added.)

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

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

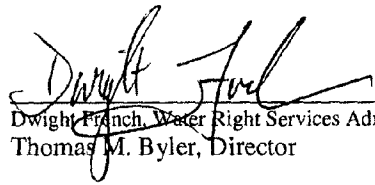
may be applied. Because ORS 540.570 does not authorize changing the location of stored water, the temporary transfer is denied.

ORDER

Now, therefore, it is ORDERED:

Transfer Application T-11833 is denied.

Dated at Salem, Oregon this 29 day of April, 2015.


Dwight Finch, Water Right Services Administrator, for
Thomas M. Byler, Director

Mailing date: APR 30 2015

Commenters and Interested Parties:

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Copies Sent to the Above:
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**BEFORE THE WATER RESOURCES DEPARTMENT
OF THE STATE OF OREGON**

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

Authority

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

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

Applicant

Sent Certified Mail 04/30/2015

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Bend, OR 97701

Attorneys

Sent Certified Mail 04/30/2015

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Other

Deschutes County
Planning Division
Attn: Community Development
PO Box 6005
Bend, OR 97708-6005

Commenters

See attached list.

Findings of Fact

1. On September 25, 2014, Tumalo Irrigation District (TID) filed a notice of intent to transfer a portion of water stored under Certificate 76684 to two reservoirs in a different location.
2. On September 30, 2014, the Department published information related to TID's intent to change the location of a portion of water stored under Certificate 76684 in its Weekly Water Rights Public Notice.

This order is a final order other than contested case subject to judicial review under ORS 183.484. Exceptions to this order may be filed with the Oregon Water Resources Commission within 20 days of the mailing of this order. ORS 540.580(10). If no timely exceptions are filed this order will become final 21 days after the mailing date of this order. If this order becomes final, appeal of this order is to the Circuit Court of Marion County or to the circuit court of the county in which all or part of the property affected by the order is situated. ORS 536.075. A petition for judicial review must be filed within the time specified by ORS 183.484.

3. On December 22, 2014, TID filed an application with the Department for a District Permanent Water Right Transfer for a Change in Place of Use. The Department assigned the application number T-11951.
4. Notice of the TID's petition was published on January 6, 2015, pursuant to ORS 540.580(6). Comments were filed in response to the notice. The comments raised several concerns regarding the transfer. In addition, Thomas and Dorbina Bishop, TID water users, filed a protest asserting that the transfer would result in injury.
5. The portion of the right proposed to be transferred is as follows:

Certificate: 76684 in the name of Tumalo Irrigation District (confirmed under T-8557; originally perfected under Permit R-2743)
Use: A primary reservoir right for storage of water for Multiple Purpose Uses
Priority Date: December 8, 1961
Quantity: 124.79 acre-feet
Source: Tumalo Creek, a tributary of the Deschutes River

Authorized Point of Diversion for the off-channel reservoir is located:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
17 S	11 E	WM	23	SE NE	2080 FEET SOUTH AND 1310 FEET WEST FROM THE NE CORNER OF SECTION 23

The reservoir is located as follows:

Twp	Rng	Mer	Sec	Q-Q
16 S	11 E	WM	32	SE SE
16 S	11 E	WM	33	S ½ SW ¼
17 S	11 E	WM	4	NE NW
17 S	11 E	WM	4	W ½ NW ¼
17 S	11 E	WM	5	NE ¼

The primary storage (reservoir) right authorizes storage of 1100.00 acre-feet of water.

6. The primary storage water right (Certificate 76684) is the source of water for the following secondary certificates and their specified uses: Certificate 74146, Certificate 74147, Certificate 76106, Certificate 74149 and Certificate 76520.
7. Transfer Application T-11951 proposes to change the storage location of a portion of the stored water to:

Twp	Rng	Mer	Sec	Q - Q	Tax lot	District Notice #
17 S	11 E	WM	13	NE NW	828	T14S.001
17 S	11 E	WM	13	NW NE	828	T14S.001
17 S	11 E	WM	13	NW SW	828	T14S.001
17 S	11 E	WM	13	NW SW	824	T14S.001
17 S	11 E	WM	13	SE NW	828	T14S.001
17 S	11 E	WM	13	SE NW	824	T14S.001
17 S	11 E	WM	13	SW NW	828	T14S.001
17 S	11 E	WM	13	SW NW	824	T14S.001
17 S	11 E	WM	13	NE SW	824	T14S.001

The subject property for the proposed transfer is approximately 79 acres in size and consists of two adjacent tax lots: tax lot 824 and tax lot 828. The property is developed with two man-made lined reservoirs. The larger reservoir is elongated in shape, located on tax lots 824 and 828, and has a capacity of approximately 67 acre-feet of water. The smaller reservoir, located on tax lot 828 has a capacity of 41 acre-feet of water. The reservoirs are approximately 22 acres in combined size.

8. A Land Use Information Form including a Land Use Compatibility Statement (LUCS) did not accompany TID's application.
9. The TID has allowed the change specified in its application before obtaining the Department's approval.

Conclusions of Law

1. Land use approval is necessary for this proposed action. ORS 197.180; OAR 690-005-0025(3); OAR 690-005-0035.
2. The change proposed in Transfer Application T-11951 is not authorized by ORS 540.580.

Opinion

A. ORS 540.580 Does Not Authorize Moving the Location of Stored Water

The TID has requested the Department to approve its request to transfer water stored under primary (reservoir) right Certificate 76684 to the two reservoirs in tax lots 824 and 828. That is, the TID requests to move some water impounded in Upper Tumalo Reservoir to two other reservoirs in a different location. Although TID characterizes this change as a "change in place of use" ORS 540.580 does not authorize the change.

ORS 540.580 governs permanent transfers of place of use of water within irrigation districts. ORS 540.580(1) specifies when the Department may approve the permanent transfer of the place of use of water within a district:

(1) In accordance with this section, a district may by petition request that the Water Resources Department approve the permanent transfer of the place of use of water within a district as long as the proposed transfer complies with all of the following:

- (a) *The rate, duty and total number of acres to which water is to be applied under the water use subject to transfer are not exceeded;*
- (b) *The use authorized under the water use subject to transfer remains the same;*
- (c) *The change in place of use will not result in injury to any existing water right; and*
- (d) *The land from which the water right is removed by the transfer shall receive no water under the transferred right.*

(Emphasis added.)

ORS 540.580(1) states that the Department may request the Department to approve a transfer of the place of use of water within a district so long as the proposed transfer complies with “all” of the requirements in (a) – (d). The requirements, in turn, refer to water that is applied to land. For example, the rate, duty and total number of acres “to which the water is to be applied” may not exceed the amount authorized by the right subject to transfer. Further, the land “from which the water right is removed by the transfer” may not receive any water from the transferred right. From the text of the statute, it is clear that the only rights that may be transferred to a different place of use are those rights authorizing the application of water to land (i.e. irrigation rights).

The context, being ORS 540.580(3), supports this interpretation. If the district allows the change in place of use of water before obtaining the Department’s approval it must notify the department in advance of the change. ORS 540.580(3). In the district’s notice to the Department the district must provide, among other things, the names of the users within the district from “whose lands and to whose lands water rights are to be transferred” and “[a] general description of the users’ lands by township, range, quarter-quarter section and tax lot number, and of the water right, for each parcel from which and to which water rights are to be transferred.” The notification is specific to the change in place of use of water applied to land and requires that the water users of the “from” lands and the “to” lands be sufficiently noticed of the proposed change.

Certificate 76684, however, is a primary water right authorizing storage of water in Upper Tumalo Reservoir for multiple purpose uses. A primary water right authorizes the storage of water for beneficial use under secondary permits. ORS 537.400(1). The water stored in Upper Tumalo Reservoir is applied to lands as specified in secondary water rights that enumerate the acres to which the water stored in Upper Tumalo Reservoir may be applied. The water impounded in Upper Tumalo Reservoir, however, is not itself applied to land. Instead, it is water impounded in the reservoir for use and application to lands pursuant to authorized secondary water rights for which the Upper Tumalo Reservoir is the source. Although impounded water occupies land, it is not applied to land and may not be considered the type of use authorized for transfer pursuant to ORS 540.580.

B. Land Use Approval is Necessary for this Proposed Action

Oregon’s land use planning statutes (ORS 197.180) require state agencies to comply with statewide planning goals and comprehensive use plans when taking actions affecting land use.

OAR Chapter 690 division 05 and the Water Resources Department's State Agency Coordination Program (SAC) govern the Department's actions that affect land use and provide the coordination procedures that the Department must follow to assure that its actions are consistent with land use laws. OAR 690-005-0010; OAR 690-005-0020(1); OAR 690-005-0035.

The coordination procedure in division 5 applies to Department programs that are considered "land use programs" to which land use laws are applicable. OAR 690-005-0025. Water right transfers are land use programs "except for those":

- (a) Where existing and proposed water uses would be located entirely within lands zoned for exclusive farm use as provide in ORS 215.203 or within irrigation districts;
- (b) Which involve changes in place of use only;
- (c) Which do not involve the placement or modification of structures including but not limited to water diversion, impoundment, or distribution facilities, water wells, and well houses; and
- (d) Which involve irrigation water uses only.

OAR 690-005-0025(3).

For a transfer to be considered exempt from the Department's land use program it must meet all of the factors in (a) through (d). In this case the TID has modified or constructed reservoirs on the Klippel mine site and seeks to move water stored in the Upper Tumalo Reservoir to the developed ponds on tax lots 824 and 828. In addition, the proposed transfer does not involve irrigation water uses, it involves a primary right for multipurpose storage. For these reasons, the exemption does not apply, and the proposed transfer is a land use program. The Department's actions must therefore be consistent with the process in OAR 690-005-0035(4).

Land use information must be submitted with requests "prior to the department taking action on the water use approval." OAR 690-005-0035(4). TID has not sent any land use information with its application, and the Department is unable to determine the compatibility of the proposed action with acknowledged comprehensive plans. Thus, even if ORS 540.580 authorizes the type of transfer TID seeks, the Department may not take any action to approve the transfer absent receiving land use information sufficient to determine the consistency of the Department's actions with acknowledged comprehensive plans.

ORDER

Now, therefore, it is ORDERED:

Transfer Application T-11951 is denied.

Dated at Salem, Oregon this 29 day of April, 2015.


Dwight French, Water Right Services Administrator, for
Thomas M. Byler, Director

Mailing date: APR 30 2015

NOTICE: Pursuant to ORS 540.580(10) the district may file exceptions to this order with the Oregon Water Resources Commission. Exceptions must be in writing and addressed to:

OREGON WATER RESOURCES COMMISSION
c/o Oregon Water Resources Department
725 Summer Street NE, Suite A
Salem, OR 97301

Exceptions must be in writing and postmarked within 20 days of the mailing date of this order. The commission shall issue an order granting or denying the exceptions within 30 days after receiving any exceptions.

If no timely exceptions are filed this order will become final 21 days after the mailing date of this order. If this order becomes final, appeal of this order is to the Circuit Court of Marion County or to the circuit court of the county in which all or part of the property affected by the order is situated. The review shall be conducted according to the provisions of ORS 183.484, 183.486, 183.497 and 183.500.

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August 14, 2015

VIA E-MAIL AND FIRST CLASS MAIL

Mr. Dwight French, Administrator
Water Right Services Division
Oregon Water Resources Department
725 Summer Street N.E., Suite A
Salem, Oregon 97301

Re: Petition for Reconsideration of *In the Matter of the Tumalo Irrigation*
District: Enforcement Order and Limited License in Conjunction with
Enforcement Order

Dear Mr. French:

This Petition for Reconsideration is submitted pursuant to ORS 183.484(2) and OAR 137-004-0080 on behalf of Thomas and Dorbina Bishop ("Petitioners" or "Bishops"), trustees of the Bishop Family Trust dated December 3, 2003. Petitioners seek reconsideration of the Water Resources Department's ("Department") June 16, 2015 Enforcement Order and Limited License in Conjunction with Enforcement Order ("Enforcement Order") issued in connection with the Tumalo Irrigation District's ("TID" or "District") water transfer applications T-11833 and T-11951. The Petitioners live at 63382 Fawn Lane, in Bend, Oregon, which is within the boundaries of the District and adjacent to the new water storage facilities at issue. Petitioners are members of the District and have commented on and been involved in TID's transfer applications throughout the application process.

1. Factual Background

As the Department is aware, Harris Kimble, Eric Cadwell, and KC Development Group, LLC (collectively "KCDG"), are developing the land neighboring the Bishops' property, eventually planning to build a residential cluster development. Starting in the early spring of 2014, KCDG built and filled two large water impoundments without reservoir permits, land use approval, or any meaningful agency review. Both facilities were clearly built and designed for recreational purposes and have already been used for those purposes: one is for fishing and general recreational use and the other is a waterski lake. While both facilities have pumps that bring water into them from TID's pipeline, neither has a way to pump water out of the lakes back into TID's system. Both structures were intended, designed, and constructed to benefit KCDG and its proposed housing development, not the full membership of the irrigation district.

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Throughout its construction process, KCDG has taken the approach that it is better to ask for forgiveness than for permission. In an agreement dated June 10, 2014, TID agreed to provide water to KCDG for their reservoirs. But by May 20, 2014, KCDG had already built and lined the northerly reservoir, and by June 1, 2014, that facility was filled with water from TID's pipeline, in an amount well in excess of any possible claim to a reasonable bulge-in-the-system ("BIS"). And by June 3, 2014, the water ski lake was already substantially constructed and being lined.

With the transfer applications at issue in this action, KCDG and TID are attempting to create a post-hoc authorization for constructing and filling the two recreational lakes by characterizing the lakes as "reservoirs" for the benefit of the irrigation district. To that end, on June 11, 2014 (weeks after water had already been moved), TID submitted a temporary transfer application (T-11833) to the Department. TID requested to temporarily "change the place of use" of 108 acre feet of water stored in the Upper Tumalo Reservoir to KCDG's facilities. On September 25, 2014, TID submitted a notice of permanent transfer (N14S.001) to the Department and on December 22, 2014, TID submitted a permanent transfer application (T-11951). In its application, TID requested to permanently "change the place of use" of 124.79 acre feet of water from the Upper Tumalo Reservoir to the KCDG lakes.

Well before TID filed the first of its water transfer applications, and beginning at least as early as March of 2014, Petitioners and others objected to KCDG's use of the irrigation district's water for its recreational lakes. In May and early June of 2014, Petitioners expressed their continuing concerns to Watermaster Jeremy Giffin by telephone and email, as well as TID. In early June of 2014, before TID had filed its temporary transfer application, Petitioners notified the Department's Salem office in writing about KCDG's illegal water storage and use and their objections to the same, as did WaterWatch. Despite these objections, TID continued to deliver water to KCDG's facilities throughout the spring and summer of 2014, before submitting its temporary transfer application or notice of permanent transfer, and into 2015, prior to any decision by the Department on the transfer applications.

On April 29, 2015, the Department denied both the temporary and permanent transfer applications. In the orders denying both applications, the Department determined that the irrigation district transfer statutes only allow movement of irrigation water from one place to another, not the movement of storage. TID has since filed petitions for reconsideration on both denials.¹

¹ Petitioners responded to the petitions for reconsideration in separate correspondence with the Department.

2. The Enforcement Order

After denying the transfer applications, the Department issued the Enforcement Order on June 16, 2015 pursuant to ORS 537.143(4). Under that statute, the Water Resources Director "may issue a limited license in conjunction with an enforcement order to address an illegal water use." In order to issue the limited license, the Director must find that:

"(a) The person did not knowingly violate state laws regarding a water use permit;

"(b) The immediate termination of the illegal use would cause serious and undue hardship to the water user that could be ameliorated by providing a period of time in which to achieve compliance with the law; and

"(c) The continued use under a limited license outweighs the public benefits of termination, including deterrence of illegal uses and protection of the water source."

In the Enforcement Order, the Director found that on June 3, 2015, the two lakes were illegally storing 125 acre feet of water and TID was still transferring water to the lakes. The Director found that "TID believed it was authorized to transfer water from the Upper Tumalo Reservoir to the North Pond and South Pond when it filled the ponds under ORS 540.580," the permanent transfer statute. The Director also found that the lakes were lined with a polyethylene liner, which could be damaged if the lakes were drained and the liners were exposed to the sun, wind, and large animals, and that the replacement cost of the liners is estimated to be approximately \$1.9 million.

Based on those findings, the Director concluded that TID did not knowingly violate state law, that requiring TID to drain the lakes would cause undue hardship to the water user because of the potential damage to the liners, and that continued use of the water under the limited license outweighed the public benefit of terminating the water use. The Department issued a temporary license to TID to keep the lakes filled with enough water to keep the liners covered, and ordered that TID obtain authorization for its water use by December 15, 2015.

Petitioners respectfully request that the Department reconsider and withdraw the Enforcement Order because, as discussed in detail below, the Director's factual findings are not supported by substantial evidence in the record and his legal conclusions are not consistent with Oregon law.

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3. The Director's Enforcement Order is not supported by substantial evidence and is otherwise in violation of Oregon law.

On review of a final order in an "other-than-contested case," substantial evidence exists to support an agency's finding of fact when the record, viewed as a whole, would permit a reasonable person to make that finding. *Noble v. Oregon Water Resources Dept.*, 264 Or App 110, 122, 330 P3d 688 (2014). A review of the record as a whole does not permit a reasonable person to make the findings the Department made.

First, TID certainly knew it was violating Oregon law when it first moved water into the lakes prior to submitting either a temporary transfer application or a notice of permanent transfer to the Department. Alternatively, TID knowingly violated Oregon law when it continued to pump water and fill the lakes after its transfer applications were denied. As such, the requirements of ORS 537.143(4)(a) were not met.

Second, the immediate hardship identified by the Director—damage to the liners—is not one that TID—the "water user"—would suffer. KCDG, not TID, owns the liners. Moreover, it is unclear from the Enforcement Order what, if anything, TID and KCDG could do in the time period specified in the order to "achieve compliance with the law."

Finally, KCDG's continued use of the water does not outweigh the public benefits of termination of the unauthorized use. The Department's decision to allow KCDG to continue using the water to cover its liners excludes all other members of TID from having access to the District's water. If the Enforcement Order is allowed to stand, there will be no deterrence for KCDG, TID, or any other developer from building facilities first and asking forgiveness later, and no incentive to engage in the required permitting process. By granting the District and KCDG the protection of a license and additional time, the Department is validating TID's and KCDG's reckless and illegal behavior and encouraging other developers to engage in similar conduct.

The failure of the Enforcement Order to meet the three required statutory factors is discussed in further detail below.

A. The Director's finding that TID did not knowingly violate state laws is not supported by substantial evidence.

The Director found that TID did not knowingly violate state laws when it filled the lakes because TID believed it was authorized to do so *under ORS 540.580*, the permanent transfer statute. This statute allows an irrigation district to apply for a "permanent transfer of the place of use of water within a district." ORS 540.580(1). The irrigation district may transfer the

Mr. Dwight French, Administrator
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water before it files an application with the Department, but only if the district provides notice to the Department *in advance of the change*, and files a full application by the end of the calendar year. ORS 540.580(2) and (3)(b). The Enforcement Order itself states that TID notified the Department of the permanent transfer on September 25, 2014. Nowhere in the Enforcement Order did the Director set forth the facts he relied upon to support his finding that TID could have reasonably believed that it was authorized to transfer the water under the permanent transfer statute prior to providing notice to the Department on that date.

The Enforcement Order does not cite the temporary transfer statute in reference to whether TID knowingly violated the law, but TID's transfer of the water to the ponds in May of 2014 was illegal under *both* the permanent and temporary transfer statutes. TID's first permit application was for a *temporary transfer* under ORS 540.570. Under that statute, an irrigation district cannot transfer water until *after* the application is filed with the Department. OAR 690-385-3000(2). But TID began transferring the water *before* filing the temporary transfer application on June 11, 2014—indeed, before the District's Board had even approved the transfer of water to KCDG on June 10th. The undisputed timeline of the sequence of events thus contradicts the Director's finding that TID did not knowingly violate Oregon law.

Furthermore, TID was aware that its water transfer was unlawful. In fact, Watermaster Giffin said the following in an email to Petitioner's attorney on June 4, 2014:

"I have talked with the district and the landowner and both are aware that they *cannot fill the reservoir until they have submitted the district temp transfer application*, which is scheduled to be next Tuesday should the board approve the transfer on Tuesday morning, so the earliest they can fill the reservoir would be Tuesday late in the day. *I explained the process to the landowner before construction* that there was a clear water right transfer path to move a storage right to this facility, but also explained that there was some risk to early excavation, being the chance that either the district does not approve the change or that through the public notice process it gets protested."

(Emphasis added.) Watermaster Giffin's communication makes clear that TID was told it was not allowed to move water prior to filing the temporary transfer application, yet it did so anyway. The Director's finding to the contrary is not supported by the record.

The unauthorized, unlawful storage in May and early June of 2014 was not remedied by filing a temporary transfer application on June 11, nor by filing a permanent transfer notice and application several months later. TID was not authorized to transfer water until either the temporary transfer application was filed or until it gave the Department notice as required by the permanent transfer statute. The evidence clearly shows that the timing and

 **TONKONTORP**
ATTORNEYS

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sequence of constructing and filling at least one of the facilities occurred before TID submitted either the temporary transfer application or the notice of permanent transfer to the Department, and also shows a warning by the Watermaster about the risk of proceeding before obtaining appropriate permission. Thus, the record simply does not support a finding that TID "did not knowingly violate state law."

Even if there were evidence in the record that showed that TID believed the initial transfer of water into the ponds beginning in the spring of 2014 and continuing into 2015 was somehow authorized under ORS 540.580, any transfer of water after the Department's denial of both of TID's transfer applications was clearly illegal. TID knew it had no authority whatsoever to continue to transfer water after April 29, 2015. By the Director's own factual findings, Watermaster Giffin observed TID unlawfully diverting water from Tumalo Creek into the lakes between June 3 and June 9, 2015. The fact that TID was still moving water more than a month after its transfer applications were denied is, in and of itself, evidence that TID knowingly violated state law. Accordingly, the Director's finding is not supported by substantial evidence and the Enforcement Order should be withdrawn.

B. The Director erred by finding that immediate termination of the water use would cause undue hardship to the water user.

ORS 537.143(4)(b) requires the Director to find that the "immediate termination of the illegal use would cause serious and undue hardship to the *water user* that could be ameliorated by providing a period of time in which to achieve compliance with the law." (Emphasis added.) The only undue hardship the Director recognized was the potential damage that may occur to the polyethylene liners in the lakes if the lakes were required to be drained. Damage to the liners, however, is not an undue hardship to the water user.

First, the hardship identified by the Director is not one suffered by the "water user." Based on TID's application, the "water user" is TID, not KCDG. There is no evidence in the record that TID owns the liners; KCDG owns them. Accordingly, the Director failed to identify any hardship suffered by the water user.

Second, KCDG installed all of the liner (and water) in the recreational lake and most of the liner in the waterski lake even before it had entered any written agreement with TID. It was only in the agreement of June 10, 2014, that TID agreed to file a temporary transfer application to request the Department's approval for moving water to the KCDG property.

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KCDG thus assumed the risk that it would not be allowed to fill the ponds, thereby leaving the liners exposed to damage.²

Third, even if TID were responsible for the liners, which it is not, if these facilities are truly intended to be "re-regulating reservoirs" as TID claims, then the water in those reservoirs must be available for drawdown by TID and for delivery to other TID water patrons on a routine basis, particularly in a drought year like this one. If the liners can never be exposed, then the "reservoirs" can never be drawn down. It simply strains credibility to consider these lakes as "reservoirs," as opposed to being recreational water features for KCDG. This is further evidence that the harm identified by the Director is not one suffered by TID, the purported "water user."

By requiring the reservoirs to stay full to protect the liners, the Department is elevating protection of KCDG's personal property over the needs of the District members and preventing TID from serving its members' needs. TID owes fiduciary duties to its members, including the duty to deliver available water to the members' lands according to their appurtenant water rights. *See Fort Vannoy Irr. Dist. v. Water Resources Com'n*, 345 Or 56, 86, 188 P3d 277 (2008) ("The [irrigation] district holds legal title to the water right as trustee, and the members hold equitable title as the beneficiaries. Acting in a fiduciary capacity, the district's duties as trustee include management of the water right and the water that it provides, and the members enjoy the use of that water as their beneficial interest."). Yet, a portion of TID's stored water is now locked up on KCDG's property, inaccessible to TID and its other patrons. By granting TID this limited license, the Department is, in essence, blessing TID's breach of its fiduciary duties to its members.

In fact, TID has already failed its members by diverting District water into the KCDG reservoirs. On June 16th (the same date that the Department issued the Enforcement Order), TID posted the following notice on its website:

"We are currently experiencing a shortage of water, but we have put in an order for 15cfs that we can pick up tomorrow after 1pm. Water patrons around the perimeter of the District may be experiencing a decrease in their water level but should see improvement by late Wednesday or early

² The Enforcement Order does not discuss whether KCDG could protect the liners by removing them as an alternative to keeping them covered with water.

Mr. Dwight French, Administrator
August 14, 2015
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Thursday morning. We appreciate your patience in resolving this matter.
(06/16/2015)³

TID has further notified its members through its website that "the shut-off date for the 2015 irrigation season has been set for Wednesday, September 30th," which is earlier than usual. Under the circumstances, the real hardship to the water users—TID and its members—is keeping TID water in in the KCDG reservoirs—off-limits to TID's other patrons—and allowing continued diversion into the reservoirs to keep them full to protect KCDG's liner.

Finally, the Director was required to find that the undue hardship suffered by the water user could be "ameliorated by providing a period of time in which to achieve compliance with the law." The Director made no such finding. There is no explanation or direction given in the Enforcement Order about what TID would need to do in order to make these facilities legal. And the Director gave no explanation for why the December 15, 2015 cutoff date was reasonable. Such a finding is required by ORS 537.143(4)(b).

C. The Director failed to determine whether "continued use under a limited license outweighs the public benefits of termination, including deterrence of illegal uses and protection of the water source."

In applying the third factor required by ORS 537.143(4)(c), the Director made the following conclusory "finding of fact":

"A limited license that assures that no additional water shall be diverted as a result of the limited license authorization protects the water source because no additional water will be appropriated. Illegal water use is deterred by requiring compliance consistent with the terms of this order."

That is not what the statute requires. By the clear text of the statute, the Director was required to weigh the public benefits of termination against continued use under the limited license. The Director's failure to do so makes the limited license insufficient and improper.

If the Director had engaged in the proper analysis, it would have become clear that the public benefit of termination far outweighs KCDG's continued use of the water. By allowing KCDG to keep water in its ponds, the Department is encouraging the very type of

³ Presumably, the "order" was for Crescent Lake water. The District did not use—and, in fact, could not use—water from the KCDG reservoirs, since the reservoirs are not equipped to deliver water back into the District's delivery system.

behavior that should be deterred. The speed at which KCDG moved this project forward—without any agency review—must be factored in to whether the Enforcement Order is truly deterring future illegal water use. Within a matter of months, KCDG excavated, built, lined, and filled the lakes, in the hope that once the lakes were built and filled, no one would require them to undo the work. With the Enforcement Order, that is precisely what has happened.⁴

As Petitioners have repeatedly pointed out to the Department during these transfer proceedings, the public has been deprived of the benefits provided by the water rights permit process. If KCDG or TID properly applied for a reservoir permit before constructing and filling new storage facilities, the project would receive a full technical and public interest review. Such a review would include, among many other things: (1) a complete airing of how the KCDG reservoirs will be used (such as for water skiing as opposed to irrigation); (2) whether the reservoirs can and will be operated as re-regulating reservoirs and integrated with TID's delivery system for the benefit of all of TID's members; (3) an analysis of the impacts of the reservoirs on wildlife and on designated deer winter range; (4) consideration of the effects of the ponds on the adjacent Klippel Water wells; (5) an assessment of the concomitant impacts of reducing storage at Upper Tumalo Reservoir, such as diminished recharge of the nearby Avion Water Company wells; (6) consideration of the impacts of the new reservoirs on evaporation and water quality; and (7) full vetting of land use compatibility by Deschutes County for the KCDG reservoirs. Failure to discuss these and other benefits of strict enforcement against TID and KCDG's unauthorized water storage renders the Order insufficient under the statutory requirements.

4. The activities authorized by the Enforcement Order are unclear, arbitrary, and inconsistent with other provisions of Oregon law and Department practice.

The Enforcement Order is further deficient in that it contains terms that are unclear and arbitrary, while omitting other terms that are normally included in limited licenses and water storage permits.

⁴ When ORS 537.143 was amended to grant the Department the authority to issue limited licenses with enforcement orders, Reed Benson from WaterWatch raised this concern that there would be no deterrence for illegal water uses if the Department was simply going to bless the use after the fact. Tape Recording, House Committee on Water Policy, HB 2184, March 19, 1995, Tape 44A, 43B (statement of Reed Benson). In response to those concerns, the legislature added the language in ORS 537.143(4)(c) to require the Director to find that continued use under the limited license "outweighs the public benefits of termination, including deterrence of illegal uses and protection of the water source."

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A. The Enforcement Order is unclear as to what diversions are permitted.

Paragraph 6 of the Order provides:

"TID is required to not divert any additional water, beyond what is currently authorized by existing water rights, into the Tumalo Feed Canal. Within 14 days of this order, TID shall demonstrate to the Department that they are not diverting more water than they would otherwise be entitled to if the two ponds did not exist."

Without referring to specific amounts of water or specific water rights, Paragraph 6 is unclear as to the relationship between the diversions allowed by the license and TID's other entitlements to divert. Nor does the Enforcement Order limit the maximum volume that may be stored in the KCDG reservoirs or in the Upper Tumalo Reservoir to avoid enlargement of the District's water right or violation of the one-fill rule. The permanent transfer application requested transfer of approximately 125 acre feet to the KCDG property, and TID should be limited to that amount, regardless of the allowed diversion rate in the Enforcement Order and regardless of the amount it may be entitled to divert under its total water rights. It is not clear whether the diversions "currently authorized by existing water rights" and the water that TID "would otherwise be entitled to if the two ponds did not exist" are one and the same thing. The Enforcement Order says that TID needs to keep the lakes "in a full or near full condition" to protect the liner and allows continued diversion of up to 0.5 cfs for this purpose. This diversion amount is not explained or justified, and is thus arbitrary.

Additionally, the Enforcement Order does not say anything about any allowed uses for the water in the reservoirs—such as re-regulation, irrigation (other than a BIS as discussed below), or for that matter, recreation or water skiing—the only purpose seemingly authorized is protecting the liners. These omissions make the Enforcement Order at best unclear and, at worst, arbitrary.

B. The Director's finding that TID may use water as a bulge for irrigation in the North Pond is not supported by substantial evidence.

The Director found that "[u]p to 14.4 acre feet of water may be lawfully used as a bulge for irrigation in the North Pond pursuant to water right certificates 74146 and 74147." This finding is not supported by substantial evidence. Prior to construction of the two lakes, KCDG had approximately 55 acres of irrigable land mapped on its property. However, the lakes themselves occupy approximately 21 acres of land, and those acres are no longer irrigable. KCDG also built new roads, rendering additional acreage non-irrigable. TID submitted an

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application (T-11834) to permanently transfer water from the areas now submerged by the reservoirs to alternate acreage, but T-11834 has never been acted on by the Department. Although TID may claim that it can irrigate the alternate acreage under ORS 540.580(3), there are multiple reasons why this is not the case. First of all, T-11834 is integrally related to T-11833 and T-11951, which have now been denied. T-11834 is not necessary without approval of the reservoirs. Furthermore, there is no evidence in the record that KCDG is irrigating more than a few acres of its land, and thus there is no justification for a BIS of 14.4 acre feet. Finally, a BIS cannot be used to justify continued storage after the end of the irrigation season.

C. The Enforcement Order is inconsistent with other limited licenses issued by the Department.

Finally, the terms of the license issued to TID are inconsistent with the terms of other permissions granted by the Department. This license contains fewer restrictions on TID and KCDG than is the case for other parties who properly applied for and received permitted water rights. For instance, in other limited licenses issued recently, the Department has included provisions requiring the licensees to install totalizing flow meters and to maintain and submit complete records of water use. Other recently-issued licenses also state that use of water under the licenses "shall not have priority over any water right exercised according to a permit or certificate, and shall be subordinate to all other authorized uses that rely upon the same source." (See, e.g., LL-1589, 1590, and 1593.)

Similarly, in a recently-issued certificate authorizing storage of water (Certificate 90482), the Department included the following provisions:

- The storage of water allowed herein is subject to the *maintenance of an outlet pipe, or the provision of other means to evacuate water when determined necessary by the Director to satisfy prior downstream rights.*
- *The water user shall pass all live flow outside the storage season described above or after one-time fill.*
- *This right does not provide for the appropriation of water for any out-of-reservoir uses, the maintenance of the water level, or maintaining a suitable freshwater condition. If any water is used for out-of-reservoir uses, or any live flow is appropriated to maintain either the water level or a suitable freshwater condition, a secondary water right is required.*
- *The water user shall not impede water distribution.*

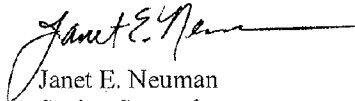
(Emphasis added.) It is inconsistent for the Department to include stricter terms in water rights that were properly applied-for and permitted than in a license issued to "ratify" unauthorized water storage.

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5. Conclusion

For the foregoing reasons, the Department should grant the Bishops' petition for reconsideration and withdraw the Enforcement Order. The Enforcement Order is not supported by substantial evidence and is not consistent with the applicable provisions of law. By pretending that these recreational ponds are irrigation district "reservoirs"—reservoirs that cannot actually supply water to District members—KCDG and TID have taken improper advantage of the considerable power and scant oversight that Oregon law grants to irrigation districts, and have effectively co-opted the Department to bless their activities after-the-fact. By issuing the Enforcement Order and giving TID time to "ameliorate" the problems, the Department is effectively sanctioning this illegal behavior. It is imperative that the Department exercise appropriate oversight and control when it is able to do so, as in this case.

Sincerely,


Janet E. Neuman
Senior Counsel

SMV/eg
copy:

Mr. Thomas and Ms. Dorbina Bishop
Ms. Jennifer M. Bragar
Mr. David A. Rabbino
Ms. Sarah Villanueva

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June 4, 2015

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

Re: Violation of Orders 95-1018 and 95-1026

Dear Mr. Woodcock:

As you know, I represent Thomas and Dorbina Bishop, who live at 63382 Fawn Lane, Bend, Oregon 97701. The Bishops' property is adjacent to property on which KC Development Group, LLC ("KCDG") has constructed a water ski lake and another recreational lake.

In conjunction with KCDG, the Tumalo Irrigation District ("TID" or the "District") filed two transfer applications seeking to transfer the storage of water from Upper Tumalo Reservoir to the KCDG facilities—Temporary Transfer T-11833 and Permanent Transfer T-11951. Both of these transfers were denied by the Department effective May 21, 2015. Order 95-1018 explicitly ordered that TID's use of water revert to the terms and conditions of Certificate 76684, which only allows storage at Upper Tumalo Reservoir.

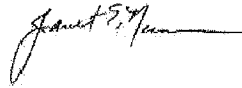
Water remains in the two unpermitted reservoirs on the KCDG property. Furthermore, I have received reports that additional water has been flowing from the TID pipeline into the KCDG water ski lake from at least Thursday, May 28th, through Tuesday, June 2nd. I transmitted this information initially to Dwight French, who referred me to you. This letter follows up on my phone message to you on June 1st inquiring about this situation.

Since the TID transfers were denied, I am aware of no authority for TID or KCDG to store water on this property, aside from a small amount for an irrigation

Mr. Douglas Woodcock
June 4, 2015
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bulge-in-the-system, much less to continue to add water to these facilities. Please advise me if there is any such authority, and how the Department intends to enforce compliance with its orders denying TID's transfer applications. Thank you.

Sincerely,



Janet E. Neuman
Senior Counsel

JEN/sdg

copy: Tom Byler
Jennifer Bragar
William Hopp, Jr.
Elizabeth Dickson
Peter Richter
Martha Pagel
Clients

037351/00001/6468785v1



Janet Neuman

From: Janet Neuman
Sent: Wednesday, June 10, 2015 11:16 AM
To: 'WOODCOCK Doug E'; BYLER Thomas M (thomas.m.byler@state.or.us)
Subject: KCDG water ski lake update [IWQV-PDX.FID840258]

Following up on my letter of June 4, I have heard that water was still being added to the KCDG water ski lake as of yesterday afternoon, and that the lake was very full. It seems that KCDG and TID are flaunting the Department's orders. Thank you for your prompt attention to this matter.

Janet E. Neuman | Senior Counsel Attorney | Tonkon Torp LLP
1600 Pioneer Tower | 888 S.W. Fifth Avenue
Portland, Oregon 97204
503.802.5722 | FAX 503.972.7422
SSRN author page: http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=39591
janet.neuman@tonkon.com | www.tonkon.com

This message may contain confidential communications and privileged information. If you received this message in error, please delete it and notify me promptly.





















Oregon

John A. Kitzhaber, M.D., Governor

Department of Fish and Wildlife

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

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

January 30, 2015

Re: DOGAMI ID No. 09-0079

Dear Mr. Mundie,

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

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

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

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

Thank you for the opportunity to comment on this application.

Sincerely,

Corey Heath, Deschutes District Wildlife Biologist

cc: Nancy Breuner, Deschutes Habitat Biologist

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

In the Matter of the Tumalo Irrigation)
District.) ORDER ON RECONSIDERATION

APPEAL RIGHTS

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

DISPOSITION

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

AUTHORITY

Enforcement Authority

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

Limited License in Conjunction with Enforcement Order

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

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

FINDINGS OF FACT

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

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

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

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

ULTIMATE FINDINGS OF FACT

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

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

CONCLUSIONS OF LAW

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

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

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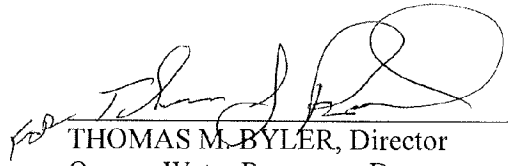
ORDER

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

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

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

DATED this 23rd day of November, 2015.


THOMAS M. BYLER, Director
Oregon Water Resources Department

CERTIFICATE OF SERVICE

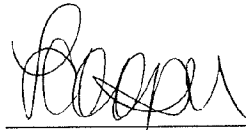
I certify that on November 23, 2015, I served a true and correct copy of the ORDER ON RECONSIDERATION on the following persons by first class mail postage prepaid:

Martha Pagel
Schwabe Williamson & Wyatt
Equitable Center
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Tonkon Torp LLP
1600 Pioneer Tower
888 SW Fifth Ave.
Portland, OR 97204



Lorri Cooper
Oregon Department of Water Resources

Tumalo Irrigation District Water Conservation Plan

Section 1 – WATER CONSERVATION GOALS

Introduction

Adequacy of deliveries has always been a concern for the Tumalo Irrigation District, and water conservation has always been a District goal. In 1996, the District began more focused efforts to assess water losses, develop water conservation alternatives, and to secure funding to implement these alternatives.

Water Loss

Historically, water losses in the system after diversions from natural stream courses have approached 60 percent, but recent improvements from piping projects such as the Bend Feed Canal, canal sealing projects, and lateral piping have reduced losses.

The District, with the assistance of a consultant and the U.S. Bureau of Reclamation, has studied the water loss mechanisms and determined that there are several causes of water loss.

On-Farm Losses: On-farm losses occur after delivery from District facilities and before application to crops. Water losses generally occur at on-farm ponds and losses from irrigation inefficiencies (see section 2, "Irrigation Efficiencies"). Historically, these losses have been estimated by the USBR at 0.5 to 1 foot per year. For the 7,400 acres of irrigation, the annual loss is estimated to be 5,000 acre-feet.

Evaporation: The primary source of evaporative loss in the District system is Tumalo Reservoir, although evaporation also occurs from the canal and lateral system.

The District has field data and observations that have been used to estimate total water loss. However, this data includes the effects of both leakage and evaporation without differentiation. Therefore, most of the impact of evaporation on system losses is included in the discussion below on leakage. However, to assess the relative impacts of evaporation versus leakage, probable evaporative losses are estimated here.

Evaporation from Tumalo Reservoir is estimated as the area of the reservoir multiplied by an annual evaporation rate. According to TID staff, the area of the reservoir during irrigation season when water is still being diverted from Tumalo creek is 40-60 acres. On average, diversions from Tumalo Creek will stop around July 4th, and water will be diverted from Crescent Lake. At that time, the area of Tumalo reservoir will decrease to about 20 acres, and then continue to gradually decrease until December when the reservoir is virtually empty.

For Central Oregon, the net evaporation rate is 2.5-3 feet per year, with rates peaking in the summer months at 4-6 inches per month. Using the monthly average evaporation rates and the average monthly surface area of the reservoir, the annual evaporation loss from the reservoir is approximately 60 acre-feet per year.