

IN THE COURT OF APPEALS OF THE STATE OF OREGON

BRIDGE CREEK RANCH LLC and	)	Oregon Water Resources Department
WATER RESOURCES	)	Nos. T-14158 & T-14170
DEPARTMENT,	)	
	)	
Respondents,	)	
	)	
v.	)	
	)	
WATERWATCH OF OREGON,	)	A189353 (control) & A189355
	)	
Petitioner.	)	

Petition for Review of Final Orders of the
Oregon Water Resources Department

PETITIONER WATERWATCH OF OREGON’S OPENING BRIEF

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STATEMENT OF THE CASE

I. Nature of the Action and Relief Sought.

In these consolidated petitions for review, petitioner WaterWatch of Oregon (WaterWatch) challenges two final orders in contested cases issued by respondent Oregon Water Resources Department (department). The orders approve respondent Bridge Creek Ranch's (BCR) requests to create an additional point of diversion for three of its certificated water rights. These water rights allow BCR to divert water from Bridge Creek, a tributary of the John Day River, for irrigation and for storage in a reservoir for later irrigation.

BCR's existing point of diversion is located on federal land managed by the U.S. Bureau of Land Management (BLM). Under federal law, BCR may not divert water at that point of diversion when flows fall below 10 cubic feet per second (cfs) in Bridge Creek. This restriction protects flows for Middle Columbia River (MCR) steelhead, a fish species listed as threatened under the federal Endangered Species Act. The challenged orders would permit BCR to divert water from a new point of diversion located on BCR's own land even when flows fall below 10 cfs in Bridge Creek, leading to lower flows and higher temperatures in Bridge Creek, which would be bad for steelhead. BCR intends to divert water in these low-flow circumstances at the new point of diversion.

WaterWatch, which has spent decades securing and protecting flows for fish and wildlife in Oregon's rivers and streams, contends that the final orders are illegal in several respects and asks this court to set aside, modify, and/or remand the orders to the department and to order whatever other relief is necessary to address the department's illegal actions.

II. Nature of the Orders on Review.

The orders on review are final orders issued by the department under ORS 540.530.

III. Basis of the Court's Jurisdiction.

This court has jurisdiction because these are petitions for review of final orders issued after a contested case. ORS 536.075(2); ORS 183.482.

IV. Timeliness of Petition.

The challenged orders were issued on October 22, 2025. ER-140; ER-201. Both petitions for review were filed on December 15, 2025, and were thus timely filed. *See* ORS 183.482(1).

V. Basis of the Agency's Power to Issue the Challenged Orders.

The Water Resources Commission has delegated to the department the authority to approve or deny “transfer” requests—*i.e.*, requests to alter certain aspects of certificated water rights without losing priority of those rights. ORS 540.510. This includes requests to “change * * * the point of diversion * * * of the water.” ORS 540.510(1)(a).

VI. Questions Presented.

1. Was it illegal for BCR to pay the department's legal fees and the cost of the administrative law judge for the contested cases?
2. Did the department err in concluding that the transfers will not lead to an “enlargement” of BCR's water rights when the transfers will allow BCR to divert water in circumstances where it would have previously been illegal?
3. Did the department err in approving an additional point of diversion for BCR under a statute that allows for a “change” in “the point of diversion?”
4. Did the department err in concluding that the transfers will not “injure” an existing in-stream water right when the transfers will lead to that in-stream water right receiving less water during low-flow periods?

5. In Case A189355, did the department err by approving BCR's request to change the point of diversion for a right to *store* water when the applicable statute allows such changes only for water *uses*?

SUMMARY OF THE ARGUMENT

BCR paid the department's legal fees for the contested cases and the cost of the administrative law judge (ALJ) hearing the cases. The department cited ORS 536.055 as authority for its agreement with BCR, but that statute does not allow a water-right applicant to jump to the front of the contested-case line by paying the department's legal fees and the cost of an ALJ. These cases represent the first time in the 20+-year history of ORS 536.055 that the department has used the statute in this way. In addition to being unauthorized by statute, the agreement between BCR and the department created an impermissible appearance of bias. For these reasons, the court should set aside the challenged orders.

Even putting that aside, the orders are substantively flawed in several ways. First, the orders approve an unlawful "enlargement" of BCR's water rights, because they will allow BCR to divert water from Bridge Creek when flows fall below 10 cfs, which it is legally prohibited from doing now.

Second, in issuing the orders, the department purported to exercise a power it does not possess: the power to authorize an *additional* point of diversion. The

relevant statutes allow the department to grant an applicant like BCR a “change” in “the point of diversion,” not an additional point of diversion.

Third, the orders will cause an in-stream water right—a water right held in trust for the benefit of the public—to be deprived of water that it would otherwise receive, thereby “injuring” that right. The department’s contrary “no-injury” conclusion rests on a misunderstanding of this court’s decision in *Fort Klamath Critical Habitat Landowners, Inc. v. Woodcock*, 334 Or App 509, 557 P3d 543 (2024), *rev den*, 373 Or 282 (2025). To the extent that the department correctly applied *Woodcock*, the decision in *Woodcock* itself reflects an incorrect understanding of “injury,” and this court should depart from it. Because the orders will “injure” an existing water right, the orders must be set aside.

Finally, the order challenged in Case A189355 is unlawful because it approves an additional point of diversion for a *storage* right rather than a right to *use* water. The transfer statutes do not allow such changes for storage rights. WaterWatch understands this argument is foreclosed by *Bridge Creek Ranch, LLC v. Oregon Water Resources Department*, 329 Or App 568, 541 P3d 920 (2023), but it seeks to preserve the issue for possible review by the Oregon Supreme Court.

STATEMENT OF FACTS

I. Bridge Creek Background.

A. Bridge Creek and Middle Columbia River Steelhead.

Bridge Creek is a tributary of the John Day River. *See* ER-105 (map of the relevant area). It flows past the Painted Hills Unit of the John Day Fossil Beds National Monument before meeting Bear Creek, then continues north-northwest until it meets the John Day. *Id.* Bridge Creek is designated critical habitat for MCR steelhead, a fish species listed as threatened under the federal Endangered Species Act (ESA). *See* 70 Fed Reg 52,630 (Sept 2, 2005).

Low flows and resultant high water temperatures in Bridge Creek are a big problem for MCR steelhead. ER-19; ER-123. According to the National Marine Fisheries Service (NMFS), the federal agency that administers the ESA for seagoing species like MCR steelhead, “[t]he ability of critical habitat in [Bridge Creek] to support recovery of MCR steelhead is primarily limited by low flows and high water temperatures resulting from irrigation and livestock grazing in the subbasin.” NMFS, Endangered Species Act Section 7(a)(2) Biological Opinion for the Bridge Creek Ranch Diversion, Wheeler County, Oregon at 3, *available at* <https://doi.org/10.25923/gdga-7181>.

When flows fall below 10 cfs in Bridge Creek—which happens nearly every summer, ER-79–80; ER-123–24—temperatures in Bridge Creek regularly exceed

25 °C, ER-123. Juvenile steelhead cannot survive in temperatures that high. ER-123.

B. Efforts to Address Flow and Temperature Issues in Bridge Creek.

There have been substantial efforts at both the federal and state levels to address the flow and temperature issues in Bridge Creek. One key effort at the federal level involves BLM, the federal agency that manages much of the land in the Bridge Creek watershed. In 2015, BLM adopted a resource management plan governing its administration of over 450,000 acres of federal land in Oregon. *See* ER-12–15 (excerpts from resource management plan). As part of that plan, BLM committed to “[c]ease water withdrawal from stream channels when stream flows drop below 10 [cfs]” in Bridge Creek, with certain limited exceptions. ER-15. BLM also committed to “[r]equir[ing] rights-of-way to convey surface or ground water across BLM land,” again with certain limited exceptions. *Id.* Under the resource management plan, any rights-of-way to facilitate diversion of water from Bridge Creek must include the 10 cfs restriction. ER-94–95; ER-118.

At the state level, the department has secured an in-stream water right in Bridge Creek to protect flows “for the purpose of supporting aquatic life and minimizing pollution.” ER-2. An in-stream water right is “a water right held in trust by the [department] for the benefit of the people of the State of Oregon to maintain water in-stream for public use.” ORS 537.332(3). The in-stream water

right in Bridge Creek (reflected in Certificate 59780) protects 6 cfs of flow from July 16 through October 31, a period that includes the hottest part the summer, when flows are typically the lowest. ER-2; ER-79–80. At other times of the year, more flow is protected—40 cfs from the middle of February through the end of May, 25 cfs during June, and 15 cfs during the first half of July. ER-2. The in-stream right protects flows in Bridge Creek from where it joins Bear Creek downstream to where it joins the John Day River. *Id.*

II. Bridge Creek Ranch’s Efforts to Add a New Point of Diversion.

A. Bridge Creek Ranch’s Operations.

BCR runs an agricultural operation just north of the Painted Hills Unit of the John Day Fossil Beds National Monument. ER-117. After flowing past the Painted Hills Unit, Bridge Creek flows north-northwest through BCR’s property. ER-105.

BCR diverts water from Bridge Creek under several different certificated water rights.¹ BCR diverts water for irrigation use under Certificates 13593 and 96311 and diverts water for storage under Certificate 68533. ER-180. The water diverted for storage is stored in the Painted Hills Reservoir and later withdrawn for irrigation use. ER-179. All three of these water-right certificates share a point of

¹ A water-right certificate reflects the fact that the holder of the certificate has a “vested” or “perfected” water right. *Bridge Creek Ranch*, 329 Or App at 576.

diversion—the place where water is taken out of Bridge Creek—located on federal land managed by BLM. ER-180. That point of diversion is sometimes called the “Section 6” diversion in reference to the legal description of its location. ER-90; ER-180. Under the two direct irrigation certificates, BCR is allowed to divert around 2.4 cfs from the Section 6 diversion in the late summer, ER-117, though it does not always divert the maximum amount, ER-118.

All of these certificated water rights are “senior” to the in-stream right in Bridge Creek. *See* ER-149. This means that, in the event there is not enough water to satisfy both BCR’s water rights and the in-stream right, BCR’s rights have “priority.” *See generally E. Valley Water Dist. v. Or. Water Res. Comm’n*, 374 Or 148, 155–57, 574 P3d 453 (2025) (describing the prior appropriation doctrine).

B. BLM Enforces Federal Restrictions Against BCR.

In 2019, BLM and BCR began having discussions about the latter’s use of the Section 6 diversion. ER-118. BLM informed BCR that it needed a right-of-way to continue using the Section 6 diversion and requested that BCR apply for one. *Id.*; *see also* ER-93–94. BLM also informed BCR that the right-of-way, once issued, would prohibit BCR from diverting water from Bridge Creek at the Section 6 diversion when flows in Bridge Creek fell below 10 cfs. ER-118.

In May 2021, soon after the start of the irrigation season, BLM issued a trespass notice to BCR for its unauthorized use of the Section 6 diversion.² ER-23–24. According to BLM, it was “important [to] * * * move quickly to stop the unauthorized use[], as continued unrestricted use of the [Section 6 diversion] that draws instream flow below 10 [cfs] jeopardizes * * * [MCR] steelhead and other sensitive species.” ER-21 (early alert preceding trespass notice).

Following receipt of the trespass notice, BCR submitted the fees necessary for BLM to process a right-of-way application, and BLM issued a right-of-way to BCR in September 2021. ER-34. BLM issued a three-year non-renewable right-of-way—rather than a longer term or renewable right-of-way—because doing so better suited BCR’s needs. ER-119. However, BLM would have considered an application for a longer term or renewable right-of-way from BCR. ER-100. Consistent with BLM’s resource management plan, the right-of-way included a stipulation that “[n]o water may be diverted when the stream flow drops below 10 cfs in Bridge Creek.” ER-32. In accordance with that restriction, BCR has ceased diverting water at the Section 6 diversion when flows fall below 10 cfs in Bridge Creek. ER-120.

² Using the Section 6 diversion without a right-of-way from BLM constitutes trespass under federal law. *See* 43 CFR § 2808.10(a). Using the diversion “in a way that is beyond the scope and terms and conditions” of a valid right-of-way is also trespass. *Id.*

C. BCR Files Transfer Applications.

Apparently unhappy with the 10 cfs limitation at the Section 6 diversion, BCR filed a transfer application with the department in December 2021 to use a new point of diversion located on BCR's own land to divert water for its storage right (Certificate 68533).³ ER-41; *see also* ER-16 (BCR describing its position on the 10 cfs limitation); ER-101–02 (BLM official discussing BCR's position). Because this new point of diversion would not be located on BLM land, federal law would not restrict BCR from diverting water at the new point of diversion when flows fall below 10 cfs in Bridge Creek. Like the Section 6 diversion, the proposed new point of diversion is upstream of the reach of Bridge Creek protected by the in-stream water right. ER-105.

The department refused to process BCR's application, concluding that it lacked authority to allow a change in the point of diversion of a certificated *storage* right. *Bridge Creek Ranch*, 329 Or App at 571. In response, BCR brought a mandamus action to compel the department to process its application. *Id.* The circuit court ruled in favor of BCR, and this court affirmed, albeit based on

³ Generally speaking, a water-right certificate specifies where the holder may divert water from its natural course (*i.e.*, the point of diversion), and the holder must apply to the department for a "transfer" if they wish to use a different point of diversion. *See Huff v. Bretz*, 285 Or 507, 518, 592 P2d 204 (1979) ("a person shall not change his point of diversion unless he files * * * an application and complies with the procedures set forth" in statute).

“slightly different reasoning from that of the trial court. *Id.* at 570. This court held that, although “the storage of water in and of itself is not a ‘use’ of water, when considered in the context of [a] secondary permit [to use stored water], it can represent a water use subject to transfer.” *Id.* at 587. WaterWatch filed an amicus brief in support of the department in that case.

In accordance with the circuit court’s order, the department began processing BCR’s application, as well as a second application seeking to use the new point of diversion on private land for BCR’s direct-irrigation rights (Certificates 13593 and 96311). ER-42; ER-51–52. Both applications sought to authorize the use of the new point of diversion *in addition to* the Section 6 diversion, not *instead of* the Section 6 diversion. ER-120; ER-182.

III. The Present Dispute.

A. The Department Issues Preliminary Determinations.

In September 2023, the department issued a preliminary determination proposing to approve BCR’s application to add a new point of diversion for its storage right (Application T-14170). ER-41–45. The department later issued a similar preliminary determination for BCR’s application for its direct irrigation rights (Application T-14158). ER-51–57. WaterWatch timely protested both applications. ER-46–50 (T-14170); ER-58–62 (T-14158).

B. The Department’s Contested Case Backlog.

At the time WaterWatch protested BCR’s applications, the relevant statute required the department to “hold a hearing” on any protested application—*i.e.*, refer the application for a contested-case hearing. ORS 540.520(7) (2023).⁴ A contested-case hearing for a water-right transfer must be presided over by an ALJ from the Office of Administrative Hearings (OAH), ORS 183.635, and the department must use lawyers from the Oregon Department of Justice (DOJ) to provide full legal representation in a contested case, *see* ORS 180.220; ORS 183.452. *See also Frohnmayer v. State Accident Ins. Fund Corp.*, 294 Or 570, 585–87, 660 P2d 1061 (1983) (discussing the general bar on an agency’s ability to retain outside counsel). The department must pay for both the ALJ hearing the contested case and the DOJ lawyer(s) providing legal representation to the department. *See* ER-65 (email from the department to BCR explaining costs associated with contested-case hearings).

Partly due to the expense associated with paying ALJs and DOJ lawyers, the department has accumulated a large backlog of protested applications awaiting contested-case hearings. *See* App-1–2 (letter from Oregon legislators to the Joint Committee on Ways and Means); ER-65 (“lack of resources to pay the DOJ and OAH costs associated with providing hearings is one of the main obstacles to [the

⁴ The statute has since been amended. *See* Or Laws 2025, ch 575, § 20a.

department] referring more protested applications for hearings more quickly”). In recent years, the department has “only been able to move 1-2 cases per biennium to a [contested-case] hearing.” ER-38. Much of this backlog is the result of third parties protesting applications for new in-stream water rights. ER-39; App-1.

C. The Department and Bridge Creek Ranch Enter into an Agreement to Expedite the Contested Cases.

In June 2024, a few months after WaterWatch filed its protests, Mike Freese, a lobbyist for BCR, reached out to the department to inquire about expediting the referral of BCR’s protested applications. ER-70. Freese asked if the department had “an option for an applicant to help defray some of the costs” of a contested case. *Id.* After some back-and-forth, a representative from the department wrote the following to Freese:

“In the past we have not used our reimbursement authority [under ORS 536.055] for protests. We are currently investigating the possibility of using RA for protests, but at this point in time it is not an option that we are currently offering.

In practice, it is likely that the Department would need to use the reimbursement authority not just for referral, but also for costs associated with the protest/OAH/DOJ/staff time, as resources to pay for OAH and DOJ is often the limiting factor for moving cases through the process.”

ER-68–69.

Freese responded to this with a lengthy email arguing that, in his view, ORS 536.055 authorized the department to enter into an agreement with BCR by which

the latter would pay *all* of the department's contested-case-related expenses, including "DOJ and OAH staff time." ER-66–68. Freese complained that, absent such an agreement, BCR would be "held hostage by [department] inaction." ER-66. Freese copied Representative Mark Owens, the co-chair of the House Committee on Agriculture, Natural Resources, Land Use, and Water. *Id.*

Two days later, the department's Protest Program Coordinator responded to Freese with an email stating that the department had reached a "preliminary conclusion" that "ORS 536.055 likely allow[ed]" it "to provide a contested case hearing on a protested application on an expedited basis in exchange for a voluntary agreement by an applicant or other party to reimburse [the department] for the cost of providing the hearing," including "the cost of [DOJ] attorneys representing [the department] in the hearing[]" and * * * the cost of paying [OAH] for the time of the [ALJ] and other staff that conduct the hearing." ER-65. The email to Freese reiterated that the department "ha[d] not used reimbursement authority for protests in the past." ER-65–66. According to internal emails, the department viewed BCR's applications as a "test case" for using ORS 536.055 in this novel way. ER-72.

Ultimately, the department and BCR entered into an agreement (Reimbursement Agreement) by which BCR agreed to pay "[t]he full cost of time and materials expended by [DOJ] and [OAH] from the referral of [BCR's protested

applications] to the OAH until the issuance of final orders.” ER-74–76. The department estimated that this would cost \$133,000. ER-74. When BCR sent the first check to the department under the Reimbursement Agreement, the department had trouble processing it, because it had no protocol for how to deal with such payments, having never used ORS 536.055 in this way. ER-77–78.

D. The Contested Case Proceedings.

After executing the Reimbursement Agreement, the department quickly referred BCR’s applications for contested-case hearings, even while applications filed much earlier awaited referral. ER-113. In November 2024, BCR filed a motion for summary determination as to certain issues. ER-114. While that motion was pending, WaterWatch learned about the Reimbursement Agreement through discovery. ER-81–82. WaterWatch then filed a motion to deny the transfer applications or else return the applications to the contested-case queue for referral in the normal course. *Id.* The ALJ denied WaterWatch’s motion, finding that the issue of whether the Reimbursement Agreement was authorized by ORS 536.055 was “beyond the scope of the ALJ’s jurisdiction,” ER-86, and that there was no showing of actual bias created by the Reimbursement Agreement, ER-86–88.

Around the same time, the ALJ granted in part and denied in part BCR’s motion for a summary determination. ER-114. On the issue of whether the transfers would “injure” the in-stream water right in Bridge Creek (Certificate

59780), the ALJ ruled that BCR was entitled to a favorable determination as a matter of law. ER-154–57. The ALJ also granted BCR’s motion as to the “change/addition” issue and the issue of whether BCR could use the transfer statutes to change the point of diversion for its storage right. ER-157–60. The ALJ denied BCR’s motion as to the “enlargement” issue. ER-151–52.

Following two days of hearings in February 2025 and post-hearing briefing, the ALJ issued proposed orders granting BCR’s two applications. ER-115; ER-177. On the “enlargement” issue, the ALJ rejected WaterWatch’s arguments. ER-129–31. The parties then filed exceptions to the proposed orders. ER-106–08 (T-14158); ER-109–12 (T-14170). In its exceptions, WaterWatch again raised the issue of the legality of the Reimbursement Agreement. ER-106–07. The department did not address this issue in the final orders, thereby denying the exceptions based on this issue. ER-133–34. On October 22, 2025, the department issued final orders approving BCR’s transfer applications.

FIRST ASSIGNMENT OF ERROR

The department erred in denying WaterWatch’s motion to deny BCR’s transfer applications or return the contested cases to the department due to the illegal Reimbursement Agreement.

I. Preservation of Error.

WaterWatch moved to deny BCR's applications or return the contested cases to the department in a motion filed on December 31, 2024. ER-81–82. WaterWatch raised the issue of the illegality of the Reimbursement Agreement again in its exceptions to the proposed orders. ER-106–07; ER-109–10.

II. Standard of Review.

The interpretation of ORS 536.055 is a question of statutory construction. Because the relevant terms in ORS 536.055 are either “exact” or “inexact” terms, the department's interpretation of the statute is owed no deference. *Coos Waterkeeper v. Port of Coos Bay*, 363 Or 354, 360–61, 423 P3d 60 (2018).

III. Argument.

Prior to the contested cases leading to the orders on review here, the department had never invoked ORS 536.055 to allow an applicant to pay for the DOJ lawyers representing the department in a contested case and the cost of the ALJ hearing the case. When first approached by BCR about the possibility of using ORS 536.055 in this way, the department stated that it was “not an option that we are currently offering.” There is a good reason why the department had never offered that option in the past: ORS 536.055 does not allow an applicant to pay the

department’s legal fees in a contested case or the cost of an ALJ. For that reason, the Reimbursement Agreement is illegal. Moreover, the Reimbursement Agreement created an impermissible appearance of bias on the part of the ALJ. For these reasons, the orders resulting from the contested cases must be set aside.

A. The Reimbursement Agreement Is Illegal.

1. The Agreement Was Not Authorized by ORS 536.055.

In interpreting ORS 536.055, the court’s “‘paramount goal’ is to ascertain the intent of the legislature that enacted” the statute, which is “determine[d] * * * by examining the text, in context, as well as legislative history ‘where that legislative history appears useful to the court’s analysis.’” *Marshall v. PricewaterhouseCoopers, LLP*, 371 Or 536, 540, 539 P3d 766 (2023) (quoting *State v. Gaines*, 346 Or 160, 171–72, 206 P3d 1042 (2009)). The text and legislative history of ORS 536.055 make clear that it does not allow an applicant to obtain a faster contested-case hearing by paying the department’s legal fees or the cost of the ALJ overseeing the hearing.

ORS 536.055 allows the department to “enter into an agreement that sets fees to be paid to the department for the purpose of enabling the department to expedite or enhance the regulatory process to provide services voluntarily requested under the agreement.” ORS 536.055(1).⁵ “Pursuant to the agreement, the

⁵ ORS 536.055 is set out in full in the appendix. *See* App-6.

department may hire additional temporary staff members, contract for services or provide additional services to the person that are within the authority of the department to provide.” *Id.* The statute lists “the processing and review of * * * [w]ater right exchanges and transfers” as among the “services” that the department may provide through these agreements. ORS 536.055(6)(b).

ORS 536.055 does not mention “legal fees” or “legal expenses” at all. This is significant because the legislature says so explicitly when it wants to allow (or require) an applicant to pay an agency’s legal fees, and it tends to list those fees as distinct from application-processing expenses. For instance, ORS 469.421(1) provides that certain applicants for energy facility site certificates must pay “all expenses” related to their applications and then lists several different types of expenses, including “[l]egal expenses” and “[e]xpenses incurred in processing and evaluating the application.” Similarly, ORS 517.973(3) requires applicants for mining operation permits to “pay all expenses incurred by the department and the permitting and cooperating agencies related to the consolidated application process,” which “may include legal expenses” as well as “expenses incurred in processing and evaluating the consolidated application.” *See also* ORS 468.065(3) (referring to “legal expenses” and separately to “expenses incurred in evaluating the project”).

Unlike the statutes discussed above, ORS 536.055 mentions only the “processing and review” of certain types of water-right applications. ORS 536.055(6). The legislature clearly knows how to distinguish an agency’s legal fees from the costs associated with the agency’s “processing” or “evaluation” of an application, so ORS 536.055’s omission of any reference to legal fees strongly implies that such fees are outside the scope of what the department may recover from an applicant under the statute. *See Progressive Universal Ins. Co. v. Voyles*, 337 Or App 381, 398, 563 P3d 371 (2025) (“Courts regularly observe that the legislature knows how to use different language when it intends to evoke different meanings.”), *rev den*, 373 Or 736.

In addition, the language of ORS 536.055 is an extremely poor fit for an arrangement like the Reimbursement Agreement. The statute allows “the department” to provide expedited or enhanced services “to the person” paying the department for such services. ORS 536.055(1). But the services provided by DOJ lawyers are not provided *to an applicant* like BCR; rather, they are provided *to the department*, which is sometimes *adverse* to the applicant in the contested case. And the services provided by an ALJ from OAH are not provided *by* the department, whose own personnel are statutorily prohibited from providing such services. ORS 183.635(1), (4). To interpret ORS 536.055 as authorizing an arrangement like the one between the department and BCR, one must pretend that

DOJ lawyers representing the department are in fact “providing services” to an entirely different party and that the department, rather than OAH, is providing an ALJ.

The legislative history of ORS 536.055 bolsters the conclusion that the Reimbursement Agreement is illegal. ORS 536.055 was intended to create “an additional transaction processing pipeline” for those willing and able to pay for expedited services. Audio Recording, House Water Committee, HB 2551, Mar 6, 2003, at 1:02:30 (statement of Kristina McNitt from the Oregon Water Resources Congress); *see also* App-3–5 (written testimony by the department in support of the law).⁶ The statute envisions the department “hir[ing] additional temporary staff members” or “contract[ing] for services” to process applications in the expedited pipeline. ORS 536.055(1); *see also* Audio Recording, House Water Committee, HB 2551, Mar 6, 2003, at 1:21:44 (statement of department representative Adam Sussman) (discussing how the department would use contractors or temporary staff to process applications in the expedited queue). DOJ personnel providing legal representation to the department and an ALJ from OAH hearing a contested case are nothing like temporary staff or contractors, because they are not under the

⁶ The audio recording of the March 6, 2003 House Water Committee hearing can be found at the following address:
<https://records.sos.state.or.us/ORSOSCMSearch/Search/SearchDetail.aspx?uri=4174080>

control of the department—indeed, they perform functions that department personnel are generally statutorily prohibited from performing. *See supra*.

Moreover, the pool of available DOJ lawyers and ALJs from OAH is limited, and the department cannot add to that pool by hiring “temporary lawyers” or “contract ALJs” to work on contested cases. *See supra* p. 13 (discussing how the department must use ALJs from OAH and lawyers from DOJ in contested cases). What this means is the department cannot set up a parallel expedited contested-case pipeline; there is just *one* pipeline. Given that, allowing a class of applicants to expedite their cases necessarily lets them “jump the line” to the detriment of other applicants. The legislature clearly did not intend such a result. *See* Audio Recording, House Water Committee, HB 2551, Mar 6, 2003, at 1:19:35 (statement of department representative Adam Sussman) (“[T]his receipts authority * * * will not distract us from the work that we’re doing to attack the workloads under * * * the folks in the normal line.”); *id.* at 1:20:20 (statement of Rep. Mike Schaufler) (“Well, I’m completely satisfied that the regular, normal lines will be taken care of.”).

The Reimbursement Agreement was not authorized by ORS 536.055 and is illegal, and the orders resulting from the contested cases funded by the agreement should be set aside. *Cf. West Linn Corp. Park, L.L.C. v. City of West Linn*, 349 Or 58, 96, 240 P3d 29 (2010) (“When a governmental entity’s power is conferred by

statute, actions outside the scope of that power are ‘extra statutory’ and therefore *ultra vires*.”).

2. *The Reimbursement Agreement Created an Unacceptable Appearance of Bias.*

In addition to being unauthorized by statute, the Reimbursement Agreement created an impermissible appearance of bias on the part of the ALJ holding the contested-case hearing. “[N]ot only the fact but also the appearance of impartiality are the very currency of judicial legitimacy.” *In re Conduct of Schenck*, 318 Or 402, 407, 870 P2d 185 (1994). An appearance of bias precludes a judicial or quasi-judicial officer from presiding over a case and can even violate due-process principles. *See State v. Langley*, 363 Or 482, 502–08, 424 P3d 688 (2018) (analyzing a claimed appearance of bias under both the Oregon Code of Judicial Conduct and due-process principles), *adh’d to as modified on recons*, 365 Or 418 (2019); *State v. Garza*, 125 Or App 385, 388–89, 865 P2d 463 (1993) (“to ensure due process, a judge’s *actual or apparent* bias must by necessity result in disqualification”) (emphasis in original), *rev den*, 319 Or 81 (1994); OAR 471-060-0005(2)(b) (providing that “good cause” exists to change an ALJ if there “is any reason why [the ALJ’s] impartiality might reasonably be questioned”).

Here, the Reimbursement Agreement created an unacceptable appearance of bias. Indeed, the agreement may have even crossed the due-process line.⁷ *See Langley*, 363 Or at 505 (discussing “cases in which a judge’s financial interest in the outcome of a matter * * * required recusal based on the perception that those interests might tempt the judge to skew the outcome of a case for one party or the other”). To an outside observer, the scene looked like this: a private party to an adversarial proceeding effectively paying the quasi-judicial officer presiding over their case, with the officer fully aware that the party—and not the opposing party—was paying. It is not difficult to see how such an observer might question the ALJ’s ability to remain impartial.

In refusing to deny BCR’s applications or return the contested cases to the agency, the ALJ relied on two cases for the proposition that WaterWatch needed to show *actual* bias, not just an appearance of bias. ER-88. This was legal error. Crucially, neither of those cases involved an allegation of an appearance of bias on the part of an ALJ from OAH. *See W.A.S. v. Teacher Standards & Practices*

⁷ The fact that the Reimbursement Agreement may have facilitated a due-process violation further supports petitioner’s interpretation of ORS 536.055. “When confronted with competing, reasonable constructions of a statute, and there is even a tenable argument that one of them would render the statute unconstitutional, [courts] generally favor the other construction.” *Pete’s Mountain Homeowners Ass’n v. Or. Water Res. Dep’t*, 236 Or App 507, 522, 238 P3d 395 (2010). Here, there is a “tenable argument” that the department’s reading of ORS 536.055 would violate due process by allowing one party to a contested case to effectively pay the salary of the presiding ALJ.

Comm’n, 314 Or App 274, 277, 499 P3d 105 (2021) (“Petitioner does not argue bias on the part of * * * the [ALJ] who initially heard the case.”); *Shicor v. Bd. of Speech Language Pathology & Audiology*, 291 Or App 369, 374–75, 420 P3d 638 (2018) (analyzing a claim of bias on the part of the agency, not the ALJ). An ALJ, like a judge on a court, is supposed to avoid even the *appearance* of bias. Compare OAR 471-060-0005(2)(b) (ALJs), with OCJC 3.10(A) (judges).

B. The Court Should Set Aside the Orders and Send BCR’s Applications Back to the Department.

This court has broad authority to fashion an appropriate remedy for the department’s violations of law. *See* ORS 536.075(9) (“The court may affirm, reverse, modify or supplement the order appealed from, and make such disposition of the case as the court determines to be appropriate.”); ORS 183.486(1) (“The reviewing court’s decision * * * shall provide whatever relief is appropriate irrespective of the original form of the petition.”). The court should set aside the challenged orders and return BCR’s transfer applications to the department for future referral to an ALJ who has not had their costs paid by BCR.

SECOND ASSIGNMENT OF ERROR

The department incorrectly concluded that the transfers will not cause “enlargement” of BCR’s water rights.

I. Preservation of Error.

WaterWatch raised the “enlargement” issue at several different points during the proceedings, including during the contested case and in exceptions to the ALJ’s proposed orders. *See* ER-108 (exceptions); ER-129–31 (portion of final order discussing WaterWatch’s “enlargement” argument).

II. Standard of Review.

This assignment of error raises a question of the correct interpretation of one of the department’s regulations. When reviewing an agency’s interpretation of its own regulations, a “court ordinarily defers to [the] agency’s interpretation * * * if that interpretation is a plausible one and otherwise consistent with the law.” *Oil Re-Refining Co. v. Env’t Quality Comm’n*, 361 Or 1, 11, 388 P3d 1071 (2017). An interpretation is “plausible” if “it is not ‘inconsistent with the wording of the rule itself, or with the rule’s context, or with any other source of law.’” *Noble v. Dep’t of Fish & Wildlife*, 355 Or 435, 448–49, 326 P3d 589 (2014) (quoting *Don’t Waste Or. Cmte. v. Energy Facility Siting Council*, 320 Or 132, 142, 881 P2d 119 (1994)).

III. Argument.

A. The Department's Conclusion that the Transfers Will Not Result in "Enlargement" of BCR's Water Rights Is Based on a Misinterpretation of the Department's Own Rules.

In order to approve a transfer request, the department must find that the transfer will "not result in enlargement" of the transferred water right. OAR 690-380-5000(1)(e). "Enlargement" of a water right is defined to include "[d]iverting more water at the new point of diversion or appropriation than is legally available to that right at the original point of diversion or appropriation." OAR 690-380-0100(2)(d).⁸ BCR will be able to, and intends to, divert water at its new point of diversion even when flows fall below 10 cfs in Bridge Creek. ER-120. Diverting water under those low-flow circumstances at its old point of diversion would violate the BLM right-of-way and therefore federal law. Thus, the transfers will

⁸ In its entirety, OAR 690-380-0100(2) reads:

"'Enlargement' means an expansion of a water right and includes, but is not limited to:

- (a) Using a greater rate or duty of water per acre than currently allowed under a right;
- (b) Increasing the acreage irrigated under a right;
- (c) Failing to keep the original place of use from receiving water from the same source; or
- (d) Diverting more water at the new point of diversion or appropriation than is legally available to that right at the original point of diversion or appropriation."

OAR 690-380-0100 was amended in 2026, but this provision was not affected.

result in BCR diverting more water during low-flow periods than it legally could have diverted at its old point of diversion. That meets the definition of “enlargement” under any sensible interpretation of “legally available.”

Despite this, the department concluded that the transfers will *not* result in “enlargement” of BCR’s water rights. This conclusion rests on the department’s idiosyncratic interpretation of the phrase “legally available” to mean legally available under the department’s “statutes and rules and the terms of the certificated water right at issue, without regard to * * * federal law.” ER-130. Under this interpretation, the 10 cfs restriction imposed by federal law does not count for purposes of the enlargement analysis.

The department’s interpretation of “legally available” in OAR 690-380-0100(2)(d) is not a plausible one, because it is “inconsistent with the wording of the rule itself.” *Don’t Waste Or. Cmte.*, 320 Or at 142. When used without any qualification, the phrase “legally available” should be read to refer to both state and federal law. *See State v. Ehrensing*, 255 Or App 402, 415, 296 P3d 1279 (2013) (interpreting the statutory phrase “lawfully entitled” to “encompass[] both state and federal law” due in large part to the phrase being “textually unqualified”). This makes sense given the Supremacy Clause of the U.S. Constitution, US Const, Art VI: when federal law forbids an activity that state law permits, state law is

preempted, and the activity is not legal. *E.g.*, *Emerald Steel Fabricators, Inc. v. Bureau of Labor & Indus.*, 348 Or 159, 176–78, 230 P3d 518 (2010).⁹

In interpreting the phrase “legally available,” the department lumped together “third-party agreements” and “federal law.” *E.g.*, ER-130. Even if the department is right that agreements with private third parties have no bearing on whether water is “legally available” for purposes of the enlargement analysis, that is not the situation presented here. The 10 cfs flow restriction is not a private agreement, nor is it a condition in a federal contract; it is a condition on BCR’s use of federal property. *See* 43 CFR § 2801.5 (“Right-of-way means the public lands that the BLM authorizes a holder to use or occupy under a particular grant or lease.”); *see also* ER-23–24 (trespass notice). Failing to adhere to that condition is not a breach of contract, but a violation of federal law subject to civil and even potentially criminal penalties. *See* 43 CFR § 2808.10(a) (defining trespass to include “using, occupying, developing, or subleasing the public lands or their resources * * * in a way that is beyond the scope and terms and conditions of your authorization”); *id.* § 2808.11 (setting out penalties for trespass). When flows fall below 10 cfs in Bridge Creek, it is *illegal* for BCR to divert water at its old point of

⁹ When state law conflicts with federal law, state law is unenforceable and without effect. *Emerald Steel Fabricators*, 348 Or at 178. Thus, when flows fall below 10 cfs in Bridge Creek, there is no water “legally available” to Bridge Creek Ranch even under *Oregon* law.

diversion, and there is thus no water “legally available” for BCR in those circumstances.

The department’s interpretation of “legally available” is also inconsistent with the purpose of the “no-enlargement” rule. Enlargement is a major concern with transfers that facilitate an increase in the amount of water the transferor can divert. One of the examples of enlargement from the department’s Technical Operations Manual illustrates the problem:

“Movement of a headgate downstream to a location at which more streamflow could be taken to satisfy the right. The Department will limit the amount of water that may be taken at the downstream location to that available at the original point of diversion and may require measurement at both locations to ensure that more water is not taken.”

ER-5–6.

This example and the situation here raise the same enlargement concern: that a transferor will be able to increase the amount of water they divert by changing their point of diversion. And yet, under the department’s interpretation of “legally available,” the situation here is not treated as enlargement, whereas the example from the department’s manual is treated as enlargement. This makes no sense.

The department’s interpretation of “legally available” is inconsistent with the text and purpose of the department’s own rules, and is thus not entitled to deference. Under a correct interpretation of “legally available,” the challenged orders will lead to “enlargement” of BCR’s water rights.

B. The Court Should Reverse or Modify the Challenged Orders.

This error does not necessarily require reversal; the court can simply modify the final orders to protect against enlargement. *See* ORS 183.484(5)(a)(A) (providing that a court may “[s]et aside or modify [an] order” if it finds legal error). The orders should be modified to provide that the new certificates issued to BCR include a condition prohibiting diversion when flows in Bridge Creek fall below 10 cfs.

THIRD ASSIGNMENT OF ERROR

The department erred by approving an additional point of diversion—as opposed to a substitute or replacement point of diversion—for BCR’s water rights.

I. Preservation of Error.

WaterWatch raised this issue to the department at several points, including in its protests and its exceptions to the proposed orders. *See* ER-49, ER-61 (protests); ER-108, ER-111–12 (exceptions).

II. Standard of Review.

Whether the department erred by approving an additional point of diversion for BCR’s water rights turns on the meaning of the term “change” (or the phrase

“change * * * the point of diversion”) in ORS 540.510(1)(a) and is thus a question of statutory interpretation. Because “change” (or “change the point of diversion”) is an exact or inexact term, this court “interpret[s] [its] meaning * * * anew, without deference to the agency’s interpretation.” *Coos Waterkeeper*, 363 Or at 360.

III. Argument.

A. The Department Cannot Authorize an *Additional* Point of Diversion for BCR’s Water Rights.

The department may authorize the holder of a “water use subject to transfer” to “change the use and place of use, the point of diversion or the use of the water without losing priority of the right,” provided certain conditions are met. ORS 540.510(1)(a). Here, BCR sought to use this transfer provision to add an *additional* point of diversion with the same priority date. The department interpreted ORS 540.510(1)(a) to allow such an addition of a point of diversion, but its interpretation is incorrect: the department may authorize a “change” in “the point of diversion,” not the *addition* of a new point of diversion while retaining the existing point of diversion.¹⁰

¹⁰ In the proceedings below, WaterWatch also argued that allowing BCR to use an additional point of diversion amounted to an unlawful “enlargement” of its water rights. ER-131.

The key question here is whether a “change” in “the point of diversion” under ORS 540.510(1)(a) includes *adding* a new point of diversion while keeping the old point of diversion. Sometimes, “changing” something can include adding to it without removing any elements. For instance, if someone says they are going to “change their workout routine,” that could involve adding a new exercise to the routine without removing any exercises. Other times, however, “changing” something means swapping out one thing for another; when someone says they are going to “change a tire,” they’re not going to add a fifth tire to their car.

As is usually the case with statutory terms and phrases, then, the meaning of “change * * * the point of diversion” depends on context. *See, e.g., Kohring v. Ballard*, 355 Or 297, 304, 325 P3d 717 (2014) (“[W]e examine word usage in context to determine which among competing definitions is the one that the legislature more likely intended.”). “A statute’s context includes * * * its immediate context—the phrase or sentence in which the term appears—and its broader context, which includes other statutes on the same subject.” *Shepard Inv. Grp. LLC v. Ormandy*, 371 Or 285, 290, 533 P3d 774 (2023). Both the “immediate context” and the “broader context” of the word “change” in ORS 540.510(1)(a) support petitioner’s interpretation.

Beginning with the immediate context, the word “change” modifies the phrase “*the* point of diversion,” which refers to a singular point. Thus, ORS

540.510(1)(a) contemplates that a “water use subject to transfer” will have just *one* point of diversion that may be changed at a time through a transfer, which implies a substitution rather than an addition.

The “broader context” surrounding ORS 540.510(1)(a) supports this conclusion. First, the transfer statutes consistently refer to “*the* point of diversion.” *See, e.g.*, ORS 540.520(1)(a), ORS 540.520(4), ORS 540.532. This suggests that there is just *one* point of diversion that may be changed at a time, and that a “change” in that point of diversion involves a substitution, not an addition.¹¹

Second, the transfer statutes use other language that implies that a change in the point of diversion involves substitution, not addition. For instance, one recently repealed provision excused from certain notice requirements “a change in the point of diversion of less than one-fourth mile, and where there are no intervening

¹¹ The cited portion of ORS 540.520(1)(a) was enacted alongside the relevant portion of ORS 540.510(1)(a) as part of the original Oregon Revised Statutes in 1953. *See* ORS 540.510 (1953); ORS 540.520(1) (1953). Accordingly, it is part of the context in which “change * * * the point of diversion” in ORS 540.510(1)(a) must be construed. *See* Or Laws 1953, ch 3, § 3 (“all sections of the [ORS] as so enacted [in 1953] shall be considered to speak as of the same date”); *Weldon v. Bd. of Licensed Prof. Counselors & Therapists*, 353 Or 85, 95, 293 P3d 1023 (2012) (“The context of a statute includes all provisions contained in the session law * * *.”). The other cited provisions are more recent, but these later-enacted provisions are still relevant to the interpretation of ORS 540.510(1)(a), because they “demonstrat[e] consistency * * * in word usage over time as indirect evidence of what the enacting legislature most likely intended.” *Halperin v. Pitts*, 352 Or 482, 490, 287 P3d 1069 (2012).

diversions between the *old diversion* of the applicant and the proposed *new diversion*.” ORS 540.520(5) (2023) (emphasis added).¹² The use of “change” in conjunction with the descriptors “new” and “old” strongly suggests that “change” refers to substitution, not addition. (If someone told you they had “changed pharmacies” and then talked about their “new pharmacy” and their “old pharmacy,” you would be surprised to learn that they were still getting some prescriptions filled at their old pharmacy.) ORS 540.525(2) similarly refers to the “new point of diversion” and the “original point of diversion.”

Finally, ORS 540.510(6) provides that when “government action results in or creates a reasonable expectation of a change in the surface level of a surface water source that impairs or threatens to impair access to a point of diversion,” a water-right holder “may change the point of diversion *or add an additional point of diversion* in accordance with the provisions of this section in lieu of complying with the requirements of ORS 540.520 and 540.530.” (Emphasis added.)

The significance of this language is twofold. First, it demonstrates that the legislature knows how to provide for an “addition” of a point of diversion as opposed to a “change” in one. *See Voyles*, 337 Or App at 398 (“[T]he legislature

¹² This provision was enacted alongside the relevant portion of ORS 540.510(1)(a) in 1953. *See* ORS 540.520(2) (1953). It was in effect when the orders challenged in this case were issued, but has since been repealed. *See* Or Laws 2025, ch 575, § 20a.

knows how to use different language when it intends to evoke different meanings.”). Second, if a “change” in the point of diversion already included the addition of a new point of diversion, the phrase “or add an additional point of diversion” in ORS 540.510(6) would be entirely unnecessary. The court should not read the statute to produce such a result. *See Matter of Compensation of Ward*, 369 Or 384, 394, 506 P3d 386 (2022) (“[T]his court will generally attempt to avoid a statutory construction that creates redundancy in the way that the statute is read.”).¹³

Reading “change the point of diversion” in ORS 540.510(1)(a) in context leads to the conclusion that a water-right holder may *substitute* a new point of diversion for an old one under the statute, but may not *add* an additional point of diversion while retaining the old one. The department’s contrary conclusion represents an error of law.

B. The Court Must Reverse the Orders.

The challenged orders purport to exercise an authority that the department does not possess, so they should be reversed. *See Richardson v. Or. Dep’t of Transp., Dep’t of Motor Vehicles*, 253 Or App 456, 470, 292 P3d 557 (2012)

¹³ ORS 540.510(6) was not enacted until 1995, but it sheds light on the meaning of ORS 540.510(1)(a) by “demonstrating consistency * * * in word usage over time as indirect evidence of what the enacting legislature most likely intended.” *Halperin*, 352 Or at 490.

(concluding that reversal of an agency order was appropriate where the agency lacked authority to take the challenged action).

FOURTH ASSIGNMENT OF ERROR

The department erred by concluding that the transfers will not “injure” an in-stream water right in Bridge Creek.

I. Preservation of Error.

WaterWatch raised this issue at several points during the proceedings. *See* ER-108 (exceptions to proposed order); ER-131–32 (portion of final order addressing this issue).

II. Standard of Review.

This assignment of error presents an issue of law concerning the meaning of the term “injury” in ORS 540.530(1)(a). Because “injury” is an exact or inexact term, this court must “interpret the meaning of [“injury”] anew, without deference to the agency’s interpretation.” *Coos Waterkeeper*, 363 Or at 360.

To the extent that this assignment of error requires review of the department’s factual findings or its application of law to facts, this court “review[s] findings of fact for substantial evidence and the application of the law to the facts

for substantial reason.” *Creekside Valley Farms, LLC v. Dep’t of Agric.*, 333 Or App 569, 574, 554 P3d 251 (2024).

III. Argument.

The transfers approved by the department will lead to an in-stream water right in Bridge Creek receiving less water than it has been receiving and would otherwise receive at low-flow times. This is an “injury” as that term is used in ORS 540.530(1)(a) and related statutes. Despite this, the department, relying on an erroneous interpretation of “injury” drawn from this court’s opinion in *Woodcock*, concluded that the transfers will *not* injure the in-stream water right. As discussed below, *Woodcock* does not control this case; if it does, however, the court should depart from it.¹⁴

¹⁴ In the proceedings before the department, WaterWatch argued that the transfers would also injure several other water rights, including in-stream water rights on the John Day River. ER-131–32. WaterWatch focuses here on the in-stream water right in Bridge Creek, because the department’s legal error as to the meaning of “injury” clearly made a difference in its assessment of injury to that water right. If the court agrees with WaterWatch on its legal argument, the department will have an opportunity to apply the correct definition of “injury” to these other water rights on remand.

A. The Department’s Conclusion that the Transfers Will Not “Injure” the In-Stream Water Right in Bridge Creek Rests on a Misinterpretation of What “Injury” Means.

1. *Under a Correct Interpretation of “Injury,” the Transfers Will Injure the In-Stream Water Right in Bridge Creek.*

For nearly 100 years, Oregon water law has contained a “no-injury” provision that generally prohibits transfers that would result in “injury” to existing water rights. *See* ORS 540.530(1)(a) (allowing a transfer to be authorized if it “can be effected without injury to existing water rights”); Or Laws 1927, ch 219, § 1 (original “no-injury” provision). But the term “injury” (or “injure”) has been used by Oregon courts in the context of transfers for even longer than that—the “no-injury rule” was established in the common law as early as the first decade of the last century. *See, e.g., Williams v. Altnow*, 51 Or 275, 302, 97 P 539 (1908) (on rehearing) (“An appropriator of water * * * may change the point of diversion or place of use, so long as he does not thereby injure or affect the rights of others * * *.”). “The modern statutory regime serves to formalize that common-law [no-injury] principle.” *WaterWatch of Or. v. Water Res. Dep’t*, 369 Or 71, 85, 501 P3d 507 (2021). Thus, “injury,” as used in ORS 540.530(1)(a), reflects the common-law no-injury rule applied by Oregon courts for more than a century.¹⁵

¹⁵ The term “injury” for purposes of transfers is defined in a regulation. *See* OAR 690-380-0100(3). But because “injury” is an “exact term” or an “inexact term,” the department has “no latitude * * * to make its own legislative or policy decisions as to the coverage of the statute.” *Springfield Educ. Ass’n v. Springfield*

Under the no-injury rule, “[a]n appropriator of water * * * may change the point of diversion or place of use, so long as he does not thereby injure or affect the rights of others.” *Williams*, 51 Or at 302. Importantly, the no-injury rule protects appropriators who are *junior* to the transferor as well as appropriators who are senior to the transferor. *See id.* (“after the rights of subsequent appropriators have attached the prior appropriator cannot change or extend his use to their injury”); *see also* App-9 (Kinney water-law treatise from 1912 stating that “in general it may be said that any change for any purpose by one appropriator which injures the vested rights of others either prior or subsequent to the date of his right can not be made”).

As one leading early 20th century treatise put it, “no general rule can be laid down which will govern every change attempted, but that whether the change should or should not be allowed is a question of fact and is to be determined from all the facts and circumstances surrounding each particular case.” App-10 (1912 Kinney treatise). In other words, whether a particular transfer will result in “injury” is a fact-intensive inquiry not amenable to resolution through broad categorical rules. The best way to understand what “injury” means is to consider some of the classic examples of injurious changes.

Sch. Dist. No. 19, 290 Or 217, 225, 621 P2d 547 (1980). To the extent that the department’s definition of “injury” is narrower than the statutory meaning, the regulatory definition is invalid.

Two related examples of “injury” stemming from a change in place of use were discussed in *Hough v. Porter*, 51 Or 318, 98 P 1083 (1909) (supplemental opinion):

“[I]f by changing the place of use, when the water is needed by others, the quantity returning to the stream after changing the place of use as compared to its previous application is substantially diminished, or if, by reason of such change, the ‘run off’ reverts to the stream or channel below the point diverted by another, thereby reducing the supply at such point, it must necessarily operate to the injury of the rights of such other party, and the change must not be permitted.”

51 Or at 438. The Colorado case of *Bates v. Hall*, 98 P 3 (Colo 1908) examined another classic example of a transfer that often causes injury: a senior appropriator moving their point of diversion from a location downstream of a junior appropriator’s point of diversion to a point upstream of the junior appropriator’s diversion. 98 P at 6–7.

In all of these examples, the transferor proposes to change an aspect of their vested water right in a manner that would deprive other appropriators (including junior appropriators) of water that they had previously been receiving and would continue to receive absent the transfer. Even though the transferor’s rights are senior to other appropriators’ rights, that seniority does not entitle the transferor to “change or extend his use to their injury.” *Williams*, 51 Or at 302. Whether the proposed change would lead to injury depends on what will happen *in fact* if the change is approved. *See Hough*, 51 Or at 438 (“if by changing the place of use

* * * the quantity returning to the stream after changing the place of use *as compared to its previous application* is substantially diminished * * *) (emphasis added); *see also* App-10 (Kinney treatise).

Here, BCR's use of its new point of diversion will lead to more frequent and severe instances of the downstream in-stream water right in Bridge Creek being denied water during low-flow periods. This is a matter of simple math. During the late summer, when flows are at their lowest, the in-stream right reflected in Certificate 59780 is entitled to 6 cfs of water. Even with the 10 cfs restriction on BCR, flows in Bridge Creek often fall to single digits during that time. *Supra* pp. 6–7. If BCR diverts water at its new point of diversion when flows are already below 6 cfs, or if BCR's diversion of water causes flows to drop below 6 cfs, the in-stream water right will receive less water than it would have received without the transfer, and less water than it is entitled to. That is enough to establish injury.¹⁶ *See Kerivan v. Water Res. Comm'n*, 188 Or App 491, 499–500, 72 P3d 659 (2003) (“[P]etitioners’ amended petition and complaint alleges that, if the ‘in[-]stream water use continues, petitioners’ ability to withdraw water will be adversely

¹⁶ The transfers would also lead to injury during low-flow periods in other times of the year. For instance, in the first half of July, the in-stream water right in Bridge Creek is entitled to 15 cfs of water. If flows are below 10 cfs, then the right is already not receiving all the water to which it is entitled. The transfers would allow BCR to divert even more water out-of-stream, leading to the in-stream water right receiving even less of the water to which it is entitled

affected during low water periods.’ We conclude that that allegation asserts an injury * * *.’), *rev den*, 336 Or 376 (2004).¹⁷

2. *The Department’s Interpretation of “Injury” Is Wrong.*

In reaching the opposite conclusion, the department relied on a very broad reading of *Woodcock*: the department read that case to stand for the general rule that “a junior or equal water right is not injured when a senior or equal water right is utilized to the fullest extent within the terms of the water right regardless of any historic lesser use of the water right.” ER-156. As the discussion above should make clear, that categorical rule is inconsistent with how “injury” has been understood by Oregon courts for more than a century. Whether a transfer will result in injury is a factual question; it is answered by comparing the current circumstances to the circumstances that will obtain after the transfer has been approved.¹⁸ *Supra* pp. 41–43. Under the department’s reading of *Woodcock*, in contrast, the facts don’t matter so long as the transferor stays within the “terms of

¹⁷ *Kerivan* addressed the meaning of “injury” in a precursor regulation to OAR 690-380-0100(3). *See* 188 Or App at 499–500. That regulation, like the current regulation, defines “injury” in a way that is perhaps too narrow relative to the statute/common law. So if the allegations in *Kerivan* were enough to establish injury under the regulation, they were enough to establish injury under the statute/common law.

¹⁸ One could also compare the circumstances if the transfer is granted to the circumstances if the transfer is denied. Here, that would lead to the same result.

the[ir] water right” following the change. This is true even if the transfer will lead to obvious deprivations of water for junior rights, as is the case here.

The department’s reading of *Woodcock* elevates the amount of water potentially available “on paper” above the amount of water that the transferor *actually* uses. This approach is inconsistent with a fundamental principle of Oregon water law: actual beneficial use, not the maximum amount of water an appropriator can use “on paper,” is the measure of a water right.¹⁹ *See, e.g., Mann v. Parker*, 48 Or 321, 323, 86 P 598 (1906) (“An appropriator of water acquires a right therein only to the extent to which it is applied to a beneficial use, and he cannot claim any more than is necessary for such purposes.”); *see also* ORS 540.610(1) (“Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state.”). In the context of transfers, this principle requires the department to measure “injury” by comparing the transferor’s *actual* use to the expected use after the proposed transfer. Under that analysis, allowing BCR to change its point of diversion will injure the in-stream water right reflected in Certificate 59780.

¹⁹ This principle is reflected in the certificates for BCR’s water rights: they specify that the “amount of water to which such right is entitled * * * is *limited to an amount actually beneficially used* * * *.” ER-1 (Certificate 13593); ER-36 (Certificate 96311) (emphasis added for both); *see also* ER-3 (similar language in Certificate 68553).

3. *Woodcock Does Not Control this Case.*

Rather than being read to stand for a broad categorical rule that cannot be squared with fundamental tenets of Oregon water law, *Woodcock* should be read in light of its facts. *See, e.g., Bramwell v. U.S. Fidelity & Guaranty Co.*, 269 US 483, 489, 46 S Ct 176, 70 L Ed 368 (1926) (“It is a rule of universal application that general expressions used in a court’s opinion are to be taken in connection with the case under consideration.”). In *Woodcock*, the alleged injury was caused by *regulation*—that is, by a watermaster curtailing the petitioners’ exercise of their water rights. 334 Or App at 523–24. *Woodcock*’s seemingly broad statements must be read with that in mind.

Here, the injury is caused not by regulation, but by a physical reduction in available water. This case is thus not like *Woodcock*. In fact, it more closely resembles a classic example of an injurious change: a senior appropriator’s change in place of use from land upstream of a junior appropriator’s point of diversion to land downstream of that point of diversion. *See Hough*, 51 Or at 438 (describing such an injurious change). Such a change has a tendency to cause injury because it reduces the amount of water physically available to the junior appropriator by moving “return flows” to a point below the junior appropriator’s point of diversion. *Id.* The fact that the senior appropriator is doing nothing more than using its water right to its “fullest extent” does not mean that there is no injury.

B. If Necessary, the Court Should Depart from *Woodcock*.

As discussed above, *Woodcock* can be distinguished from this case.

However, if the court agrees with the department that *Woodcock* controls here, WaterWatch respectfully asks the court to depart from *Woodcock*. Although this court “begin[s] with the assumption that issues considered in [its] prior cases are correctly decided,” it must be willing to reconsider prior decisions that are shown to be incorrect. *Farmers Ins. Co. of Or. v. Mowry*, 350 Or 686, 698, 261 P3d 1 (2011). Read as broadly as the department reads it, the principle of law announced in *Woodcock*—that a “deprivation of water as a result of [a transferor’s] use of its full legal water right is simply a feature of the prior appropriation system [and] is not an ‘injury’ that is legally cognizable,” 334 Or App at 524—is incorrect. And because the *Woodcock* court was “not presented with * * * important argument[s]” regarding the meaning of “injury” and “failed to apply [the] usual framework for decision or adequately analyze the [injury] issue,” it is appropriate to depart from *Woodcock*. *Mowry*, 350 Or at 698.

1. Read as Broadly as the Department Reads It, Woodcock Is Wrong.

As discussed above, the common-law no-injury rule now codified at ORS 540.530(1)(a) requires a factual inquiry into what will happen if a proposed transfer is approved—will the change cause junior rights to be deprived of water that they are now receiving and would otherwise continue to receive but for the

transfer? The department’s reading of *Woodcock* is inconsistent with that longstanding “no-injury” rule. *See supra* pp. 44–45 (discussing why the department’s interpretation of “injury” is wrong). So construed, *Woodcock* is plainly wrong. *See State v. Civil*, 283 Or App 395, 415–17, 388 P3d 1185 (2017) (discussing the “plainly wrong” standard).

2. *The Woodcock Court Was Not Presented with Important Arguments Regarding the Meaning of “Injury” and Did Not Adhere to the Usual Framework for Construing Statutes.*

In *Woodcock*, the petitioners did not point out the inconsistency of the department’s reading of “injury” with the common-law understanding of “injury,” nor did they cite the early 20th century cases and treatises making clear that “injury” is a fact-intensive inquiry. *See* App-12–15 (relevant portion of the petitioners’ reply brief in *Woodcock*). The respondents in *Woodcock*, meanwhile, relied heavily on the *regulatory* definition of “injury,” which is irrelevant given that “injury” is not a delegative term. *See* App-16–19 (department’s answering brief); App-20–25 (intervenor-respondent’s answering brief).

Given the arguments it was presented with, it is perhaps not surprising that the *Woodcock* court did not conduct a thorough analysis of the meaning of “injury” that included an examination of the common-law history of the term. The statement from *Woodcock* relied on most heavily by the department—that an “alleged deprivation of water as a result of [a transferor’s] use of its full legal water

right * * * is not an ‘injury,’” *Woodcock*, 334 Or App at 524—was not followed by a citation to any statute, rule, or case.

More fundamentally, the court in *Woodcock* did not engage in the ordinary statutory interpretation analysis. *See Woodcock*, 334 Or App at 522–24. Again, this is not surprising given the way the parties framed the issue, particularly their focus on the regulatory definition of “injury.” But “injury” is a nondelegative term meant to “formalize th[e] common-law [no-injury] principle,” *WaterWatch of Or.*, 369 Or at 85, and, to properly interpret the term, the *Woodcock* court should have applied the usual statutory interpretation framework. The fact that it did not justifies departing from *Woodcock*. *See Hostetter v. Bd. of Parole & Post-Prison Supervision*, 255 Or App 328, 334–35, 296 P3d 664 (2013) (revisiting the holding of a prior decision where the court had not used the usual analytical framework and had not been presented with important arguments), *rev den*, 353 Or 747.

3. *Departing from Woodcock Would Not Be Disruptive.*

A final consideration that weighs in favor of departing from *Woodcock* (or at least does not weigh against departing from it) is that *Woodcock* was decided just a few years ago. The major justifications for *stare decisis* are “[s]tability and predictability”—“individuals and institutions act in reliance on [judicial] decisions, and to frustrate reasonable expectations based on prior decisions creates the potential for uncertainty and unfairness.” *Mowry*, 350 Or at 698. Those concerns

are lessened when the precedent being challenged is recent, because there hasn't been enough time for reliance interests to build up. *See id.* at 693 n.3 (discussing how the Oregon Supreme Court “has inquired into the age of the precedent at issue and the extent to which it had been relied upon in other cases” when determining whether to depart from an erroneous decision). This court should correct *Woodcock* now, *before* reliance interests have built up.

C. The Court Should Remand to the Department for Application of the Correct Standard.

The court should set aside the orders and remand to the agency for further action under the correct legal standard. *See Noble*, 355 Or at 459–60 (remanding to the agency to apply the correct legal standard in the first instance).

FIFTH ASSIGNMENT OF ERROR

The department erred by allowing BCR to add a new point of diversion for the storage right reflected in Certificate 68533, because a storage right is not a “water use subject to transfer” within the meaning of ORS 540.510 and the other transfer statutes. This assignment of error applies only to A189355.

I. Preservation of Error.

WaterWatch raised the “water use subject to transfer” issue at several points during the proceedings. *See* ER-48 (protest); ER-112 (exceptions).

II. Standard of Review.

Whether a storage right is a “water use subject to transfer” is a question of statutory construction. Because the relevant terms are exact or inexact terms, this court “interpret[s] the[ir] meaning * * * anew, without deference to the agency’s interpretation.” *Coos Waterkeeper*, 363 Or at 360.

III. Argument.

As noted earlier, this court has already ruled that the specific storage right at issue here is a “water use subject to transfer.” *Bridge Creek Ranch*, 329 Or App at 587. WaterWatch respectfully disagrees with that ruling. But, unlike the court in *Woodcock*, the court in *Bridge Creek Ranch* was presented with all important arguments, including arguments made by WaterWatch as *amicus curiae*. Thus, there is no basis to ask this court to depart from its ruling in *Bridge Creek Ranch*. WaterWatch makes the argument that BCR’s storage right is not a “water use subject to transfer” to preserve the issue for possible review by the Oregon Supreme Court.

Oregon water law has always distinguished between the “use” and “storage” of water. As originally enacted, the Water Rights Act’s permitting scheme singled out “reservoir permits” and specified that “the party or parties proposing to apply to a beneficial use the water stored in any such reservoir shall file an application

for [another] permit, to be known herein as the secondary permit .” Or Laws 1909, ch 216, § 58 (emphasis added). Just two years later, the Oregon Supreme Court confirmed that, under the Act, a permit “to construct a reservoir and store surplus water * * * does not include the right to divert and use such stored water, which must be the subject of the secondary permit.” *Cookinham v. Lewis*, 58 Or 484, 491–92, 114 P 88, *reh’g den*, 58 Or 484, 115 P 342. Some 40 years later, the Attorney General stated, unequivocally, that “[s]torage in and of itself is not a use. Storage must be for a future purpose.” 25 Op Atty Gen 206 (1951). Given this longstanding distinction between “use” and “storage,” the phrase “water use subject to transfer” is best construed to refer only to rights to use water, not storage rights.

CONCLUSION

For the reasons given above, the court should grant WaterWatch’s petitions.

Date: September 8, 2026

Respectfully submitted,

/s/ Andrew R. Missel

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

I certify that this brief contains 11,989 words, which complies with the court's order of March 4, 2026 allowing petitioner to file an opening brief limited to 12,000 words. I also certify that this brief complies with the typeface requirements of ORAP 5.05 because the text of the brief, including footnotes, is set in a 14-point proportionally-spaced font.

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APPENDIX



OFFICES OF REPRESENTATIVE KEN HELM AND REPRESENTATIVE MARK OWENS

Joint Committee on Ways and Means
Oregon State Capitol
900 Court Street NE
Salem, Oregon 97301

February 9, 2024

Co-Chairs Steiner and Sanchez; Vice-Chairs Girod, Gomberg, and Smith; and members of the Joint Committee on Ways and Means:

The Oregon Water Resources Department has had significant backlogs in resolving protested water rights decisions due to multiple causal factors as described in a [2019 report to the legislature](#). Causal factors include increasing competition for limited water resources, complexity of water law, lack of investment in upfront planning, cumbersome administrative processes, and underinvestment in the Department's legal budget. Some final water rights decisions have been pending for over 30 years. Backlogs cause delays, increase costs, and create uncertainty for Oregonians utilizing the water right transaction process. When timelines for protest resolution are unpredictable, protestants are hamstrung in their ability to make economic and ecological decisions related to water resources.

In 2021, the Legislature invested \$2.2 million General Fund to alleviate the protest backlog. This included temporary increases in capacity at the Department, the Office of Administrative Hearings (OAH) and the Department of Justice (DOJ). The Department was able to increase staff capacity to 3 FTE, DOJ assigned an attorney to this project and hired another attorney, and the OAH hired new hearings officers. Since the 2021 investments, the Department has accomplished more work on reducing the backlog than in any other biennium since the processing statutes were overhauled in 1995. Additional funding is needed to maintain momentum and prevent costly delays for applicants and the state.

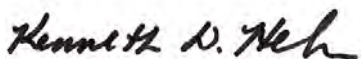
At the beginning of the 2021-2023 biennium the protest backlog was 125. Since July 1, 2021, the Department has resolved protests on 61 applications; this includes all methods of resolution including settlement, withdrawal of protest, withdrawal of application, issuance of final order, etc. Currently, 5 protested water rights are currently referred to the OAH for a contested case hearing. Despite this significant progress, the Department's current caseload has grown to 224; this is largely due to the fact that in February 2022, the Department received 113 new protests to instream water right applications filed by the Oregon Department of Fish and Wildlife (ODFW). Sustained investments are needed to continue to reduce the backlog. This will resolve some protested decisions that have been outstanding for decades and will bring much needed certainty to instream and out-of-stream water users.

Eliminating the protest backlog is a multi-year effort. If we do not sustain funding in this biennium, the entire process could take years to reinstate. Recruiting, onboarding, and training was a large workload and time investment this biennium for the limited duration protest staff. Without additional funding the Department, OAH, and DOJ may not be able to retain staff focused on this project. Retaining existing staff, as well as funding for OAH hearing officers and attorneys at the DOJ would help to maintain momentum on current backlog reduction efforts. There needs to be capacity in all three entities for a smooth workflow; otherwise, the bottleneck will simply relocate, and the backlog will continue to grow. Funding for this work was included in the 2023 Governor's Recommended Budget, but was not funded for the 2023-2025 session.

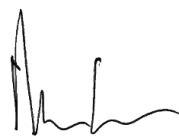
In order to not lose the momentum generated by investments made in 2021, we urge you to

1. **increase the Oregon Water Resources Department budget by \$1,852,213 (\$1,343,310 for OAH and DOJ fees and \$508,903 for staff) to continue to make progress on the protest backlog, and;**
2. **increase the Oregon Department of Fish and Wildlife budget by \$150,000 to provide consistent capacity to resolve protested instream water rights.**

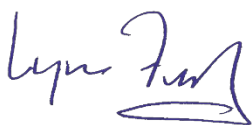
Signed by the following members of the Oregon Legislative Assembly:



Representative Ken Helm – HD 27



Representative Mark Owens – HD 60



Senator Lynn Findley – SD 30



Representative Court Boice – HD 01



Senator Lew Frederick – SD 22



Representative Mark Gamba – HD 41



Senator Bill Hansell – SD 29



Representative Annessa Hartman – HD 40



Representative Bobby Levy – HD 58



Senator Dennis Linthicum – SD 28



Oregon

Theodore R. Kulongoski, Governor

App-3

Water Resources Department

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MEASURE: HB 2551
EXHIBIT: I
HOUSE COMMITTEE ON WATER
DATE: 3/6/03 PAGES: 3
SUBMITTED BY: A. Sussman

Before the
House Water Committee

TESTIMONY ON HB 2551

Presented by: Adam Sussman, Legislative Coordinator
Water Resources Department

March 6, 2003

Introduction

Thank you for the opportunity to present testimony on HB 2551, a measure that allows the Department to enter into agreements to expedite processing or provide services voluntarily requested. This authority, known as "receipts authority" could be used for the processing of various water right transactions including: the processing and review of water right applications, permit extensions, permit amendments, final proof surveys, water right exchanges, transfers, and water management and conservation plans. The Department supports HB 2551 as proposed to be amended by the Oregon Water Resources Congress.

HB 2551 will have a fiscal impact on the Department related to the receipt of revenue and the limitation required to employ additional staff or enter into contracts for services. The fiscal impact is unknown at this time because this would be a new authority for the Department.

Background

Since 1990 Oregon has averaged more than 50,000 new residents per year, and a 34% increase in population is projected over the next 25 years. Today there are approximately 84,000 water rights to use surface water or ground water, and to store water; representing a 30% increase in the last decade. All of these increases in population, water demand, and agency workload have occurred against a backdrop of declining Department staffing of some 10% in the same period and significant budgetary constraints. These trends in workload and budget have forced us to work smarter, to build new partnerships, continually seek stakeholder input, and to critically evaluate our decision-making criteria and procedures.

Notwithstanding the Department's efforts, workloads continue to increase and backlogs are developing. Currently, there are over 700 water right transfers pending, over 250 permit extensions pending, over 5,500 final proof surveys awaiting review, approximately 30 water management and conservation plans awaiting review, and 10 requests for the allocation of

House Water Committee
March 6, 2003
Page 2

conserved water awaiting final processing. To the extent possible, the Department is flexible and works to expedite high priority transactions that involve land sales, economic development activities or instream flow benefits. However, we are unable to keep up with our customers' needs given current staffing and budget constraints.

In part, the Department is addressing this lack of resources through its fee bill (HB 2268). Increasing the Department's statutorily established fees will help to ensure an adequate number of staff to process incoming work and to keep backlogs from growing. HB 2551 does not replace HB 2268, but it complements the Department's fee bill effort by providing an additional tool to address customer needs and to support economic and environmental activities throughout Oregon.

Specifically HB 2551 would:

- Allow the Department to enter into an agreement, with any person, to set fees to be paid to the Department in order to expedite or enhance services voluntarily requested under an agreement.
- Allow the Department, under such an agreement, to hire additional staff, contract for services, or provide additional services to that person not otherwise available due to budgetary restraints.
- Allow the Department, as part of an agreement, to waive the statutory fees established under ORS 536.050.
- Preclude the Department from "compelling" a person to enter into a receipts authority agreement.
- Preclude the Department from requiring a person to pay more for a service than the cost to the Department in providing the service.
- Require the Department to review its responsibilities to identify services provided by the Department that are appropriate for the Department to contract with private parties.
- Provide the Department authority to expend fees collected under agreements to review responsibilities appropriate for contracting and for fulfilling individual agreements including the processing of water right permit applications, permit extensions, permit amendments, final proof surveys, water right exchanges, transfers, and the review of water management and conservation plans.

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March 6, 2003
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Discussion

The demand on the Department's services continues to grow and the issues surrounding water allocation are becoming increasingly complex. Even with streamlining and technology enhancement efforts, increases in the number of water right transactions and the analysis required to ensure the protection of existing water rights have resulted in workload backlogs.

The authority provided in HB 2551 would provide a new tool to address this problem by allowing the Department and water users to enter into an agreement to expedite processing. This bill complements the Department's existing efforts to do more with fewer resources. Moreover, Department activities and resources aimed at reducing existing workloads will not be diverted by "receipts authority" agreements because as part of the agreement the Department will collect fees to cover the full cost of expedited processing. To the extent necessary, the Department will use the fees in an agreement to hire temporary staff and outsource process services and functions to the private sector.

Conclusion

HB 2551 would allow the Department to enter into an agreement with any person in order to expedite processing or provide services voluntarily requested. The Department supports HB 2551 as proposed to be amended by the Oregon Water Resources Congress.

HB 2551 will have a fiscal impact on the Department related to the receipt of revenue and the limitation required to employ additional staff or enter into contracts for services. The fiscal impact is unknown at this time because this would be a new authority for the Department.

536.055 Agreements to expedite processing and review of applications, permits and other administrative matters; fees. (1) The Water Resources Department may, with any person, enter into an agreement that sets fees to be paid to the department for the purpose of enabling the department to expedite or enhance the regulatory process to provide services voluntarily requested under the agreement. Pursuant to the agreement, the department may hire additional temporary staff members, contract for services or provide additional services to the person that are within the authority of the department to provide.

(2) Notwithstanding the fees established in ORS 536.050, as part of an agreement entered into under this section, the department may waive all or part of a fee imposed for a service.

(3) The department may not modify existing processing priorities or schedules or create processing priorities or schedules for a particular department-provided service in order to compel a person to enter into an agreement under this section. However, without violating this subsection, the department may modify its processing priorities or schedules based on the overall operating needs of the department.

(4) The department may not require that a person pay more for a service under an agreement entered into under this section than the cost to the department in providing the service to the person.

(5) The department shall review the responsibilities of the department to identify services provided by the department that are appropriate for the department to perform under the provisions of this section. Failure to identify responsibilities under this subsection does not prohibit the department from entering into agreements under this section.

(6) Fees paid under this section shall be deposited in the State Treasury to the credit of the department. Such moneys are continuously appropriated to the department for the purpose of reviewing department responsibilities to determine those services for which the authority provided in this section may be used and for fulfilling the individual agreements entered into pursuant to this section, including the processing and review of:

(a) Water right permit applications, permit extensions, permit amendments and final proof surveys;

(b) Water right exchanges and transfers; and

(c) Water management and conservation plans required by rule by the department. [2003 c.745 §2]

A TREATISE
ON THE
LAW OF IRRIGATION
AND WATER RIGHTS

AND THE ARID REGION DOCTRINE OF
APPROPRIATION OF WATERS

AS THE SAME IS IN FORCE IN THE STATES OF THE ARID AND SEMI-
ARID REGIONS OF THE UNITED STATES; AND ALSO INCLUDING
AN ABSTRACT OF THE STATUTES OF THE RESPECTIVE
STATES, AND THE DECISIONS OF THE COURTS
RELATING TO THOSE SUBJECTS.

BY
CLESSON S. ^{plwyne}KINNEY
OF THE
SALT LAKE CITY BAR.

SECOND EDITION
IN FOUR VOLUMES.

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CHAPTER 48.

CHANGES WHICH MAY BE MADE.

- § 856. Scope of chapter—Changes in general.
- § 857. Point of diversion may be changed.
- § 858. Point of diversion—Effect of change—Others must not be injured.
- § 859. Changes in dams—Flooding lands.
- § 860. Changes in location of ditch or canal.
- § 861. Changes in the character of the works for conveying the water—
As against the rights of the land owner.
- § 862. Changes in the character of works for conveying the water—As
against the rights of the ditch owner.
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to the rights of others.
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- § 870. Change in the use of water—What changes may be made.
- § 871. Changes in the use and the place of use—Statutes authorizing and
restricting.
- § 872. Changes on sale—Rights of the purchasers.
- § 873. The nature and extent of injuries to others which will prevent
changes.

§ 856. **Scope of chapter—Changes in general.**—In the taking of the first steps of an appropriation, it sometimes happens that the appropriator can not always make his plans with sufficient definiteness so that afterward it is necessary to make changes. Again, it often happens that the channel of the stream from which he takes the water changes, and other changes are made, due to natural causes; and hence this necessitates a change in the works of the appropriator. These changes are quite numerous and will be discussed in this chapter in detail. Among them may be named the right to change the point of diversion,¹ the location of the ditch or canal,² the changes necessarily due to the shifting in the channel

¹ See Secs. 857-859.

² See Sec. 860.
(1499)

of the natural stream,³ the change of the water from one watershed to another,⁴ of the place of use,⁵ in the application of the water from one use to another,⁶ of the manner of use, and the time of diversion and other changes which may be made by the appropriator.

In general, it may be said that any change in the point of diversion, location of the ditch or canal, the use of the water, and its application, may be made by an appropriator, provided that the rights of others are not materially impaired or injured. But, on the other hand, as said by the Colorado Court in a recent case:⁷ "An appropriator of water for irrigation may not change the place of use, the point of diversion, the character of the use, or make an enlarged use of his original appropriation, to the prejudice of the rights of the other appropriators from the same source of supply after their rights have attached."⁸

And in general it may be said that any change for any purpose by one appropriator which injures the vested rights of others either prior or subsequent to the date of his right can not be made. And in the statutes relating to this subject it is always provided that the change may be made if others are not injured thereby. And the courts in construing these statutes have always held that the converse of the proposition was also true, to the effect that the change could not be made if the rights of others were materially injured by such change.

³ See Sec. 864.

⁴ See Sec. 866.

⁵ See Secs. 866-868.

⁶ See Secs. 870-872.

⁷ *Diez v. Hartbauer*, 46 Colo. 599, 105 Pac. Rep. 868.

⁸ See, also, *Vogel v. Minnesota etc. Co.*, 47 Colo. 543, 107 Pac. Rep. 1108; *Windsor etc. Co. v. Hoffman etc. Co.*, 48 Colo. 82, 109 Pac. Rep. 422; *Windsor etc. Co. v. Lake Supply Ditch Co.*, 44 Colo. 214, 98 Pac. Rep. 729; *Bates v. Hall*, 44 Colo. 360, 98 Pac. Rep. 3; *Smith v. Corbit*, 116 Cal. 587, 48 Pac. Rep. 725; *Santa Paula etc. Works v. Peralta*, 113 Cal. 38, 45 Pac. Rep. 168; *Ortman v. Dixon*, 13 Cal. 33; *McKinney v. Smith*, 21 Cal. 374, 1

Morr. Min. Rep. 650; *McDonald v. Bear River etc. Co.*, 13 Cal. 220, 15 Cal. 145, 1 *Morr. Min. Rep.* 626; *Davis v. Gale*, 32 Cal. 26, 91 Am. Dec. 554, 4 *Morr. Min. Rep.* 604; *Nevada etc. Co. v. Powell*, 34 Cal. 109, 91 Am. Dec. 685, 4 *Morr. Min. Rep.* 253; *Higgins v. Baker*, 42 Cal. 233, 7 *Morr. Min. Rep.* 525; *Head v. Hale*, 38 Mont. 302, 100 Pac. Rep. 222; *Smith v. Duff*, 39 Mont. 382, 102 Pac. Rep. 984, 133 Am. St. Rep. 587; *Davis v. Chamberlin*, 51 Ore. 304, 98 Pac. Rep. 154; *Williams v. Altnow*, 51 Ore. 275, 95 Pac. Rep. 200, 97 Pac. Rep. 539; *Hough v. Porter*, 51 Ore. 318, 95 Pac. Rep. 732, 98 Pac. Rep. 1083, 102 Pac. Rep. 728.

§ 873. The nature and extent of injuries to others which will prevent changes.—A water right being a property right of the highest order, its owner may do what he wishes with his own, including the making of such changes as he sees fit to make, provided that he does not materially injure the rights of others in making them.¹ It is evident that no general rule can be laid down which will govern every change attempted, but that whether the change should or should not be allowed² is a question of fact and is to be determined from all the facts and circumstances surrounding each particular case. The principal question to be determined in cases of this nature is whether or not any other appropriator's rights are injured by the change. The restriction to the right to make the change, that others must not be injured by the change, is a matter of defense; and, therefore, the burden of proof showing that injuries have been done to the rights of others is upon the one seeking damages for injuries actually committed or seeking an injunction against contemplated injuries.³ There is no presumption that a greater quantity of water was diverted, or is about to be diverted, after the change than was diverted before, even if the water is used to irrigate a greater acreage after the change than it irrigated before;³ nor, under this state of facts, will it be presumed that the vested rights of others, have been or will be injured by the change.⁴

¹ That a water right is a property right, see Secs. 768-771.

A priority to the use of water is a property right, and its character and method of use may be changed, provided such change does not injuriously affect the rights of others. *Seven Lakes Res. Co. v. New Loveland etc. Co.*, 40 Colo. 382, 93 Pac. Rep. 485, 17 L. R. A., N. S., 329.

See, also, *Lower Latham D. Co. v. Bijou Irr. Co.*, 41 Colo. 212, 93 Pac. Rep. 483.

² *Lorenz v. Jacobs*, 98 Cal. 332, 33 Pac. Rep. 119.

See, also, for injuries and the remedies therefor, Chaps. 81-83.

³ "The mere fact that it is the intention of the appellee to apply the water, diverted from its original head-

gate into the new headgate and new ditch, upon a greater acreage, does not even presumptively establish that more water, measured in time or quantity, will be used than was diverted through the original headgate, nor will it presumptively establish injury to the vested rights of others." *Fulton etc. Co. v. Meadow Island Irr. Co.*, 35 Colo. 558, 86 Pac. Rep. 748.

See, also, *Platte Valley Irr. Co. v. Central Trust Co.*, 32 Colo. 102, 75 Pac. Rep. 391; *Fort Lyon C. Co. v. Chew*, 33 Colo. 392, 81 Pac. Rep. 37; *Cache La Poudre Irr. Co. v. Larimer etc. Co.*, 25 Colo. 144, 53 Pac. Rep. 318, 71 Am. St. Rep. 123; affirming *Id.*, 8 Colo. App. 237, 45 Pac. Rep. 525.

⁴ See cases cited *supra*.

INJURIES WHICH WILL PREVENT CHANGE. 1539

The injury to the rights of others must be proven as is any other fact by the party alleging the injury.

Upon the question of the extent of an injury to the vested rights of others, which must exist before any change is prevented, we will say in general here that it must be of such a nature that it is a real substantial injury and seriously affecting the rights of others. A mere fanciful or trifling injury will not prevent the change.⁵

⁵ For injuries and remedies therefor, See Chaps. 81-83.

IN THE COURT OF APPEALS OF THE STATE OF OREGON

FORT KLAMATH CRITICAL HABITAT LANDOWNERS, INC.; NBCC,
LLC; AGRI WATER, LLC; ROGER NICHOLSON; GOOSE NEST
RANCHES, LLC; RANDALL KIZER; GERALD H. HAWKINS;
HARLOWE RANCH, LLC; and E. MARTIN KERNS,
Petitioners-Appellants,

v.

DOUG WOODCOCK, in his official capacity as the Oregon Water
Resources Department Director; TOM SKILES, in his official capacity as
District No. 17 Watermaster; OREGON WATER RESOURCES
DEPARTMENT; and LISA J. JARAMILLO, in her official capacity as
Transfer and Conservation Section Manager, for Doug Woodcock, Director,
Oregon Water Resources Department,
Defendants-Respondents,

and

THOMAS FAMILY LIMITED PARTNERSHIP,
Intervenor-Respondent.

PETITIONERS-APPELLANTS'
REPLY BRIEF

Marion County Circuit Court No. 21CV37688

Court of Appeals No. A181385

Appeal from the Judgment of the Marion County Circuit Court,
Honorable Audrey J. Broyles, Presiding Judge

Opinion Filed: February 21, 2023
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March, 2024

brought temporary transfers within the purview of ORS §§ 537.801—537.809. *See In re Water Rts. of Deschutes River*, 134 Or. at 659 (finding that temporary transfers are also authorized by ORS 540.520). The later-in-time passage of ORS 540.523 did not disturb this intent, and if it did the maxim against implied repeals would instruct against finding that ORS 540.523 impliedly repealed ORS §§ 537.801—537.809’s application to temporary transfers. Therefore, Intervenor’s transfer, which takes water out of Oregon and transfers it to the LKNWR in California, is the type of transfer the Legislature intended to be subject to ORS §§ 537.801—537.809. Intervenor and OWRD’s failure to adhere to ORS §§ 537.801—537.809 is clearly a manifest legal error. Thus, this Court should reverse the judgment of the circuit court with instructions to set aside and vacate the Final Order.

b. Petitioners’ Water Rights Can and Will Be Injured by The Final Order (Second Assignment of Error).

OWRD’s Final Order will cause injury to Petitioners’ water rights. Petitioners do not dispute that their water rights are upstream of Intervenor’s, and that “return flows” from Intervenor’s water right are not directly available to Petitioners. Nevertheless, the Final Order will decrease the amount of water which otherwise would satisfy the Klamath Tribe’s *most senior* water right because the transfer does not account for consumptive use—i.e., it does not consider the importance of return flows in satisfying the Klamath Tribe’s senior water right. *See, e.g., United States v. United States Bd. of Water*

Commissioners, 893 F.3d 578, 599 (9th Cir. 2018) (like Oregon, California and Nevada have a “no injury” rule in water right transfers. In analyzing injury, both state agencies consider consumptive use, and often limit transfers to the “consumptive use” portions of water rights to ensure that no injury occurs); Janet C. Neuman, *Oregon Water Law; A Comprehensive Treatise on the Law of Water and Water Rights in Oregon* at 190 (2011) (explaining that only the “consumptive use” portion of right may be transferred under Oregon law if any additional transfer would result in injury).⁸ Therefore, the Klamath Tribe’s rights will be satisfied *less often* as a result of Intervenor’s transfer. This will have a direct negative impact on Petitioners, as it will result in increased regulation of Petitioners’ rights to offset the water lost due to Intervenor’s transfer. OWRD has already conceded that these facts and allegations were sufficient to defeat their motion for summary judgment (ER-

⁸ OWRD’s Final Order does not take into account “consumptive use” of KA-67, and instead approves the transfer of almost the entire “paper right.” ER-198—203. But, as these authorities explain, only the transfer of the “consumptive use” portion of a right (i.e., the amount of water diverted, minus the amount that flows back into the stream) is permissible if a transfer of any greater amount would result in other water users receiving less water. It is irrelevant that Petitioners are upstream water users. Under the facts in the record, OWRD’s Final Order approves the transfer of *more than* the consumptive use of KA-67, which will in turn cause greater on-paper depletion of the Wood River and Crooked Creek. Ultimately, this will result in less water available to satisfy the senior claims of the Klamath Tribes, and Petitioners will be forced to pick up the difference by using less water themselves. ER-305—307. Thus, although the chain of causation is slightly nuanced here, the Final Order will result in less water available to Petitioners.

62—63; ER-66), and therefore Petitioners respectfully request that the Court reverse the ruling of the Circuit Court, allowing for discovery and a presentation of evidence pertinent to this claim.

c. OWRD and Intervenor Mischaracterize Petitioners’ “Character of Use” Theory as an Enforcement Issue (Third Assignment of Error).

OWRD and Intervenor argue that the Final Order does not approve a change in the character of KA-67 because the Final Order’s terms state that the transfer is for an “irrigation use.” OWRD Ans. Br. at 29—30; Intervenor’s Ans. Br. at 37—38. Therefore, according to OWRD and Intervenor, any concerns over the *actual use* of water pursuant to the transfer is an “enforcement” issue.

OWRD and Intervenor are mistaken. The Final Order allows Intervenor’s water right to be taken from the Wood River Valley, where it is used to grow forage for livestock (i.e., irrigation for agricultural purposes), and transferred to the LKNWR for wildlife (*see* OAR 690-300-0010(62)). ER-259—264; ER-316—320. The Final Order states that it is transferring KA-67 for “irrigation” use in the new LKNWR place of use. ER-264 (Final Order stating that the use of KA-67 as transferred shall be in accordance with the right’s terms and conditions); ER-260 (Final Order stating that KA-67 is for irrigation). The administrative record acknowledges that the purported “irrigation” use approved by the Final Order is *not* irrigation for agricultural

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NEST RANCHES, LLC; RANDALL
KIZER; GERALD H. HAWKINS;
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MARTIN KERNS,

Petitioners-Appellants,

v.

DOUG WOODCOCK, in his official
capacity as the Oregon Water
Resources Department Director; TOM
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OREGON WATER RESOURCES
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JARAMILLO, in her official capacity
as Transfer and Conservation Section
Manager, for Thomas Byler, Director,
Oregon Water Resources Department,

Defendants-Respondents,

and

THOMAS FAMILY LIMITED
PARTNERSHP,

Intervenor-Respondent.

Marion County Circuit
Court No. 21CV37688

CA A181385

RESPONDENTS' ANSWERING BRIEF

Appeal from the Judgment of the Circuit Court
for Marion County
Honorable AUDREY J. BROYLES, Judge

Continued...

insert requirements into statutes that have been omitted”). If the legislature had intended to limit transferable water to the amount historically used by the right holder, it would have said so explicitly. *See, e.g., State v. Clemente-Perez*, 357 Or 745, 767, 359 P3d 232 (2015) (if legislature had wanted merely to prohibit carrying concealed weapons in public, however, it could have explicitly said so”).

In sum, intervenor has an ownership interest in the right to use the full amount of water authorized by KA-67, and that full amount was properly subject to transfer. *See Janet C. Neuman, The Good, the Bad, and the Ugly: The First Ten Years of the Oregon Water Trust*, 83 Neb L Rev 432, 470–71 (2004) (“Oregon is, by statute and historical practice, a “paper water right” transfer state,” and absent injury, a “transfer will be approved for the entire amount of the water right stated in the water rights certificate.”); *see also* (TCF 627 (In Oregon, the “full quantity of water allowed under a water right may be transferred unless the change either would result in injury to other water rights or an enlargement of the right proposed for transfer.”))).

C. The circuit court did not err in granting the department’s and intervenor’s motions for summary judgment on the ground that the temporary transfer did not injure any existing water right as a matter of law.

Petitioners are correct that “even if Intervenor *can* transfer the full value of KA-67, such a transfer is subject to the no injury requirement” in

ORS 540.523(2). (App Br 29) (emphasis in original). But petitioners are incorrect when they contend that “[b]ecause there are disputed facts on the existence of injury, summary judgment on this ground was improper.” (App Br 30).

For purposes of water right transfers, “injury” or “injury to an existing water right” mean that “a proposed transfer would result in another, existing water right not receiving previously available water to which it is legally entitled.” OAR 690-380-0100(3). And in this case, the final order does not change the quantity of water legally available to petitioners, because intervenor is entitled to use up to the full amount of its water right, even if it has not historically done so. And changing the points of diversion, which are already downstream from petitioners, does not affect petitioners’ water rights. *See* (TCF 389 (Upstream users are junior “in priority” to the transferred right and “can already be regulated off” so claim that they will be “subject to more severe curtailment” is not a “valid argument”)). Stated differently, where, as here, the other water rights are upstream rights, an otherwise lawful increase over the historic use of a downstream water right cannot constitute legal injury, because the right holders are not legally entitled to any previously unused portion of the downstream right.

Petitioners also argue that they have been injured by the transfer because they will no longer benefit from return flows at KA-67’s original place of use.

(App Br 30-31). *See* OAR 690-012-0020(11) (defining “return flow” as “water that returns to a stream * * * following its diversion and use from a surface or groundwater source”). But because petitioners’ water rights are upstream from both the original point of diversion for KA-67 and the new point of diversion further downstream, petitioners’ cannot divert water previously diverted by intervenor, regardless of the point of diversion. Thus, regardless of whether there is a factual dispute about where return flows from KA-67 historically returned to the stream, this claim fails as a matter of law.

In sum, the circuit court did not err in granting summary judgment on this claim.

ANSWER TO THIRD ASSIGNMENT OF ERROR

The circuit court did not err in granting the department’s and intervenor’s motions for summary judgment on petitioners’ third claim for relief on the ground that the final order “did not authorize any change in the authorized character of use” of intervenor’s water right.

Preservation of Error

This claim of error is preserved.

Standard of Review

Review is for legal error. ORS 183.484(5)(a).

IN THE COURT OF APPEALS OF THE STATE OF OREGON

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Manager, for Thomas Byler, Director, Oregon Water Resources Department,
Defendants-Respondents,

and

THOMAS FAMILY LIMITED PARTNERSHP,

Intervenor-Respondent.

Marion County Circuit Court No. 21CV37688

Court of Appeals No. A181385

**INTERVENOR-RESPONDENT'S
ANSWERING BRIEF AND SUPPLEMENTAL
EXCERPT OF RECORD**

Appeal from the Judgment of the Marion County Circuit Court, Honorable
Audrey J. Broyles, Presiding Judge

Opinion Filed: February 21, 2023
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January 2024

circuit court correctly applied the standards of its review under ORS 183.484.’”

Coquille Sch. Dist. 8 v. Castillo, 212 Or App 596, 600, 159 P3d 338 (2007)

(citation omitted). Where a party has moved for summary judgment under

ORCP 47, the circuit court must determine whether the movant has

demonstrated that there are no material issues of fact and that the movant is

entitled to judgment as a matter of law. *Id.*

C. Argument

1. The Trial Court Correctly Stated the Legal Test for “Injury”

All parties agree that the controlling legal standard is “injury.” *See* (Petitioners’ Brief at 29) (agreeing that “[a]ll that is relevant is whether [the] transfer would cause injury”). Generally, the doctrine of “injury” refers to the idea that junior water right holders cannot alter their water rights to the detriment of senior water rights. *See WaterWatch of Or. v. Water Res. Dep’t*, 369 Or 71, 84–85, 501 P3d 507 (2021). In the context of a temporary transfer, the terms “injury” and “injury to an existing water right” are specifically defined to mean that “a proposed transfer would result in another, existing water right not receiving previously available water to which it is legally entitled.” OAR 690-380-0100(3).

Petitioners frame various arguments that the trial court misstated the legal test for injury. (Petitioners’ Brief at 27–29.) These arguments do not

accurately reflect the trial court’s ruling. As relevant, the trial court ruled as follows:

“[T]he court finds that the Final Order did not alter the quantity of water that [Thomas Family is] entitled to use, nor did it change the legal rights between Petitioner[s] and [Thomas Family]. * * * Petitioner[s’] claim for potential injury is speculative and is insufficient to prove a legally cognizable injury caused by the Final Order. Future enforcement decisions are not relevant to this injury analysis. OWRD properly applied the full water rights analysis. An increase in use of water by the holder of water rights, within the limits of a valid water right, does not constitute injury to other water rights regardless of whether that increase in use occurs in conjunction with a transfer.”

(SER-49.)

From the trial court’s full ruling, it is evident that the trial court correctly understood and applied the controlling legal standard, as discussed further below.

2. Distinguishing Between “Paper” Water Rights and “Historical Use” Is Not Necessary to Correctly Apply Oregon’s Injury Test

As Thomas Family argued below, (ER-068), the Court need not wade into the distinctions between “paper value” and “historical use” or “historical consumptive use” to resolve Petitioners’ second assignment of error, because the controlling legal test is “injury.” Nonetheless, the trial court’s ruling did not misstate or misapply these concepts.

In the parlance of Western water law, a water right’s “paper” value is the maximum amount of water that the water right holder is authorized to divert

under the water right. *See generally* Janet C. Neuman, *Oregon Water Law: A Comprehensive Treatise on the Law of Water and Water Rights in Oregon* at 186 (2011) (“*Oregon Water Law*”).⁹ The concept of “historical use” can have different connotations depending on legal context, but it generally refers to how a water right has actually been used in practice—which may not fully align with the “paper” authorization. *See, e.g.*, OAR 690-380-2120 (governing transfer applications to align location of point of diversion authorized on paper to reflect “historical use”). Both terms are further distinguishable from the concept of “consumptive use.” “Consumptive use” can also have various meanings but, as relevant, commonly refers to the amount of water permanently removed from a stream when water is diverted. *See, e.g.*, OAR 690-505-0605(2) (defining “consumptive use” for purposes of Deschutes Basin program as “the amount of a[n] * * * appropriation that does not return to surface water flows * * * due to transpiration, evaporation or movement to another basin”). For example, when an irrigator diverts water to grow crops, the amount of water absorbed by crops and soil is considered the “consumptive use” portion. *Oregon Water Law, supra*, at 186. In contrast, “return flows” are any excess water that is not “consumed” by crops and flows back into the stream. *Id.*

⁹ This treatise, upon which Petitioners also rely, is excerpted and appended to this brief.

In some Western states, these distinctions are critical to water right transfers. For example, in Colorado, water users are only allowed to transfer the amount of water that represents their “historical consumptive use.” *See, e.g., Pueblo W. Metro. Dist. v. Se. Colo. Water Conservancy Dist.*, 717 P2d 955, 959 (Colo 1986). In Montana, water right transfers are limited by both “historic use” (the full amount of water “historically diverted”) *and* “historic consumptive use” (“the historic volume *consumptively* used”). Mont Admin R 36.12.1902(3) (emphasis added).

These distinctions are simply not necessary to evaluate water right transfers in Oregon, where the controlling test is “injury” and “injury” has a specific legal meaning. OAR 690-380-8004(4)(a); OAR 690-380-0100(3) (“injury” means “a proposed transfer would result in another, existing water right not receiving previously available water to which it is legally entitled”). Nonetheless, Oregon law does authorize water right holders to transfer the full paper value of a water right, so long as doing so will not cause injury. As one leading treatise explains:

“[OWRD] interprets the transfer statute to allow transfer of the full ‘paper right’ described in a [water right] *as long as the proposal passes the no-injury test*. Oregon’s approach differs from the practice in some other states.”

Oregon Water Law, supra, at 186 (emphasis added). The Department’s internal guidance on this issue is in accord:

“Some states only allow the consumptive use portion of a water right to be transferred. Other states only allow transfer of the quantity of water that has historically been diverted. Oregon is a ‘face value’ state. The full quantity of water allowed under a water right may be transferred unless the change * * * would result in injury to other water rights * * * .”

(ER-205.)

In short, the trial court correctly stated the legal test for injury when it ruled that “OWRD properly applied the full water rights analysis” and “[a]n increase in use of water by the holder of water rights, *within the limits of a valid water right*, does not constitute injury to other water rights.” (SER-49 (emphasis added).)

3. As a Matter of Law, Petitioners Are Not Legally Entitled to Thomas Family’s Downstream “Return Flows”

Petitioners’ factual arguments rely heavily on alleged changes to return flows caused by T-13673. In some circumstances, “consumptive use” and “return flows” *may* be relevant to evaluate injury in Oregon. That is because return flows can affect the amount of water physically instream for *senior* and *downstream* water right holders to divert. *See Oregon Water Law, supra*, at 190 (“[c]hanging the place of use might deprive *downstream* users of return flow that the *downstream* parties have relied on to satisfy their water rights” (emphases added)).

However, return flows are *not* relevant to evaluate injury to upstream users, like Petitioners, who have never had physical access to Thomas Family’s

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8/14/1995	Water Right Certificate 68553 (storage right) (excerpt from OWRD Ex A2)	ER-3
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11/20/2024	Bridge Creek Flow Data, 2012–2024 (excerpt from WW Ex P50)	ER-79

¹ This was attached as an exhibit to the department’s Response to WaterWatch’s Statement Regarding Stipulated Issues.

² These emails were included as exhibits to WaterWatch’s Motion to Deny Applications or Return Case to Agency and/or attached to WaterWatch’s exceptions to the proposed orders.

³ These were attached to WaterWatch’s exceptions to the proposed orders.

⁴ This was included as an exhibit to WaterWatch’s Motion to Deny Applications or Return Case to Agency.

⁵ These were attached to WaterWatch’s exceptions to the proposed orders.

12/11/2024	Bridge Creek Flow Data, 2024 (excerpt from WW Ex P51)	ER-80
12/31/2024	WaterWatch Motion to Deny Applications or Return Cases to Agency (excerpt)	ER-81
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2/19/2025	Map (BCR Ex R1) ⁶	ER-105
6/27/2025	WaterWatch Exceptions for T-14158 (excerpt)	ER-106
6/27/2025	WaterWatch Exceptions for T-14170 (excerpt)	ER-109
10/22/2025	Final Order for T-14158 (including attachments)	ER-113
10/22/2025	Final Order for T-14170 (including attachments)	ER-175

⁶ It is unclear when this map was generated. The “date” used is the last date of the contested-case hearing, because the map was admitted into evidence during the hearing.

STATE OF OREGON

COUNTY OF WHEELER

CERTIFICATE OF WATER RIGHT

This Is to Certify, That BEN TAYLOR

of Mitchell, State of Oregon, has a right to the use of
the waters of Bridge Creek

for the purpose of irrigation and domestic

and that said right has been confirmed by decree of the Circuit Court of the State of Oregon for
Wheeler County, and the said decree entered of record at Salem, in the Order
Record of the STATE ENGINEER, in Volume 12, at page 388; that the priority
of the right thereby confirmed dates from 1868;

that the amount of water to which such right is entitled, for the purposes aforesaid, is limited to an
amount actually beneficially used for said purposes, and shall not exceed one-fortieth of one cubic
foot per second per acre of land irrigated before June 15, and one-eightieth of one
cubic foot per second per acre after June 15, during the irrigation season from March 1
to October 1 of each year, measured at the point of diversion from the stream.

A description of the lands irrigated under such right, and to which the water is appurtenant (or,
if for other purposes, the place where such water is put to beneficial use), is as follows:

13.2 acres in SE $\frac{1}{4}$ SW $\frac{1}{4}$	10.4 acres in SW $\frac{1}{4}$ SW $\frac{1}{4}$
Section 24;	.3 acre in SE $\frac{1}{4}$ SW $\frac{1}{4}$
4 acres in NW $\frac{1}{4}$ NE $\frac{1}{4}$	Section 30;
10.6 acres in SW $\frac{1}{4}$ NE $\frac{1}{4}$	3.4 acres in NE $\frac{1}{4}$ NW $\frac{1}{4}$
6.1 acres in SE $\frac{1}{4}$ NE $\frac{1}{4}$	9.5 acres in NW $\frac{1}{4}$ NW $\frac{1}{4}$
18.5 acres in NE $\frac{1}{4}$ NW $\frac{1}{4}$	Section 31,
13.3 acres in SE $\frac{1}{4}$ NW $\frac{1}{4}$	T. 10 S., R. 21 E., W. M.
3.4 acres in NE $\frac{1}{4}$ SW $\frac{1}{4}$	
14.6 acres in NE $\frac{1}{4}$ SE $\frac{1}{4}$	
25.8 acres in NW $\frac{1}{4}$ SE $\frac{1}{4}$	
3.8 acres in SW $\frac{1}{4}$ SE $\frac{1}{4}$	
22.3 acres in SE $\frac{1}{4}$ SE $\frac{1}{4}$	
Section 25;	
0.2 acre in NE $\frac{1}{4}$ NE $\frac{1}{4}$	
Section 36,	
T. 10 S., R. 20 E., W. M.	

And said right shall be subject to all other conditions and limitations
contained in said decree.

The right to the use of the water for irrigation purposes is restricted to the lands or place of use
herein described.

WITNESS the signature of the State Engineer,

affixed this 1st day
of July, 1940.

CHAS. E. STRICKLIN

State Engineer.

Recorded in State Record of Water Right Certificates, Volume 120, page 13593.

STATE OF OREGON
COUNTY OF WHEELER
CERTIFICATE OF WATER RIGHT

THIS CERTIFICATE ISSUED TO

STATE OF OREGON
WATER RESOURCES DEPARTMENT
SALEM, OREGON 97310

confirms the right to use the waters of BRIDGE CREEK, a tributary of the JOHN DAY RIVER, in the JOHN DAY RIVER BASIN to maintain an instream flow for the purpose of SUPPORTING AQUATIC LIFE AND MINIMIZING POLLUTION.

The right is for flows to be maintained IN BRIDGE CREEK BETWEEN THE MOUTH OF BEAR CREEK (SECTION 25, T 10 S, R 20 E, W.M.) AND THE MOUTH OF BRIDGE CREEK (SECTION 3, T 10 S, R 20 E, W.M.).

The right is established under Oregon Revised Statutes 537.346.

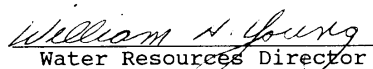
The date of priority is NOVEMBER 3, 1983.

The right is limited to not more than the amounts during the time periods listed below:

<u>Period</u>	<u>Flows (cubic feet per second)</u>
OCT 1 - OCT 31	6
NOV 1 - FEB 15	25
FEB 16- MAY 31	40
JUN 1 - JUN 30	25
JUL 1 - JUL 15	15
JUL 16- SEP 30	6

This instream water right shall not apply to domestic, livestock, or municipal uses or waters legally stored or legally released from storage.

Witness the signature of the Water Resources Director affixed this 1st day of February, 1989.


Water Resources Director

Recorded in State Record of Water Right Certificates number 59780.

MF204

STATE OF OREGON
COUNTY OF WHEELER
CERTIFICATE OF WATER RIGHT

THIS CERTIFICATE ISSUED TO

WILLIAM SMITH PROPERTIES, INC.
15 SW COLORADO AVENUE
BEND, OREGON 97702

confirms the right to store the waters of BEAR CREEK AND BRIDGE CREEK, tributaries of THE JOHN DAY RIVER, in MITCHELL RANCH RESERVOIR (PAINTED HILLS RESERVOIR) ENLARGEMENT, appropriated under Permit 48540, for IRRIGATION.

The right to store these waters was perfected under Reservoir Permit R-9896. The date of priority is OCTOBER 17, 1983. The amount of water entitled to be stored each year under this right is 490.0 ACRE-FEET, BEING 160.0 ACRE-FEET FROM BEAR CREEK AND 330.0 ACRE-FEET FROM BRIDGE CREEK.

The reservoir is located as follows:

NE 1/4 SW 1/4
NW 1/4 SW 1/4
SW 1/4 SW 1/4
SE 1/4 SW 1/4
SECTION 25

SE 1/4 SE 1/4
SECTION 26

NW 1/4 NW 1/4
SECTION 36

TOWNSHIP 10 SOUTH, RANGE 20 EAST, W.M.

THE DAM AND RESERVOIR ARE TO BE OPERATED AND MAINTAINED IN STRICT ACCORDANCE WITH THE APPROVED PLANS AND SPECIFICATIONS ON FILE WITH THE WATER RESOURCES DEPARTMENT.

The right to store and use the water for the above purpose is restricted to beneficial use at the place of use described.

WITNESS the signature of the Water Resources Director, affixed AUGUST 14, 1995.

MARtha O. PAGEL

Martha O. Pagel

Recorded in State Record of Water Right Certificates numbered 68553.

R-67960.DSM

11.01**WATER RIGHT TRANSFER REVIEWS*****BACKGROUND***

Even though a water right is attached to the land on which it was established, water may not be used in any manner in which the right holder desires. The use of water by individuals within or outside of irrigation districts is constrained to four primary guidelines that are detailed in the water right certificate—the point of diversion and the source of the water, the place of use, the type of use, and the maximum quantity of water to be diverted. For most changes in the point of diversion, point of appropriation, the type of use, the place of use, or any combination of these, the water right holder (generally the landowner) must file a transfer application with the Department. The Department may approve an application for transfer only if:

1. The water right proposed for change is a water use subject to transfer;
2. The change would not result in enlargement of the right being transferred;
3. The change would not result in the injury of another existing water right;
and
4. All other requirements are met, including that the proposed new point of diversion or appropriation will develop that same source as authorized under the existing water right.

The following provides information and the criteria that the Department uses in evaluating injury, enlargement, and same source, along with case study examples illustrating the issues to be considered when reviewing transfers.

DISCUSSION

Western states use a variety of methods for determining the amount of water that can be transferred. Some states only allow the consumptive use portion of a water right to be transferred. Other states only allow transfer of the quantity of water that has historically been diverted. Oregon is a “face value” state. The full quantity of water allowed under a water right may be transferred unless the change either would result in injury to other water rights or an enlargement of the right proposed for transfer.

The Department must make an affirmative finding that injury will not occur when approving a transfer. As a result, the demonstration that injury could occur as a result of a transfer, rather than that injury will necessarily occur is sufficient to prevent a transfer. In some cases, transfer applications will be protested and the protestants will provide information on the potential for injury. Regardless of whether a transfer is protested or not, the Department has

The Department's evaluation of the impacts of the proposed change in place of use will be based on the assumption that the right is exercised as originally authorized. As a result, the Department will evaluate the impacts on other water rights assuming that the proposed change includes an increase in consumptive use that could not have occurred under the original water right of record. If the water user intends to use the right in a manner other than for "Building Heating and Cooling", a request for a change in character of use also will be required. In evaluating a proposed change in character of use, the Department will also consider whether the transfer would result in an enlargement of the right.

WHAT IS ENLARGEMENT?

Discussion

Water law does not allow the enlargement of a water right. A water right may only be exercised at the authorized place of use for the specific use described in the right. In addition, the use of water under a right is limited to the amount needed to satisfy the beneficial purpose for which the right was issued.

Prior to adoption of the Division 380 rules, enlargement was considered as an element of injury. To clarify that a water right cannot be enlarged regardless of whether another right would be injured, the Division 380 rules establish injury and enlargement as two separate criteria used in reviewing transfer applications.

For example, the enlargement of a water right calling on the Columbia River likely would not injure other water rights. However, the Department would not approve the transfer of the right if doing so would allow enlargement of the right.

Under the Division 380 definitions:

"Enlargement" means an expansion of a water right and includes, but is not limited to:

- (a) Using a greater rate or duty of water per acre than currently allowed under a right;
- (b) Increasing the acreage irrigated under a right;
- (c) Failing to keep the original place of use from receiving water from the same source; or
- (d) Diverting more water at the new point of diversion or appropriation than is legally available to that right at the original point of diversion or appropriation.

Examples of possible enlargement include:

- An inability to dry up the lands covered by the water right. This generally is a problem in areas with extremely low-gradient streams bisecting areas which were natural wetlands or meadows. If water flows from a stream, either on the surface or subsurface, to lands covered by a water right for a significant portion of the season and, as a result, plant growth is demonstrably greater than on surrounding lands which are not irrigated, then we will consider a proposed transfer as resulting in an enlargement.
- Movement of a headgate downstream to a location at which more streamflow could be taken to satisfy the right. The Department will limit the amount of water that may be taken at the downstream location to that available at the

original point of diversion and may require measurement at both locations to ensure that more water is not taken.

- A change to instream use at a rate which would exceed the seasonal duty for the existing right when calculated based on 24-hour per day use of the instream right for the prescribed period during which the right is to be protected. Subject to the prohibition against injuring other water rights, the Department will allow alternatives as proposed by the applicant such as the use of water at a constant, reduced rate for the full season; the use of water at the full rate for a reduced period, or otherwise shaping the rate to maximize beneficial use instream during prescribed periods. In evaluating these proposals, the Department will ensure that other rights are not injured and that the maximum rate, duty and season of use for the original right are not exceeded.

Following are examples of water right transfers that raise enlargement issues and a discussion of the conclusions that the Department has reached:

Enlargement Case 1: Transfer of More Water than Could Be Used under Existing Right

Situation

A water right issued for dust control in a cattle feedlot allows a maximum rate of diversion of 1 cfs. The right does not specify a season of use or a duty. In describing the need and purpose for the original permit, the applicant indicated that the right was necessary for dust control during not more than forty-five days per summer for a period of two hours per day at a rate of 450 gallons per minute. The use of water in this manner would require the use of only 7 acre-feet of water.

A water right transfer is proposed to change the place of use and character of use to allow use of the water in an industrial facility. Under the proposed new use, water could be beneficially used year-around at full rate. This would result in a diversion of as much as 724 acre-feet of water.

Discussion

Changing the character of use through a water right transfer creates a significant potential for enlarging a water right. The amount of water that could be beneficially used without waste under many existing rights is substantially less than the “face value” of the right assuming a constant diversion of water throughout the authorized period of use. If the right will no longer be subject to the same beneficial use criteria after a transfer, the change may result in an enlargement. In evaluating whether this will occur, it is important to consider both the instantaneous rate allowed under the right and the annual duty that could be diverted. While it may be beneficial for water to be periodically taken at the authorized rate at any time during a year, it does not necessarily follow that it is beneficial for water to be taken at that rate throughout the year.

For many water rights, it is not clear exactly how much water could be beneficially used. The original permit application provides some information that can be used in understanding what the applicant believed could be used at the time. The quantity of water that has been historically used could provide another indicator of what would constitute beneficial use without waste. However, neither of these indicators definitively answer the question of how much water could be beneficially used under the existing right and, thus, how much water can be transferred to the proposed new use.

In the example, the water user is not entitled to the use of the full 724 acre-feet of water. To achieve that volume of diversion, the water user would have to apply dust control water throughout the year, including during period of heavy precipitation and freezing temperatures. The use of water in that manner would have been wasteful.

The applicant bears the ultimate responsibility for identifying a reasonable and appropriate quantity of water that could have been diverted under the existing, authorized use and for agreeing to conditions that limit the quantity of water to be diverted after the transfer is completed. The Department can provide advice and assistance in calculating the quantity of water, but cannot unilaterally impose the condition. In the absence of the applicant's agreement, the Department will deny the application because a finding cannot be made that the transfer will not result in enlargement.

Enlargement Case 2: Industrial Water Rights

Situation

The owner of an industrial facility holds a water right for up to 1 cfs to supply water needs within the facility. Given the nature of the specific industrial use at the site, water could be diverted at full rate throughout the year beneficially and without waste. However, because of changes in the facility, the full quantity of water is no longer required at the existing facility. The owner of the facility is planning another industrial facility at another location that will also need water and applies to transfer 0.5 cfs of the water right to the new location.

Discussion

In determining if the proposed transfer will result in injury to other water rights, the Department will consider the impacts of the change using estimates of consumptive use and irretrievable losses based on the authorized use. The Department will conclude that there is no injury if the impacts on other water rights do not exceed the impacts that likely could have occurred in the absence of the transfer.

However, the Department does not consider the transfer of a portion of the quantity of water that could have been used for industrial purposes to constitute an enlargement. Subject to the requirement that the change not result in injury to other water rights, a portion of the quantity of water allowed under an industrial water right can be moved to a new use without “drying up” a portion of the existing use.

Enlargement Case 3: Extension of Season***Situation***

A change in character of use is proposed under which the water right would be exercised year-around. The originating right is an irrigation right with a specified season. The transfer applicant is proposing to transfer the right to agricultural use at the existing maximum rate of diversion, but has agreed to limit annual diversions of water to the quantity allowed under the existing right.

Discussion

Although extension of the allowable season of use under a water right frequently will raise injury issues, the extension of the season does not constitute enlargement of the right if the total annual diversion is limited to the quantity that could have been diverted under the originating right. The injury issues that are raised are a result of the new use of water that will occur during periods in which it has not existed in the past.

Injury issues are minimized if the authorized source for the right is a ground water aquifer that functions as a reservoir. In such a system, the potential effects on other users are influenced more by the total quantity of water removed from the aquifer than by the timing of the removal. However, the potential effects on other users resulting from use of ground water where there is a potential for substantial interference with surface water or from the use of surface water are influenced more by the timing of the use than by the total quantity of water used. Absent injury to other water rights, the season of use can be extended through a water right transfer regardless of source. However, careful evaluation of the impacts on other rights is particularly important in situations in which the proposed change will affect surface water flows.

Enlargement Case 4: Ready, Willing, and Able

Situation

A water right holder has exercised a water right through a series of temporary transfers. During the period in which water has been used at locations other than that authorized under the existing, certificated right, one of the wells listed on the certificate has been abandoned. As a result, the water right holder no longer has the capacity to divert the full quantity of water allowed under the right.

The water right holder is now seeking a transfer to change the authorized point of appropriation from the abandoned well to a different well a short distance away. The Department has reviewed the well logs for the two wells and has concluded that they take water from the same source.

Discussion

A water user must be ready, willing, and able to use water under a water right or risk forfeiture of the right. However, the ultimate test of whether a user is ready, willing, and able is whether or not forfeiture could be proven in a cancellation proceeding. The right has been beneficially used under the temporary transfers and is not subject to forfeiture. Therefore, the abandonment of the well is not a constraint on transfer of the right.

If there are questions about whether a transfer applicant has the capability to use the full quantity of water allowed under a water right proposed for transfer, the Department will request more specific information about how the water right has been exercised and better documentation of how the water has been used. Failure of the applicant to provide the requested information may provide a basis for denial of the application as incomplete.

Enlargement Case 5: Multiple Changes in Character of Use

Situation

An irrigation water right for 10 acres has been transferred to industrial use. The original water right allowed the use of up to 1/40th cfs per acre with a duty of 4.5 acre-feet per acre. No injury issues were identified at the time of the original transfer and the certificate for the industrial water right allows the use of up to 0.25 cfs with an annual duty of 45 acre-feet. The industrial facility is being closed and the owner has applied to transfer the water right to irrigation of 20 acres.

Discussion

Water rights retain many of the conditions of the decrees and permits under which the rights were originally established. Transfer orders specifically provide that the use is subject to all other conditions and limitations contained in the previous right and any related decree. In addition, certificates refer to the permit or decree under which the right was originally established. A water right that was originally established at rate of 1/40th cannot be

transferred back to irrigation at a lesser rate. The Department will not allow an irrigation water right to be enlarged by converting the right to another use, and then back to irrigation of a larger number of acres.

Enlargement Case 6: Drying Up Land

Situation

An irrigation water right is served by a series of small dams and ditches. During the spring, the lands are sub-irrigated and, as the irrigation season progresses, the water user maintains the irrigation by installing and removing the small dams to push the streamflow through the ditches and across the land. The water user applies to transfer the irrigation water rights to another location.

Discussion

When changing the place of a water right, the user must be able to prevent water from the authorized source from reaching the “From” lands. The inability of the water user to dry up the existing, authorized place of use can be a result of a variety of factors—the lands are along a low gradient stream, the lands are served by leaky ditches that will continue to be used, or the proposed place of use is up-gradient of the authorized place of use and tailwater will flow to the “From” lands. If all or a portion of the “From” lands will continue to receive water from the source described under the right, then the Department will not allow the water rights for those lands to be moved.

Continued irrigation of the “From” lands from another source does not constitute an enlargement. For example, the lands currently are irrigated using reclaimed water under a NPDES or WPCF permit, then the water right for those lands may be transferred to another location regardless of the source of the reclaimed water. Additionally, the continued sub-irrigation of low-gradient lands after a transfer is not an enlargement if the authorized source under the transferred right is separate and distinct from the source of the sub-irrigation. However, the quantity of water that can be transferred may be limited based on the quantity of water that could have been used beneficially without waste under the existing right.

Enlargement Case 7: Changes from Specific Uses to General Uses

Situation

A water right allows group domestic use and irrigation of up to ½ acre of lawn and non-commercial for 15 families. The water right is in the name of the water company that supplies potable water to the area. The water company files an application to transfer the domestic right to quasi-municipal use in two quarter-quarter sections.

Discussion

A change from a specific use to a more general use that encompasses the existing specific use raises enlargement issues. Examples of these types of transfers include changes from domestic to quasi-municipal, irrigation to quasi-municipal, irrigation to wildlife refuge, and boiler use to industrial use. When processing transfers involving changes from specific to general uses, the Department will consider whether the proposed new use will allow an increase in the use of the right beyond that originally authorized. If such an increase could occur, the Department will propose alternative conditions to the applicant to eliminate the potential enlargement. These conditions can include limitations on the extent to which water can be applied for the original specific purpose of the right or a reduction in the quantity of water transferred. For example, in transfers from irrigation to wildlife refuge use, the Department has limited the number of acres that can be irrigated under the right in a single season to the number of acres allowed under the original right.

WHAT IS THE SAME SOURCE?

Discussion

Transfer rule and current guidance advise that a change in point of diversion (or point of appropriation) is restricted to the same surface water source (or same ground water aquifer).

OAR 690-380-2110(2) states:

"Except as provided in ORS 540.531 and OAR 690-380-2130 [SW diversion to GW appropriation], a change in point of diversion is restricted to the same source of surface water. A change in point of appropriation under a water right or certificate of registration modification is restricted to the same aquifer."

Use of the wrong point of diversion does not constitute forfeiture unless it's diverting water from the wrong (different) source:

- If a water right holder is diverting water from an unauthorized POD, but they are still accessing the same (authorized) source of water, the right is not subject to forfeiture.
- If, however, a water right holder is diverting water from an unauthorized POD on a different (unauthorized) source of water, then the right would be subject to forfeiture because they are not accessing the source of water allowed under the right.

The Department has conducted cancellation proceedings in which the use of the wrong POD was an issue. These cases confirm that the water right is not forfeited as a result of the use of an unauthorized POD provided that use is made from the correct source. In one case, the authorized POD was a short distance downstream of the POD that was used (Spec. Or. Vol. 32, page 544). In the other case, the authorized POD was 5 or 6 miles upstream of the POD that was used (Spec. Or. Vol. 34, page 136). In both cases, the names of the stream on which

John Day Basin

Record of Decision and Resource Management Plan



BLM
Prineville District





United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Prineville Field Office
3050 NE Third St.
Prineville, OR 97754

In reply refer to: 1610

Dear Interested Party:

In accordance with the Federal Land Policy and Management Act (FLPMA) and the National Environmental Policy Act (NEPA), the Bureau of Land Management (BLM) has prepared the attached Record of Decision (ROD) and approved John Day Basin Resource Management Plan (JDBRMP). The JDBRMP addresses management of about 456,600 acres of public land in eight counties in central Oregon.

The JDBRMP integrates all resource management activities in the plan area into a single unified land use plan that replaces three land use plans, one Wild and Scenic River Plan, and one Coordinated Resource Management Plan. The ROD was prepared in accordance with 40 CFR Part 1505.2, which requires a concise document linking the final decision to the analysis presented in the Proposed Resource Management Plan/Final Environmental Impact Statement (PRMP/FEIS).

A 30-day protest period was provided on the proposed land use planning decisions in the John Day Basin PRMP/FEIS in accordance with 43 CFR Part 1610.5-2. The BLM received 27 protest letters. All but three were classified as form or comment letters. After careful consideration of all points raised in those protests, the BLM Director concluded that the BLM Oregon State Director and the Prineville District followed all applicable laws, regulations, policies, and pertinent resource considerations in developing the proposed plan. Responses were sent from the BLM Director to all protesting parties to address their concerns. The BLM's protest summary report is available on the Prineville BLM District's planning web page at: <http://www.blm.gov/or/districts/prineville/plans/johndayrmp/jdbsupportdocs.php>.

The Governor of Oregon was provided a formal 60-day review period to determine if the proposed plan conformed to existing state and local plans, programs, and policies. No inconsistencies were identified.

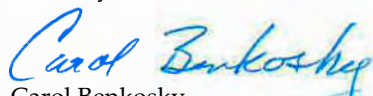
The ROD serves as the final decision for the land use plan decisions described in the attached approved JDBRMP and becomes effective on the date the ROD is signed. No further administrative remedies are available at this time for these land use plan decisions. Some of these planning decisions will require preparation of a detailed, project-specific environmental analysis prior to on-the-ground implementation. Future public involvement opportunities will be provided as appropriate at that time.

Other decisions have been addressed to a sufficient level of detail in the John Day Basin PRMP/FEIS process to be implemented over time without further NEPA analysis. These are considered to be new "implementation decisions" (see the Implementation Decisions section of the ROD). These will be implemented as funding and staff are available. A separate appeal opportunity for these selected decisions is being provided at this time. The appeal period will close 30 days from the date the Notice of Availability of the John Day Basin ROD/RMP appears in the Federal Register. This date will also be announced via local news releases, legal notices, and/or individual mailings. Please review the ROD carefully for more detailed discussion of the appeal process.

Updates on implementation of the JDBRMP will be available on the internet at: <http://www.blm.gov/or/districts/Prineville/index.php>.

We appreciate your interest and help in this planning effort and look forward to your continued participation as the plan is implemented.

Sincerely,


Carol Benkosky
Prineville BLM District Manager

John Day Basin Resource Management Plan



John Day Basin ROD & RMP

16. Avoid livestock trailing, bedding, loading, and other handling activities in Riparian Management Areas.
17. Locate troughs associated with spring developments and off-channel water on ground with a slope, vegetated buffer, and distance away from Riparian Management Areas to ensure that management of the area does not contribute sediment to or remove vegetation from hydric soils, riparian or wetland areas. Fence developed spring areas to exclude livestock. Use an automatic shut-off or efficiently return overflow to the source in a short-return interval.

Guideline

1. 1 Over the course of two years, forest cover treatments should not result in more than 80 percent loss of forest cover in areas of less than 15 to 18 inches annual precipitation zone. This 80 percent change applies to cumulative activities across all ownerships of a watershed Hydrologic UNit Code (HUC 5). Phased treatments are preferred.
2. 1 During forest and juniper watershed treatments lop and scatter limbs or similar material (see Table 2 in the Vegetation section), where peak flows exceed natural values (e.g., Harris and Hubbard, 1993).

Objective AQ7

Maintain water rights needed to meet BLM management purposes and maintain beneficial uses.

Management Actions

1. 1 Water rights on BLM-administered lands are held in, or transferred to, the name of the United States, Department of Interior, BLM. To maintain all valid water rights, the BLM will inventory and catalog Public Water Reserve (PWR) 107 water rights for livestock and domestic water use and document existing water rights over the life of the plan and beyond.
2. 1 Compile the history of use on BLM water rights and points of diversion. Voluntary relinquishment of mining water rights that are no longer valid will contribute to meeting instream flow goals. To maintain beneficial use of water rights, complete a change-of-use to instream use for each water right not used for their original purpose.
3. 1 Require rights-of-way to convey surface or ground water across BLM land, with the exception of off-channel water for livestock and wildlife beneficial uses that improve watershed condition and attain ACS objectives.
4. 1 Increase instream flows through cooperative efforts to lease water rights instream and improve irrigation efficiency. Apply Land and Water Conservation Funds to restore instream flows that support ecological and recreational resource values during periods of peak demand.
5. 1 For the North Fork John Day subbasin, acquire and maintain instream and other water rights necessary to support recreational activities including fishing, canoeing, hiking, kayaking, swimming, white water rafting, big game hunting, obligate diverse wildlife assemblage, and anadromous fish and bull trout habitat throughout pertinent life cycles.
6. 1 Limit withdrawals of water from stream systems to those that do not contribute to degradation of fish and aquatic life. Cease water withdrawal from stream channels when stream flows drop below 10 cubic feet per second at Bridge Creek (USGS gauge 14046778), after August 15th on the Mainstem John Day River, and at similar in-stream flow goals for fish, recreation and pollution abatement in the plan area. These goals include ODFW minimum instream flow goals, State Scenic Waterway, or future BLM instream flow goals identified by the BLM. Withdrawals include, but are not limited to: irrigation of agricultural land for cultivation of agricultural crops, permanent conversions (see glossary), or wildlife food and cover plots; mining operations; and rangeland restoration.
 - a. Water may be withdrawn beyond the shut-off limits to restore perennial vegetation in floodplains when it is determined that the long-term benefit to water quality and fish habitat restoration outweighs the short-term impacts and is consistent with the Endangered Species Act and Clean Water Act. Allowable uses include the establishment of perennial vegetation (see Vegetation objectives) that will not require irrigation after establishment for the purposes of restoring riparian habitats and growing hardwood riparian stock for out-planting.



January 27, 2020

Elizabeth E. Howard

Admitted in Oregon, Washington and
North Dakota
T: 503-796-2093
C: 503-312-8765
ehoward@schwabe.com

Amanda Roberts
Central Oregon Field Manager
Prineville District Office
Bureau of Land Management
3050 NE 3rd Street
Prineville OR 97754

RE: Right of Way Application - Bridge Creek Water Right Diversions & Access
Our File No.: 129629-213607

Dear Ms. Roberts:

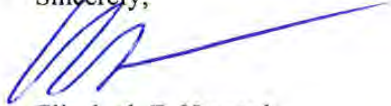
Enclosed please find the right of way application discussed with Kyle Hensley, Anna Smith, and Jana Wilcox in late 2019. This application is being filed by Bridge Creek Ranch LLC to facilitate access to its authorized water right diversions on Bridge Creek and in order to complete repairs and upgrades required by Oregon Water Right Transfer Application T-9873. These same points of diversion have been used in some instances since the 1880s for other, existing water rights and are critical for filling the Painted Hills Reservoir with water that is being used for irrigation and will, upon completion of work this summer, also be used for instream releases to supplement summer time flows in Bear and Bridge Creek.

As explained in the application, this is a renewal and expansion of the Right of Way issued to Derby Smith Partners, Serial No. 60685. As we also explain in the application, Bridge Creek Ranch does not agree that the limitation on water right diversions set forth in paragraph "n" of the Derby Smith right of way should or can lawfully be applied to water lawfully diverted by Bridge Creek for use on lands (or in storage facilities) that are not owned by the BLM. If one traces the origin of the Bridge Creek withdrawal limitation back to the John Day Basin RMP and Sutton Mountain CRMP, it is clear that this provision was meant to apply to water rights appurtenant to and used on BLM lands, not to water rights appurtenant to private lands. Bridge Creek Ranch does not dispute that the 10 cfs withdrawal limitation can be applied to the diversion of water rights used on BLM's lands, of which there are approximately 112 acres covered by the diversions included in the right of way. Bridge Creek Ranch also wishes to note that the work it is doing on the Painted Hills Reservoir will increase summer flows, thereby providing instream benefits consistent with the BLM's objectives in the John Day Basin RMP. This work is strongly supported by the Tribes, Oregon Department of Fish & Wildlife and the Oregon Water Resources Department, among others.

Amanda Roberts
January 27, 2020
Page 2

We look forward to working with BLM to successfully complete the Bridge Creek water diversion and access right of way renewal and issuance. Please let us hear from you or your staff **before February 6, 2020** to confirm that you are processing the application and any other information you may need to complete it, so that we can move this process forward expeditiously.

Sincerely,



Elizabeth E. Howard

EEH:cw
Enclosures

cc: Mike Pati
Gabe Williams
Gordon Tolton

PDX\129629\213607\EEH\27082712.1

CONVERSATION RECORD – Anna Smith and Amanda S Roberts, Field Manager		Time: 4pm	Date: July 18, 2020
TYPE: ☐ VISIT ☐ CONFERENCE ☒ TELEPHONE ☐ INCOMING ☐ OUTGOING			
Location of Visit/Conference:			
NAME OF PERSONS CONTACTED OR IN CONTACT WITH YOU: Gordon Tolton	ORGANIZATION (Office, dept., bureau, etc.)	TELEPHONE NO. (b)(6)	
SUBJECT: withdrawal of water from Bridge Creek			
SUMMARY: John Day Basin RMP direction to withdrawals from Bridge Creek when flows drop below 10cfs. (JDBRMP page 52) <u>In more detail:</u> Amanda Roberts explained to Gordon that the BLM in conversation with the ranch about operations at the point of diversion. However, Amanda wanted to ensure that the BLM remained consistent in making the annual phone call about stopping withdrawals when Bridge Creek Stream flows drop below 10 cfs. Gordon said thanks for the call.			
ACTION REQUIRED:			
NAME OF PERSON DOCUMENTING CONVERSATION:	SIGNATURE:	DATE:	
ACTION TAKEN:			

OF271 CONVERSATION RECORD OPTIONAL FORM 271 (12-76)

From: [Smith, Anna K](#)
To: [Lightcap, Scott W](#)
Cc: [Brown, Michael E](#); [Moss, Jeffrey D](#)
Subject: Fw: Flow vs Water Temperatures for Fish
Date: Thursday, May 20, 2021 10:05:36 AM
Attachments: [image.png](#)

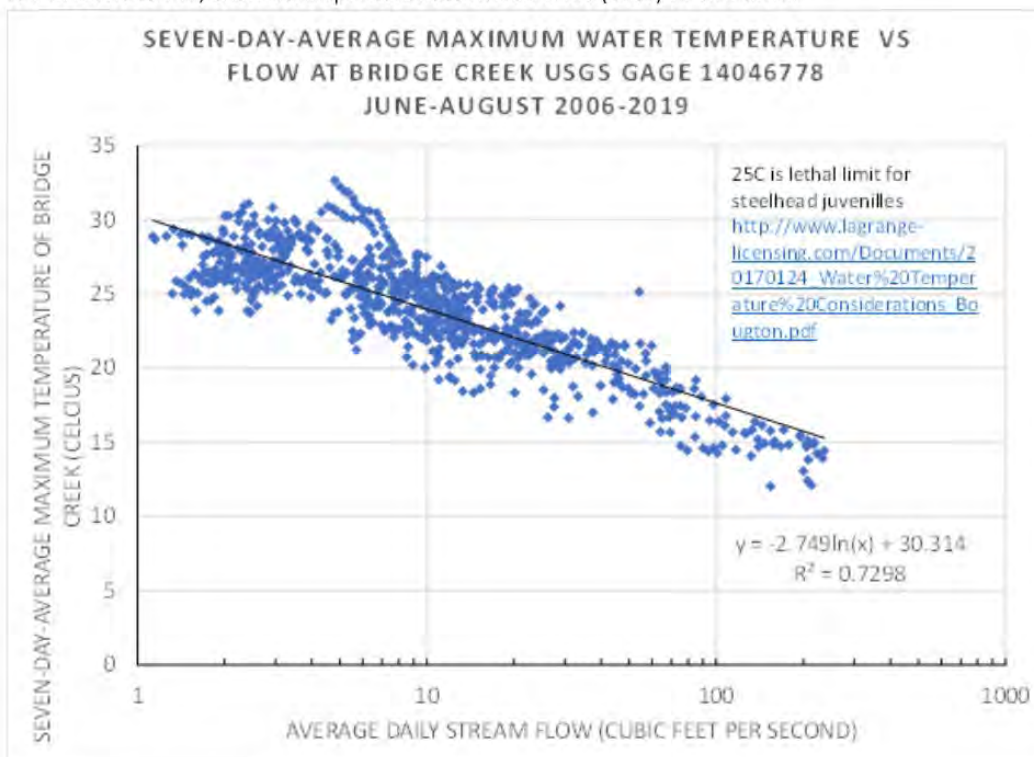
my analysis of 10cfs. State water quality standard is 18C.

From: Smith, Anna K
Sent: Friday, March 12, 2021 09:23 AM
To: Roberts, Amanda S <asroberts@blm.gov>
Cc: Mckinney, Stephanie D <smckinney@blm.gov>
Subject: Flow vs Water Temperatures for Fish

Dear Amanda,

ODFW says steelhead die at 25C. The graph below plots Bridge Creek Flow vs Bridge Creek Water Temperature in Augusts (2006 to 2019).

It's evident to me, than 10cfs protects steelhead a lot (80%) of the time.



Anna Smith
 Hydrologist
 Central Oregon Field Office

Prineville District BLM
541-416-6747

EARLY ALERT

May 25, 2021

To: HQ BLM/DOI Officials

From: BLM Oregon/Washington State Office

Through: Division Chief, HQ Public Affairs

Subject: Bridge Creek Ranch Trespass

Who: Mike Pati, Bridge Creek Ranch LLC

Where: T. 11 S., R. 21 E., sec. 5, lot 4; sec. 6, lot 1. Bridge Creek area North of Mitchell Oregon, on Central Oregon Field Office

When: May 27, 2021

Action/Issue: The BLM Central Oregon Field Office (COFO) is preparing to issue two notices of trespass to Bridge Creek Ranch LLC (BCR).

Background: The COFO is preparing to issue two notices of trespass to BCR for two separate unauthorized uses on public lands: an agricultural field approximately 18.5 acres in size and the use of a point of diversion (POD) on public lands. The POD is used to fill a pond on their private land and water their agricultural fields.

The COFO is working to resolve the unauthorized uses. The COFO staff and management have met with BCR staff in the field, and BCR submitted incomplete applications for a right-of-way and an agricultural use lease in November 2020. In December 2020 the BLM determined the processing category for the applications and requested processing fees from BCR. To date, no processing fee has been submitted.

It is important that the BLM move quickly to stop the unauthorized uses, as continued unrestricted use of the POD that draws instream flow below 10 cubic feet per second (cfs) jeopardizes the Endangered Species Act threatened mid-Columbia River steelhead and other sensitive species. Should the POD be authorized in the future, stipulations would be included to protect the minimum instream flow. The BLM is unable to apply stipulations to unauthorized uses. Instream flows are trending downward and approaching 10 cfs. In recent weeks flows dropping below 10 cfs were recorded.

In addition, addressing these unauthorized uses sooner rather than later is important as the lands in trespass have also been identified for inclusion the proposed Painted Hills National Monument.

Bridge Creek Ranch LLC is likely to perceive economic hardship when they are notified that they are not allowed to continue unauthorized uses on public land.

The COFO is aware that Bridge Creek Ranch LLC uses the water for their agricultural fields and is aware that a Notice of Trespass will impact their current operations.

Media Interest: None to date.

Contact: Barry Bushue, State Director, Oregon/Washington, (503) 808-6026.



United States Department of the Interior
BUREAU OF LAND MANAGEMENT
Prineville District Office
3050 NE 3rd Street
Prineville, Oregon 97754



In Reply Refer To:
2921 (ORP040)
OROR 070503

MAY 28 2021

CERTIFIED MAIL - 7019 1640 0001 7183 1386
RETURN RECEIPT REQUESTED

AUTHOR INITIALS _____ DATE _____

SUPERVISOR INITIALS SPK DATE 5/28/21

Bridge Creek Ranch, LLC
Attn: Mike Pati
355 Goodpasture Island Road, Suite 300
Eugene, OR 97401

TRESPASS NOTICE

You are hereby notified that the Bureau of Land Management (BLM) has made an investigation and evidence shows that you have impacted public lands in trespass. We allege that you have violated the law and regulations approved by the Secretary of the Interior pursuant to the authority vested in her by said law.

Our investigation shows that you, or a subcontractor working for you, have been using a point of diversion (POD) and appurtenant features for the transportation of water without approval on federal lands administered by the BLM Prineville District, located in Wheeler County, Oregon.

The POD is located along the eastern bank of Bridge Creek and has been used to divert water from the creek without prior approval. An application from Bridge Creek Ranch was received via email on November 03, 2020. On December 16, 2021 a Processing Category Determination letter was mailed via certified mail to Mike Pati requesting a processing fee per 43 CFR 2804.14. After a processing category is determined, the applicants must submit the appropriate payment for that category before BLM begins processing the application. To date, no processing fee has been submitted.

For any activities on BLM lands that are not casual use, you must obtain prior BLM approval (43 CFR 2804.29(b)). As the BLM has not written a final decision and issued a grant (43 CFR 2805.10), the POD is an alleged unauthorized use and development (43 CFR 2808.10).

The lands we alleged have been impacted in trespass are described as follows:

Willamette Meridian, Oregon
T. 11 S., R. 21 E.,
sec. 6, lot 1.

The area described above contains approximately 0.72 acres.

The action you have undertaken constitutes an unauthorized use under the Federal Land Policy and Management Act of 1976, as amended (43 USC 1701 et seq.) and the regulations found in 43 CFR 2808. As a consequence of this act you may be liable for the administrative costs incurred by the United States as a consequence of such trespass; the rental value of the lands during the term of the trespass; and rehabilitation and restoring of the lands involved.

Unless you receive written authorization from the BLM in the form of a Right-of-Way grant, you shall stop all activities associated with the POD.

You are allowed 10 days from receipt of this notice to schedule a meeting with the BLM. At this meeting you may present evidence to show that you are not responsible for the trespass as we have alleged. Failure to comply with this notice and to resolve your trespass liability may result in trespass penalties and a citation for your appearance before a designated United States magistrate who may impose a fine not more than \$1,000.00 or imprisonment of not more than 12 months or both under Title 43 CFR 9262.1.

If you have any questions regarding this notice of trespass please contact Faith Simitz, Realty Specialist by phone at 541-416-6783 or by email at fsimitz@blm.gov.

Sincerely,



Amanda S. Roberts
Field Manager, Central Oregon Field Office

Enclosure: Form 1842-1

Form 2800-14
(August 1985)

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
RIGHT-OF-WAY GRANT/TEMPORARY USE PERMIT

Issuing Office
PRDO - Central Oregon Field Office
Serial Number
OROR 070300

1. A (right-of-way) (permit) is hereby granted pursuant to:

- a. ☒ Title V of the Federal Land Policy and Management Act of October 21, 1976 (90 Stat. 2776; 43 U.S.C. 1761);
- b. ☐ Section 28 of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 185);
- c. ☐ Other (describe) _____

2. Nature of Interest:

- a. By this instrument, the holder Bridge Creek Ranch, LLC receives a right to construct, operate, maintain, and terminate a Sec. 6 Point of Diversion (830' road, 770' pipeline, headgate, meter, weir, screens) on public lands (or Federal land for MLA Right-of-Way) described as follows:

Willamette Meridian, Oregon
T. 11 S., R. 21 E.,
sec. 5, lot 4;
sec. 6, lot 1.

The area described above contains approximately 0.71 acres.

Pipeline: 770 ft x 12 ft, 0.22 acres
Road: 830 ft x 15 ft, 0.29 acres
Screen, meter, diversion, headgate: 0.20

- b. The right-of-way or permit area granted herein is various feet wide, various feet long and contains 0.71 acres, more or less. If a site type facility, the facility contains _____ acres.
- c. This instrument shall terminate on December 31, 2024, 3 years from its effective date unless, prior thereto, it is relinquished, abandoned, terminated, or modified pursuant to the terms and conditions of this instrument or of any applicable Federal law or regulation.
- d. This instrument ☐ may ☒ may not be renewed. If renewed, the right-of-way or permit shall be subject to the regulations existing at the time of renewal and any other terms and conditions that the authorized officer deems necessary to protect the public interest.
- e. Notwithstanding the expiration of this instrument or any renewal thereof, early relinquishment, abandonment, or termination, the provisions of this instrument, to the extent applicable, shall continue in effect and shall be binding on the holder, its successors, or assigns, until they have fully satisfied the obligations and/or liabilities accruing herein before or on account of the expiration, or prior termination, of the grant.

(Continued on page 2)

3. Rental:

For and in consideration of the rights granted, the holder agrees to pay the Bureau of Land Management fair market value rental as determined by the authorized officer unless specifically exempted from such payment by regulation. Provided, however, that the rental may be adjusted by the authorized officer, whenever necessary, to reflect changes in the fair market rental value as determined by the application of sound business management principles, and so far as practicable and feasible, in accordance with comparable commercial practices.

4. Terms and Conditions:

- a. This grant or permit is issued subject to the holder's compliance with all applicable regulations contained in Title 43 Code of Federal Regulations parts 2800 and 2880.
- b. Upon grant termination by the authorized officer, all improvements shall be removed from the public lands within 90 days, or otherwise disposed of as provided in paragraph (4)(d) or as directed by the authorized officer.
- c. Each grant issued pursuant to the authority of paragraph (1)(a) for a term of 20 years or more shall, at a minimum, be reviewed by the authorized officer at the end of the 20th year and at regular intervals thereafter not to exceed 10 years. Provided, however, that a right-of-way or permit granted herein may be reviewed at any time deemed necessary by the authorized officer.
- d. The stipulations, plans, maps, or designs set forth in Exhibit(s) A Stipulations and B Maps, dated 07/08/2021, attached hereto, are incorporated into and made a part of this grant instrument as fully and effectively as if they were set forth herein in their entirety.
- e. Failure of the holder to comply with applicable law or any provision of this right-of-way grant or permit shall constitute grounds for suspension or termination thereof.
- f. The holder shall perform all operations in a good and workmanlike manner so as to ensure protection of the environment and the health and safety of the public.

IN WITNESS WHEREOF, The undersigned agrees to the terms and conditions of this right-of-way grant or permit.

Randall Jordan Pope
(Signature of Holder)
RANDALL JORDAN POPE, PRESIDENT, POPE
PROPERTIES INC., SOLE MEMBER OF BRIDGE
CREEK RANCH, LLC
(Title)

9/10/21
(Date)

Annika S. Pope
(Signature of Authorized Officer)
Field Manager, Central Oregon Field Office
(Title)

Sept 29, 2021
(Effective Date of Grant)

(Form 2800-14, page 2)

Exhibit A – OROR 070300

Stipulations for Bridge Creek Ranch – Point of Diversion
July 8, 2021**1.0 Definitions**

- 1.1 The Central Oregon Field Manager or designated representative is the Authorized Officer (AO), as defined by 43 CFR 2920.0-5(a).
- 1.2 "Grantee" means Bridge Creek Ranch, and any and all assignees that may be of record, including all agents, contractors, subcontractors, and employees.
- 1.3 "Grant" means the license, lease, permit, or other permission granted by the United States to the grantee for the use of public lands and resources.

2.0 General

- 2.1 The grantee will address all matters to the Central Oregon Field Manager, 3050 NE 3rd St., Prineville, Oregon 97754.
- 2.2 In case of change of address, the grantee shall immediately notify the AO.
- 2.3 Any modifications to the proposed activities must be approved in writing by the AO.
- 2.4 This grant is subject to all prior valid and existing rights, and the United States makes no representations or warranties whatever, either expressed or implied, as to the existence, or nature of such valid existing rights.
- 2.5 The right to grant additional rights-of-way or permits for compatible use on, over, under, or adjacent to the land involved in this grant is reserved to the AO.
- 2.6 It is the responsibility of the grantee to ensure that field party members are familiar with and adhere to these stipulations.
- 2.7 The holder, in exercising the privileges granted under this grant shall comply with the regulations of the Department of the Interior and all Federal, State, County and Municipal laws, ordinances, or regulations, which are applicable to the area or operations covered by this grant.
- 2.8 This grant may be terminated if the BLM determines that the grantee is manufacturing, distributing, dispensing, or possessing with intent to manufacture, distribute, or dispense a controlled substance on the public lands described herein in violation of the Controlled Substances Act of 1970, 21 U.S.C. § 801 *et seq.*
- 2.9 In the advent of a disagreement of the interpretation or implementation of these stipulations the grantee agrees that the AO shall have the final say in how these stipulations are interpreted and implemented.

- 2.10 This grant may not be encumbered, hypothecated, assigned, subleased, or transferred without prior written approval by the AO.
- 2.11 The AO may revoke or terminate this grant in whole, or in part, upon a determination by the AO that the terms, conditions, or stipulations of the grant have been violated, or by determination by the AO that the grantee's actions pose a threat to human health or safety, or irreparable harm to the surrounding environment.
- 2.12 The grantee shall not enclose or obstruct in any manner, or erect or maintain any signs or structures on roads or trails commonly used for public travel or access to public lands surrounding the grant.
- 2.13 This grant does not authorize the permittee to take from the public lands any mineral or vegetative material, including timber, without securing authorization under 30 USC 601 et seq.
- 2.14 This grant does not authorize any other use of the public lands or improvements belonging to the US Government.
- 2.15 Grantee shall comply with Title VI of Civil Rights Act of 1964 (42 U.S.C. 2000 et seq.) and the regulations of the Secretary of the Interior issued pursuant thereto.

3.0 Environmental

- 3.1 Grantee will not intentionally harass or harm migratory birds or interfere with their nesting and brood rearing activities.
- 3.2 Grantee will not intentionally harass or harm migratory Middle Columbia Summer Steelhead or interfere with their spawning and rearing activities.
- 3.3 All activities shall be conducted so as to avoid or minimize disturbance to vegetation. If it becomes necessary to remove vegetation, prior approval by the AO is required.
- 3.4 All operations shall be conducted with due regard for good resource management and in such a manner as not to block any stream, or drainage system, or cause the pollution or siltation of any stream or lake.
- 3.5 The grantee shall conduct all activities associated with the construction, operation, and termination of the right-of-way within the authorized limits of the right-of-way. If any scarring or damage occurs outside of approved areas as a result of the holder's operations, the areas shall be repaired and reseeded, or otherwise corrected as necessary to the satisfaction of the Authorized Officer.
- 3.6 The grantee will do everything reasonable, both independently and/or upon request of the authorized officer to prevent and suppress fires on or near the lands occupied under the right-of-way.
- 3.7 Petroleum products or by-products shall not be used for dust suppression.
- 3.8 Any revegetation will be with native species only.

4.0 Operational

- 4.1 Prior to ground-disturbing activities within the existing right-of-way, the holder shall notify the BLM Authorized Officer. The COFO Archaeology Staff shall review the project and inform the BLM Authorized Officer and holder of the nature of the cultural resources compliance that will be required. Cultural resources compliance may include cultural resources inventory, updated site recording for known archaeological sites, archaeological excavation and data recovery, archaeological monitoring, and/or other actions at the expense of the holder. Unless otherwise stated by Authorized Officer, or in the case of an emergency, implementation of ground-disturbing activities shall not proceed until the cultural resources compliance is complete.
- 4.2 There shall be no disturbance of any archaeological or historical sites, including graves and remains of cabins, and no collection of any artifacts whatsoever. Also, collection of vertebrate fossils, including mammoths and mastodon bones, tusks etc., is strictly prohibited. If historic resources are encountered then all artifacts will be respectfully left in place and the Central Oregon Field Office's cultural resources staff will be notified immediately.
- 4.3 Any cultural and/or paleontological resource (historic or prehistoric site or object) discovered by the Grantee, or any person working on his behalf, on public or Federal lands shall be immediately reported to the Authorized Officer. Grantee shall suspend all operations in the immediate area of such discovery until written authorization to proceed is issued by the Authorized Officer. An evaluation of the discovery will be made by the AO to determine appropriate actions to prevent the loss of significant cultural or scientific values. The Grantee will be responsible for the cost of evaluation and the Authorized Officer will make any decision as to proper mitigation measures after consulting with the Grantee.
- 4.4 All waste generated during operation, maintenance, and termination activities under this authorization shall be removed or otherwise disposed of as required by state and federal law. In this case the waste must be dumped in a Department of Environmental Quality (DEQ) approved landfill site. Waste in this sub-paragraph means all discarded matter, including but not limited to, human waste, trash garbage, refuse, and oil drums, petroleum products, ashes and discarded equipment.
- 4.5 Areas of operation shall be left clean of all unauthorized foreign objects. This shall include, but is not limited to, wires, pins, flags and reflectors.
- 4.6 All fuel or lubricant spills will be cleaned up immediately, taking precedence over all other matters, except the health and safety of personnel. Spills will be cleaned up utilizing absorbent pads or other Oregon State DEQ approved methods. Any such spill sites will be documented so that they can be located during the compliance check.
- 4.7 Recovered spill fluids will be removed and either incinerated in approved receptacles or in accordance with appropriate laws and regulations.
- 4.8 As soon as possible, but not later than 24 hours, notice of any such discharge, will be given to the AO and any other Federal and State Officials as are required by law.
- 4.9 All State and Federal safety standards and regulations for fuel transportation and handling will be followed. Only fuel products and amounts specifically authorized shall be stored on

site, and shall be located at least 100 feet away from any source of water. All fuel containers, including barrels and propane tanks, shall be marked with the grantees name, product type, and year filled.

- 4.10 The grantee shall protect all Survey Monuments. In the advent of obliteration or disturbance of a survey monument, the grantee shall immediately notify the AO. The grantee will be financially responsible to re-establish the survey monuments to the Bureau standards.
- 4.11 No hazardous materials shall be transported or disposed within the area of authorized use.
- 4.12 Prior to abandonment of any portion of the facilities authorized by this grant, the grantee shall contact the Authorized Officer, and if the situation warrants, to arrange a joint inspection of the right-of-way. The inspection will be held to agree on an acceptable rehabilitation plan. The Authorized Officer must approve the plan in writing prior to the grantee commencing any abandonment and/or rehabilitation activities.
- 4.13 Any further ground disturbance will be done after approval by the Authorized Officer.
- 4.14 Grantee shall inform and ensure compliance of the grant and its stipulations by his/her agents, contractors, subcontractors, employees, and guests.
- 4.15 No new access trails or roads are authorized without written authorization from the Bureau of Land Management.
- 4.16 The BLM Prineville District Office (PRDO) forester shall be notified prior to any cutting activity when the following factors are present:
 - 4.16.1 The total number of trees being removed at any one time exceeds ten and/or the removal of trees needed removed in a given area create a visible impact to the landscape visible to the public;
 - 4.16.2 The number of trees over 12 inches diameter at breast height (DBH) exceeds five; and/or
 - 4.16.3 Any one tree exceeds 18 inches DBH.

In these cases the BLM shall be notified with a description of the trees and coordinates or map. BLM may appraise the timber involved and charge the Grantee the current market value stumpage. Alternatively, BLM may remove cut trees with a local or currently active contractor in the area.
- 4.17 If felling trees within the ROW, leave boles of trees intact when they are greater than or equal to 12" in diameter. All limbs and boles less than 12" in diameter of tree will be chipped.
- 4.18 All activities will be in accordance with the Industrial Fire Precaution Level (IFPL). The holder may request a waiver to proceed from the BLM if the IFPL would otherwise not allow the type of equipment as proposed.
- 4.19 The site must be kept clean. All waste generated during the operation and termination activities of this lease shall be removed and disposed of as required by state and federal laws.

As defined in this paragraph "waste" means all discarded matter, including but not limited to human waste, trash, garbage, litter, oil drums, petroleum, ashes, and discarded equipment.

- 4.20 Fuel storage containers, including slow test holding tanks and hazardous substances, with a total combined capacity larger than 55 gallons shall not be placed within 100 feet of the ordinary high water mark of any water body. Containers which exceed a total combined capacity of 110 gallons must be stored within an impermeable diked area or portable impermeable containment structure capable of containing 110 percent capacity of the largest independent container. All containers must clearly be marked with the content's and the Lessee's name. Drip pans and materials, such as absorbent pads, must be on hand to contain and clean up spills from any transfer or handling of fuel.
- 4.21 This authorization does not relieve the lessee from securing any other permits, licenses, or other authorizations required by federal, state, or local law.
- 4.22 Grantee shall minimize disturbance to existing fences, gates, brace panels, and other improvements on public lands. The Grantee is required to promptly repair impacted improvements to appropriate Bureau standards and/or specifications as determined by the AO. Grantee shall contact the owner of any improvements prior to disturbing them. No permanent gates shall be allowed unless approved by the AO.
 - 4.22.1 When necessary to pass through a fence line, the fence shall be braced on both sides of the passageway prior to cutting of the fence.
- 4.23 Within 180 days prior to termination of the right-of-way the holder shall contact the authorized officer to arrange a joint inspection of the right-of-way. This inspection will be held to agree to an acceptable termination (and rehabilitation) plan. This plan shall include, but is not limited to, removal of facilities, drainage structures, or surface material, recontouring, topsoiling, or seeding. The authorized officer must approve the plan in writing prior to the holder's commencement of any termination activities.
- 4.24 The holder shall be responsible for the prevention of establishment, spread, or introduction, as well as the control of invasive plants and weeds in the project area, and shall consult with the AO and/or local authorities for acceptable weed control methods. The holder shall adhere to prevention and control measures as provided for in the 2016 Integrated Invasive Plant Management for the Prineville District Revised Environmental Assessment, or otherwise provided for by the AO. The holder shall use appropriate safety equipment and operating procedures, minimize ground disturbance and exposed soil areas during treatments, and utilize methods for disposal of vegetation that prevent spreading or reinfestation of unwanted vegetation. The holder shall only use BLM-approved herbicides and treatment methods.
 - 4.24.1 Use of pesticides or herbicides shall comply with the applicable Federal and State laws. Pesticides or herbicides shall be used in accordance with their registered uses and within limitations imposed by the Secretary of the Interior. Prior to the use of pesticides or herbicides, the grantee shall obtain from the AO written approval of a plan showing the type and quantity of materials to be used, pest(s) to be controlled, method of application, location of storage and disposal of containers, and any other information deemed necessary by the AO. Emergency

use of pesticides or herbicides shall be approved in writing by the AO prior to such use.

- 4.25 No water may be diverted when the stream flow drops below 10 cfs in Bridge Creek, as measured at the Bridge Creek gauge station near the mouth of Bridge Creek.

Randall Soles Pqr
Grantee Signature

9/10/21
Date

MEMO TO THE FILE

RIGHT OF WAY: OROR 070503

DATE: 09/27/2021

BY: Faith Simitz – Realty Specialist

REGARDING: Trespass Liability

BACKGROUND: Bridge Creek Ranch, LLC (BCR) submitted an SF-299 application for the Section 6 POD although had not paid processing 6 months past request. Field visits by botany staff identified the agricultural field (known as the Eighteen Acre Field) was in production, and as the Section 6 POD is used to irrigate this field, it was alleged that BCR was using the Section 6 POD although it was unauthorized.

Without an authorization, BCR wouldn't be constrained by stipulations that support ESA listed fish health within Bridge Creek, specifically a stipulation that requires the POD to be cut-off at 10 cfs as water below 10 cfs heats up and causes fish stress and kill. BLM hydrologist, Anna Smith, brought this year's drought to attention and concern for irrigation when flows would be below 10 cfs. As of June 2021 Bridge Creek was reading at 4 cfs.

A trespass notice was sent on May 28, 2021, requesting BCR to stop all activities associated with the Section 6 POD. Elizabeth Howard, Attorney and Authorized Agent for BCR/Pape, sent a letter on June 10, 2021. A meeting between BLM and BCR occurred on June 14, 2021 (see notes) where goals for BLM and BCR were discussed, including needs for authorization of the Section 6 POD.

Trespass liability, per the Realty Trespass Abatement Handbook (H-9232-1) includes administrative costs, rental, and reclamation. Resolution of the trespass for the BLM includes authorization of the Section 6 POD and bonding associated with reclamation. Due to the goal for authorization, and in being good neighbors, fees associated with authorization and bonding were determined sufficient for trespass liability.

Amanda S. Roberts
Field Manager, Central Oregon Field Office



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

Prineville District Office

3050 NE 3rd Street

Prineville, Oregon 97754



In Reply Refer To:
2921 (ORP040)
OROR 070503

OCT 06 2021

CERTIFIED MAIL – 7019 2280 0000 7156 1054
RETURN RECEIPT REQUESTED

AUTHOR INITIALS JS DATE 09/29/2021

SUPERVISOR INITIALS _____ DATE _____

Bridge Creek Ranch, LLC
Attn: Mike Patti
355 Goodpasture Island Road, Suite 300
Eugene, OR 97401

Trespass Notice Resolution – Case Closed

On May 28, 2021, you were advised through a Trespass Notice that the United States of America, through the Bureau of Land Management (BLM), had made an investigation against you for the alleged unauthorized use of public land pursuant to Title 43 CFR 2808.10 and under the authority of the Federal Land Policy and Management Act of 1976, as amended (43 U.S.C 1701 et seq). BLM's investigation identified the unauthorized use of a point of diversion (POD) and appurtenant features. The purpose of our notice was to provide you time in which to make restitution of your trespass, to provide information or evidence to assist in the equitable adjudication of the Bureaus trespass claim against you.

The lands alleged in trespass are described as follows:

Willamette Meridian, Oregon

T. 11 S., R. 21 E.,

sec. 6, lot 1.

The area described above contains approximately 0.71 acres.

Bridge Creek Ranch, LLC submitted an application for a point of diversion (POD) in Section 6, T. 11 S., R. 21 E., "Section 6 POD", via email on November 3, 2020. The application was serialized as OROR 070300 and fees to process the application were requested by BLM on December 16, 2020. Bridge Creek Ranch, LLC submitted fees on June 1, 2021 and BLM began processing the Right-of-Way (ROW). A grant was offered to Bridge Creek Ranch, LLC and a reclamation bond, monitoring fees, and rental were requested on letters dated August 26, 2021. Bridge Creek Ranch, LLC submitted the appropriate payments, a surety bond for reclamation, and two signed copies of the grant in September 2021.

RESOLUTION

The issuance of the ROW grant, OROR 070300, constitutes authorization of the Section 6 POD to Bridge Creek Ranch, LLC. The activity has been authorized and is no longer in alleged trespass, therefore, the Bureau of Land Management is closing trespass case OROR 070503.

Thank you for your professionalism and cooperation in resolving this matter.

If you have any questions please contact Faith Simitz, Realty Specialist, at fsimitz@blm.gov or (541) 416-6783.



Amanda S. Roberts
Field Manager, Central Oregon Field Office

CC:

Elizabeth Howard, Attorney
Schwabe Williamson & Wyatt
1211 SW 5th Ave, Ste 1900
Portland, OR 97204

STATE OF OREGON
COUNTY OF WHEELER
CERTIFICATE OF WATER RIGHT

THIS CERTIFICATE ISSUED TO

U.S. BUREAU OF LAND MANAGEMENT
3050 NE THIRD ST
PRINEVILLE OR 97754

confirms the right to use the waters of BRIDGE CREEK tributary to John Day River for IRRIGATION OF 119.7 ACRES and DOMESTIC.

This right was confirmed by decree of the Circuit Court of the State of Oregon for Wheeler County. The decree is of record at Salem, in the Order Record of the Water Resources Director in Volume 12, at Page 388. The date of priority is 1868.

The amount of water to which such right is entitled, for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes, and shall not exceed one-fortieth of one cubic foot per second per acre of land irrigated before June 15, and one-eightieth of one cubic foot per second per acre after June 15, during the irrigation season from March 1 to October 1 of each year, measured at the point of diversion from the stream.

The point of diversion is located as follows:

TwP	Rng	Mer	Sec	Q-Q	Survey Coordinates
11 S	21 E	WM	9	NE SW	ORIGINAL POD - LAST CHANCE OR CARROL DITCHES - 1650 FEET NORTH AND 80 FEET WEST FROM S1/4 CORNER, SECTION 9
11 S	21 E	WM	6	NE NE	ADDITIONAL POD - 590 FEET SOUTH AND 2160 FEET EAST FROM N1/4 CORNER, SECTION 6
11 S	21 E	WM	9	NW NW	ADDITIONAL POD - 960 FEET SOUTH AND 780 FEET EAST FROM NW CORNER, SECTION 9

A description of the lands irrigated under such right, and to which the water is appurtenant (or, if for other purposes, the place where such water is put to beneficial use), is as follows:

IRRIGATION					
TwP	Rng	Mer	Sec	Q-Q	Acres
10 S	21 E	WM	31	SW NE	11.0
10 S	21 E	WM	31	NW SE	22.8
10 S	21 E	WM	31	SW SE	0.1
10 S	21 E	WM	31	SE SE	9.4
11 S	21 E	WM	5	NW NW	3.0
11 S	21 E	WM	5	SW NW	9.6
11 S	21 E	WM	5	SE NW	2.9
11 S	21 E	WM	5	NE SW	20.8
11 S	21 E	WM	5	NW SW	4.7
11 S	21 E	WM	5	SE SW	0.5
11 S	21 E	WM	5	NW SE	0.8

NOTICE OF RIGHT TO PETITION FOR RECONSIDERATION OR JUDICIAL REVIEW

This is an order in other than a contested case. This order is subject to judicial review under ORS 183.482. Any petition for judicial review must be filed within the 60-day time period specified by ORS 183.482. Pursuant to ORS 183.482, ORS 536.075 and OAR 137-003-0675, you may petition for judicial review and petition the Director for reconsideration of this order. A petition for reconsideration may be granted or denied by the Director, and if no action is taken within 60 days following the date the petition was filed, the petition shall be deemed denied.

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
11 S	21 E	WM	5	SW SE	12.9
11 S	21 E	WM	5	SE SE	4.4
11 S	21 E	WM	6	NE NE	5.8
11 S	21 E	WM	8	NE NE	9.0
11 S	21 E	WM	8	NW NE	2.0

The water user shall maintain a headgate, an in-line flow meter, weir, or other suitable device for measuring and recording the quantity of water diverted.

The water user shall maintain fish screens or fish by-pass devices, as appropriate, at the new points of diversion.

The quantity of water diverted at the additional points of diversion, together with that diverted at the old point of diversion, shall not exceed the quantity of water lawfully available at the original point of diversion.

The right to use water for the above purpose is restricted to beneficial use on the lands or place of use described and is subject to all other conditions and limitations contained in the decree.

This certificate is issued to confirm changes in ADDITIONAL POINTS OF DIVERSION approved by an order of the Water Resources Director entered JULY 24, 2006, at Special Order Volume 69, Page 187, approving Transfer Application T-9873, supersedes Certificate 13592, State Record of Water Right Certificates.

JUN 17 2022

Issued _____

Dwight French
Water Right Services Division Administrator, for
Thomas M. Byler, Director
Oregon Water Resources Department



Water Resources Department

725 Summer Street NE, Suite A

Salem, OR 97301

(503) 986-0900

Fax (503) 986-0904

Update on Water Rights and Transfers Backlog Reduction Efforts House Committee on Agriculture, Land Use, Natural Resources and Water Representative Ken Helm, Chair

Submitted by: Bryn Hudson, Legislative Coordinator

3/7/2023

Thank you for the opportunity to provide information related to the Department's water rights and transfers protest backlog reduction efforts. This information is provided for informational purposes and the Department is not taking a position at this time.

Background on Protests related to Water Right Transactions

The Department is responsible for processing applications for new water use authorizations, as well as processing proposed changes to existing water rights (called transfers), and efforts to prove up on water right permits in order to obtain a water right certificate. In general, most types of water rights transactions involve a public comment period as well as protest period before a final order is issued. If a protest is filed by the applicant or by a third party, the Department will proceed to seek resolution to the issues with the parties through a settlement agreement, or where resolution cannot be reached, refer the case to the Office of Administrative Hearings for a contested case hearing. If a contested case hearing is held, the Administrative Law Judge (ALJ) will issue a proposed order. Parties generally may file exceptions to the ALJ proposed order. The Director generally issues the final order before it can then be appealed in the Court of Appeals. Depending on the complexity of the matter, the issues once referred can take a year to go through hearings process. More information on contested cases can be found in the Department's 2019 report to the legislature on litigation and contested cases available on the [Department's website](#).

Protest Backlog

The Department's backlog of protests is a result of consistent underinvestment in staff to undertake the work at the Department, the Office of Administrative Hearings (OAH), and the Department of Justice (DOJ). With the lack of resources, the Department has had to make decisions about which cases to move forward, often based on readiness of the parties and if it seemed unlikely that a settlement could be reached. Typically, we have only been able to move 1-2 cases per biennium to hearing.

It is important to recognize that the staffing impacts of contested case hearings are not limited to the Department's protest staff. Hearings often require resources from a variety of staff, such as hydrologists, hydrogeologists, watermasters, caseworkers, protest coordinators, and their managers. Hearings also require DOJ and OAH resources, in addition to the Department. In some cases, they may also involve and require participation of other agencies such as ODFW and DEQ.

2021 Legislative Investment and Progress Made

In 2021, the Legislature invested \$2.2 million General Fund, to facilitate the referral and completion of administrative hearings or other procedures, such as reaching a settlement agreement, to alleviate the protest backlog related to water right decisions. The Department hired two limited duration positions to work with the existing protest program coordinator, to help complete this work, bringing program capacity up to 3 FTE temporarily. Note that for the most part during this biennium, two of the three positions have been filled due to turnover in one of the limited duration positions. The remainder of the funds not used for staffing are allocated to paying for Department of Justice and Office of Administrative Hearings costs. The OAH hired new Hearing Officers, allowing for significant work for OAH to start in December 2021. DOJ assigned an attorney to assist with select protests beginning in late 2021 and also hired another attorney to support the backlog reduction project in April 2022. Department staff provided training to OAH and DOJ staff in December of 2021. To date, the Department has spent just under half of the \$2.2 million.

At the beginning of this biennium (June 30, 2021), the protest backlog was 125. Since July 1, 2021, the Department has resolved protests on 25 applications. Another 24 protested applications have been referred to the OAH for a contested case hearing. Settlements are expected on several of these cases prior to the hearing process being completed. It is not uncommon for a contested case hearing to last 1.5 years. For this reason, only one protested application that was referred to the OAH this biennium, has had a hearing and final orders issued in this biennium. Since the 2021 investments, the Department has accomplished more work on reducing the backlog than in any other biennium since the processing statutes were overhauled in 1995.

Despite these significant efforts to reduce the protest backlog, there are some factors that remain outside the Department's control. As of January 31, 2023, the Department's current caseload, including those cases at OAH, has grown to 245; this is largely due to the fact that in February 2022, the Department received 112 new protests to instream water right applications filed by ODFW.

For the 245 pending protests, 24 were protested by the applicant and 224 were protested by third parties (three of the protested applications were protested by both the applicant and a third party). The types of applications protested include: 186 instream water right applications, 23 applications for a new water right permit, 10 applications for a transfer, and 26 applications for an extension of time to develop their water right.

Lessons Learned from 2021-2023 Protest Backlog Reduction Efforts

The Department is always working to resolve protests via settlement, prior to moving through the formal hearing process. Since the 2021 investment, the Department has been able refer 24 cases to OAH (25 others have been resolved), compared to previous biennial averages of 1-2 cases referred, and has learned a variety of lessons over the last biennium.

Investments need to span multi-biennia for all three agencies: Eliminating the protest backlog is a multi-year effort. Contested cases can take 12-24 months on average to go through the entire contested case process and often involve staff with other workloads, limiting how many can reasonably be completed in one biennium. Recruiting, onboarding, and training was a large workload and time investment this biennium for the limited duration protest staff, and it can be difficult to retain these staff for the full term as people tend to prefer and seek out permanent positions. Retaining these existing staff, as well as funding for Office of Administrative Hearings hearing officers for attorneys at the Department of Justice would help to maintain momentum on

current backlog reduction efforts. There needs to be capacity in all three for a smooth workflow; otherwise, the bottleneck will simply relocate, and the backlog will continue to grow.

Working through protests helps the agency improve its permitting processes: As the Department works through protests, it has identified areas for improvement in its proposed final orders and preliminary determinations. Lessons learned from protests processed this biennium have enabled the Department to improve the legal sufficiency and clarity of its documents.

Providing opportunity for settlement can be cost-effective: Currently, timelines for negotiations are flexible and allow more time for parties to potentially settle rather than move to an Administrative Hearing. This process is almost always a more cost-effective solution for the Department and parties.

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

In the Matter of Transfer Application	)	PRELIMINARY DETERMINATION
T-14170, Wheeler County	)	PROPOSING APPROVAL OF AN
	)	ADDITIONAL POINT OF DIVERSION

Authority

Oregon Revised Statutes (ORS) 540.505 to 540.580 establish the process 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. Oregon Administrative Rules (OAR) Chapter 690, Division 380 implement the statutes and provides the Department's procedures and criteria for evaluating transfer applications.

Applicant

BRIDGE CREEK RANCH LLC
355 GOODPASTURE ISLAND ROAD
EUGENE, OR 97401

Findings of Fact

1. On December 8, 2021, Bridge Creek Ranch LLC filed a Transfer Application requesting a change in point of diversion under Certificate 68553, which authorizes the storage of water from Bear Creek (160.0 acre feet) and Bridge Creek (330.0 acre feet), tributaries of the John Day River, in Painted Hills Reservoir to be appropriated for beneficial use (irrigation) under secondary Permit S-48540 (Certificate 68554). The Oregon Water Resources Department (Department or OWRD) determined that the application could not be accepted at that time because, based upon guidance provided by the Oregon Department of Justice, a storage right does not qualify as a "water use subject to transfer" as defined in ORS 540.505(4) and therefore did not meet the criteria outlined in ORS 540.510 for filing a transfer application.
2. On December 5, 2022, a matter entitled "Bridge Creek Ranch, LLC vs. Oregon Water Resources Department; 22CV05598" came before the Marion County Circuit Court (Court) for hearing relating to a mandamus proceeding filed by the applicant.
3. On January 10, 2023, the Court issued a letter opinion that found "*...storage of water for different purposes qualifies as 'a water use.' As such, a right to store water under a water certificate is a right to a 'water use' established by... a water certificate under ORS 540.505(4)(b).*" The Court also found "*...that OWRD has the authority to allow transfers of point of diversion and point of use for certificated storage rights under ORS 540.530.*"

Pursuant to OAR 690-380-4030, any person may file a protest or standing statement within 30 days after the last date of publication of the newspaper notice or the Department's weekly notice as prescribed by OAR 690-380-4020, whichever is later, of this preliminary determination.
--

4. On February 7, 2023, the Department filed an appeal of the Court's findings.
5. On February 1, 2023, the Marion County Circuit Court issued a Peremptory Writ of Mandamus citing facts and legal conclusions made in the Court's letter opinion entered on January 1, 2023, and ordering OWRD to begin processing Bridge Creek Ranch, LLC's application in accordance with the Petition for Writ of Mandamus within seven (7) days after OWRD's receipt of a new and complete application for transfer involving water right Certificate 68553.
6. On February 9, 2023, Bridge Creek Ranch LLC filed an application for a change in point of diversion under Certificate 68553. The Department deemed the application complete and assigned the application number T-14170.
7. Notice of the application for transfer was published on February 14, 2023, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
8. On May 5, 2023, the applicant amended the application from a change in point of diversion to an additional point of diversion.
9. On July 31, 2023, the Department sent a copy of the draft Preliminary Determination to the applicant proposing to approve Transfer Application T-14170. The draft Preliminary Determination cover letter gave an August 31, 2023 deadline for the applicant to respond. The applicant requested that the Department proceed with issuance of a Preliminary Determination and provided the necessary information to demonstrate that the applicant is authorized to pursue the transfer. The applicant requested until October 1, 2027 to complete the changes proposed under this transfer.
10. The portion of the right to be transferred is as follows:

Certificate: 68553 in the name of WILLIAM SMITH PROPERTIES INC. (perfected under Permit R-9896)
Use: STORAGE for IRRIGATION
Priority Date: OCTOBER 17, 1983
Rate: 330.0 ACRE-FEET (AF)
Source: BRIDGE CREEK, tributary of THE JOHN DAY RIVER

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q
10 S	20 E	WM	25	NE SW
10 S	20 E	WM	25	NW SW
10 S	20 E	WM	25	SW SW
10 S	20 E	WM	25	SE SW
10 S	20 E	WM	26	SE SE
10 S	20 E	WM	36	NW NW

11. Certificate 68553 does not describe the location of authorized Bridge Creek POD 2; however, information is available describing the location as:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
11 S	21 E	WM	6	NE NE	BRIDGE CREEK POD 2 - 590 FEET SOUTH AND 2160 FEET EAST FROM THE N1/4 CORNER OF SECTION 6

12. Transfer Application T-14170 proposes an additional point of diversion on Bridge Creek located approximately 1,110 feet downstream from the existing authorized Bridge Creek POD 2, as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
10 S	21 E	WM	31	SE SE	POD 3 - 160 FEET NORTH AND 1850 FEET EAST FROM THE S1/4 CORNER OF SECTION 31

13. The Oregon Department of Fish and Wildlife (ODFW) has determined that a fish screening and/or by-pass device is necessary at the new point of diversion to prevent fish from entering the diversion and/or safely transport fish back to the body of water from which the fish were diverted and that the diversion is not currently equipped with an appropriate fish screening and/or by-pass device. This diversion may be eligible for screening cost share funds.

Transfer Review Criteria [OAR 690-380-4000(14), 690-380-4010(2) and 690-380-2110(2)]

14. Water has been stored within the five-year period prior to submittal of Transfer Application T-14170 according to the terms and conditions of the right. There is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.
15. A water delivery system sufficient to store the full amount of water allowed under the existing right was present within the five-year period prior to submittal of Transfer Application T-14170.
16. The proposed point of diversion diverts water from the same source of surface water (Bridge Creek) as the authorized point of diversion (Bridge Creek POD 2), as required by OAR 690-380-2110(2).
17. The proposed change, as conditioned, would not result in enlargement of the right.
18. The proposed change, as conditioned, would not result in injury to other existing water rights.
19. All other application requirements are met.

Determination and Proposed Action

The additional point of diversion proposed in Transfer Application T-14170 appears to be consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000. If protests are not filed pursuant to OAR 690-380-4030, the transfer application will be approved.

If Transfer Application T-14170 is approved, the final order will include the following:

1. *The additional point of diversion proposed in Transfer Application T-14170 is approved.*
2. *The right to store the water is restricted to the place of storage described and is subject to all other conditions and limitations contained in Certificate 68553 and any related decree.*
3. *Water right Certificate 68553 is cancelled. A new certificate will be issued describing that portion of the right not affected by this transfer.*
4. *The quantity of water diverted for storage at the new point of diversion (POD 3) shall not exceed the quantity of water lawfully available at the original point of diversion (Bridge Creek POD 2).*
5. *Water shall be acquired from the same source of surface water (Bridge Creek) as the original point of diversion (Bridge Creek POD 2).*
6. *Prior to diverting water, the water user shall install a headgate to control and regulate the quantity of water diverted. The type and plans of the headgate must be approved by the Department prior to beginning construction and shall be installed under the general supervision of the Department. The water user shall maintain the headgate as required by the Department*
7. *Water Use Measurement Conditions:*
 - a. *Before diversion of water may begin under this order, the water user shall install a totalizing flow meter, or, with prior approval of the Director, another suitable measuring device, at each point of diversion.*
 - b. *The water user shall maintain the meters or measuring devices in good working order.*
 - c. *The water user shall allow the Watermaster access to the meters or measuring devices; provided however, where the meters or measuring devices are located within a private structure, the Watermaster shall request access upon reasonable notice.*
8. *Reservoir Water Use Measurement Conditions:*
 - a. *Before diversion of water may begin under this order, the water user shall install staff gages, or, with prior approval of the Director, other suitable measuring devices, that measure the entire range and stage between empty and full in each reservoir.*
 - b. *Before diversion of water may begin under this order, if the reservoir is located in channel, weirs or other suitable measuring devices must be installed upstream and downstream of the reservoir, and an adjustable outlet valve must be installed. The water user shall maintain such devices in good working order. A written waiver may be obtained, if in the judgment of the Director, the installation of weirs or other*

suitable measuring devices, or the adjustable outlet valve, will provide no public benefit.

- c. *The water user shall allow the Watermaster access to the devices; provided however, where any device is located within a private structure, the Watermaster shall request access upon reasonable notice.*
9. *Prior to diverting water, the water user shall install a fish screening and/or by-pass device, as appropriate, at the new point of diversion consistent with the Oregon Department of Fish and Wildlife's (ODFW) design and construction standards. Prior to installation, the water user shall obtain written approval from ODFW that the required screen and/or by-pass device meets ODFW's criteria. Prior to submitting a "Claim of Beneficial Use" report, the water user must obtain written approval from ODFW that the required screening and/or by-pass device was installed to the state's criteria. The water user shall maintain and operate the fish screen and/or by-pass device, as appropriate, at the point of diversion consistent with ODFW's operational and maintenance standards.*
10. *Completion of the change shall be made, consistent with the terms of this order, on or before **October 1, 2027**. A "Claim of Beneficial Use" report prepared by a Certified Water Right Examiner shall be submitted by the applicant to the Department within one year after the deadline for completion of the change.*
11. *After satisfactory proof of the change is received, a new certificate confirming the right transferred will be issued.*

Dated in Salem, Oregon on

SEP 25 2023



Lisa J. Jaramillo, Transfer and Conservation Section Manager, for
DOUGLAS E. WOODCOCK, ACTING DIRECTOR
Oregon Water Resources Department

This Preliminary Determination was prepared by Kim French. If you have questions about the information in this document, you may reach me at 503 979-9607 or Kim.R.French@water.oregon.gov.

Protests

Under the provisions of ORS 540.520(6) & (7) and OAR 690-380-4030, within 30 days after the last date of publication of the newspaper notice or the Department's weekly notice as prescribed by OAR 690-380-4020, whichever is later, any person may file, jointly or severally, a protest expressing opposition of approval of the transfer application and disagreement with

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

In the Matter of Transfer Application	)	Protest of WaterWatch of Oregon
T-14170, Wheeler County	)	
	)	
(Application by Bridge Creek Ranch LLC)	)	

WaterWatch of Oregon ("WaterWatch") hereby protests the application and preliminary determination ("Preliminary Determination") of the Oregon Water Resources Department ("Department") in the above matter. Pursuant to OAR 690-380-4030 and OAR 690-002-0030, Protestants state as follows:

A. Facts Showing WaterWatch Is Entitled to Relief.

1. Water right certificate C68553 authorizes diversions of water from Bridge Creek, a tributary to the John Day River, for storage in Painted Hills Reservoir. The priority date of the right is October 17, 1983.

2. On or about February 6, 2023, Bridge Creek Ranch applied to change the point of diversion for the water from Bridge Creek to a different location downstream on Bridge Creek. Bridge Creek Ranch explained: "The new POD will be located on Bridge Creek Ranch's property, whereas the current POD is located on Bureau of Land Management property."

3. Under a permit and/or agreement from and/or with the Bureau of Land Management (BLM), diversions from Bridge Creek have been subject to a bypass flow requirement that prohibits or restricts diversions from Bridge Creek when flows in Bridge Creek are less than 10 cubic feet per second.

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4. The bypass flow requirement at the current point of diversion on Bridge Creek has limited diversions under storage right C68553 at times when water would otherwise be available for diversion under the right.

5. Diversions of water by Bridge Creek Ranch at the proposed new point of diversion may not be subject to the same bypass flow requirement as diversions at the current point of diversion from Bridge Creek. Thus, the Preliminary Determination would allow Bridge Creek Ranch to divert more water from Bridge Creek than it could diverted at the current point of diversion, which would constitute an enlargement of diversion under the water right.

6. The Bureau of Land Management (BLM) has rights to divert water from Bridge Creek at the same point of diversion currently used by Bridge Creek Ranch. The BLM sometimes chooses not to divert water under its water rights and to instead leave the water instream for the benefit of fish, wildlife, and other aquatic resources. Presently, the water the BLM chooses not to divert is not subject to diversion by Bridge Creek Ranch under C68553. However, the water could potentially be diverted by Bridge Creek Ranch at the proposed new point of diversion, which would constitute a further enlargement of the diversion.

7. C59780 is an instream water right protecting flows in Bridge Creek, in varying amounts depending on the time of year, from the mouth of Bear Creek to the mouth of Bridge Creek, which is downstream from both the existing and the proposed points of diversion from Bridge Creek. C59780 has a priority date of November 3, 1983, which is junior to C68553 (Bridge Creek Ranch's right to divert water from Bridge Creek for storage).

8. By allowing Bridge Creek Ranch to divert more water from Bridge Creek for storage, the Preliminary Determination result in other existing water rights, including but not

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2

limited to the instream water right reflected in C59780, not receiving previously available water to which the holder of the right is legally entitled.

9. According to the Preliminary Determination, “[o]n May 5, 2023, the applicant amended the application from a change in point of diversion to an additional point of diversion.” There is no record in the Water Rights Information System of any amended application. No notice or comment period was provided for the alleged amended application before the Preliminary Determination.

10. The water storage right reflected in C68553 is a right to store water only, not a right use water. Thus, it is not a “water use subject to transfer” within the meaning of ORS chapter 540.520.

11. A reasonable opportunity for discovery and further investigation may show that the water right reflected in C68553 has been forfeited by non-use.

12. A reasonable opportunity for discovery and further investigation may show that Bridge Creek Ranch is not ready, willing, and able to use the full amount of water allowed under the right.

B. How the Preliminary Determination Is in Error and Deficient (Not Required but Set Forth for Further Identification of Issues).

The facts set forth above show that the Preliminary Determination is in error and deficient for reasons including but not limited to the following:

1. The Preliminary Determination would enlarge the diversion under C68553.
2. The Preliminary Determination would injure other existing water rights.
3. The Preliminary Determination would allow changes to a storage right, which is not authorized by statute.

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4. The Preliminary Determination would allow an additional point of diversion, not a change in the point of diversion. Thus, the Preliminary Determination would allow a change not authorized by statute.

5. The Preliminary Determination would approve an application, as the Preliminary Determination claims it was amended, that has not been subject to the required notice and comment period and/or other process as provided by statute and/or rule.

6. A reasonable opportunity for discovery and further investigation may show that the Preliminary Determination would allow transfer of a water right that has been forfeited by non-use.

7. A reasonable opportunity for discovery and further investigation may show that the Preliminary Determination would allow a transfer of the storage right even though the application is not ready, willing, and able to use the full amount of water allowed under the right.

C. Specific Relief or Action Requested.

Protestants request a final order denying the application.

D. Name, Address and Telephone Number of Protestants.

The names and addresses of the Protestants are as follows:

WaterWatch of Oregon
213 SW Ash Street, Suite 208
Portland, OR 97204

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E. Name and address of other person or persons necessary to, or having a direct interest in, the proceeding.

The following other persons are necessary to, or have a direct interest in, the proceeding:

Bridge Creek Ranch LLC
255 Goodpasture Island Road
Eugene, OR 97401

Elizabeth Howard and Lindsay Thane
Schwabe, Williamson & Wyatt
1211 SW 5th Ave., Suite 1900
Portland, OR 97204

F. Citation of Legal Authority.

Protestants rely on legal authorities including the following:

1. ORS 540.505 through ORS 540.580, including: ORS 540.510; ORS 540.520 and ORS 540.530.
2. ORS 540.610 and ORS 540.631.
3. OAR Chapter 690 Division 380, including: OAR 690-380-0100(2), (3); OAR 690-380-2110; OAR 690-380-4010; OAR 690-380-4030; OAR 690-380-5000; OAR 690-380-5140; OAR 690-380-6010.

G. Protest Fee.

Pursuant to ORS 536.050, the required fee of \$950 is included with this protest.

H. Request for Hearing.

Protestant requests a contested case hearing.

Dated: October 23, 2023

Respectfully submitted,

Brian Posewitz

Brian Posewitz
Staff Attorney
WaterWatch of Oregon
8508 SE 11th Ave.
Portland, OR 97202
brian@waterwatch.org

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

In the Matter of Transfer Application	)	PRELIMINARY DETERMINATION
T-14158, Wheeler County	)	PROPOSING APPROVAL OF ADDITIONAL
	)	POINTS OF DIVERSION AND PARTIAL
	)	CANCELLATION OF A WATER RIGHT

Authority

Oregon Revised Statutes (ORS) 540.505 to 540.580 establish the process 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. Oregon Administrative Rules (OAR) Chapter 690, Division 380 implement the statutes and provides the Department's procedures and criteria for evaluating transfer applications.

ORS 540.621 establishes the process for the owner of land to which a water right is appurtenant to certify under oath that the water right, or a portion thereof, has been abandoned and request voluntary cancellation.

Applicant

BRIDGE CREEK RANCH, LLC
355 GOODPASTURE ISLAND ROAD
EUGENE, OR 97401

Findings of Fact

1. On January 24, 2023, BRIDGE CREEK RANCH, LLC, filed an application for additional points of diversion under Certificates 13593 and 96311. The Department assigned the application number T-14158.
2. Notice of the application for transfer was published on January 31, 2023, pursuant to OAR 690-380-4000. A timely comment was submitted to the Department in response to the notice. The issue raised by the comment focused primarily on concerns that:
 - a) The proposed new POD may allow use of water in excess of what has been allowed at the current POD.
3. The application states "if the transfer is approved, much of the existing infrastructure associated with the authorized Point of Diversion (POD) in Section 6 will be removed and the land on which it is located will be revegetated. Bridge Creek Ranch currently has an authorization from the Bureau of Land Management (BLM) to use the POD in Section 6, but that authorization expires on December 31, 2024. If this transfer is approved, then the

Pursuant to OAR 690-380-4030, any person may file a protest or standing statement within 30 days after the last date of publication of the newspaper notice or the Department's weekly notice as prescribed by OAR 690-380-4020, whichever is later, of this preliminary determination.

Section 6 POD infrastructure, such as the concrete-box fish screen structure and two pipes, will be removed, leaving in place only the diversion structure on the streambank with a fish screen over the entrance. The land where the portion of the POD structure will be removed and will then be revegetated as directed by the BLM. The existing Section 6 POD will be used to irrigate a seed mix that will be planted on an 8 acre BLM field in Section 6, which will require initial irrigation until the perennial native plants are established. Thereafter, the BLM intends to lease the water rights for the 8 acres instream.”

4. The Department’s watermaster review indicates that Transfer Application T-14158 does not include the entirety of the acres authorized under Certificate 13593 for transfer. Because the application indicated that if the transfer is approved and completed, the BLM POD will be disconnected and as such there will be no POD to serve those acres. The watermaster requested the applicant submit a voluntary cancellation affidavit to the Department, cancelling the acres not associated with Bridge Creek Ranch’s points of diversion.
5. On June 26, 2023, the agent for the applicant submitted an affidavit for voluntary cancellation of a portion of Certificate 13593, as well as amended application pages and an amended map.
6. Transfer Application T-14158 proposes an additional point of diversion under Certificate 13593 and Certificate 96311, however, the application does not clearly describe the “from” and the “to” portions of the lands affected by the additional point of diversion for either certificate.
7. On October 18, 2023, the Department spoke with the agent for the applicant via phone. The agent for the applicant submitted amended application pages via email, satisfying the deficiency.
8. On November 15, 2023, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-14158 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of December 15, 2023, for the applicant to respond. The applicant requested that the Department proceed with issuance of a Preliminary Determination and provided the necessary information to demonstrate that the applicant is authorized to pursue the transfer.
9. On December 12, 2023, the applicant requested to extend the date for completion of full beneficial use of the water to October 1, 2028.
10. The portion of the first right to be transferred is as follows:

Certificate:	13593 in the name of BEN TAYLOR (confirmed by Bridge Creek Decree, recorded at Special Order Volume 12, Page 388)
Use:	IRRIGATION OF 147.1 ACRES AND DOMESTIC
Priority Date:	1868
Rate:	3.68 cubic feet per second (cfs) before June 15 and 1.84 cfs after June 15

Limit/Duty: The amount of water to which such right is entitled; for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes, and shall not exceed one-fortieth of one cubic foot per second per acre of land irrigated before June 15, and one-eightieth of one cubic foot per second per acre after June 15, during the irrigation season from March 1 to October 1 of each year, measured at the point of diversion from the stream.

Period of Use: MARCH 1 to OCTOBER 1

Source: BRIDGE CREEK

Authorized Place of Use:

IRRIGATION AND DOMESTIC					
Twp	Rng	Mer	Sec	Q-Q	Acres
10 S	20 E	WM	24	SE SW	13.2
10 S	20 E	WM	25	NW NE	4
10 S	20 E	WM	25	SW NE	10.6
10 S	20 E	WM	25	SE NE	5.2
10 S	20 E	WM	25	NE NW	18.3
10 S	20 E	WM	25	SE NW	13.3
10 S	20 E	WM	25	NE SW	1.5
10 S	20 E	WM	25	NE SE	14.6
10 S	20 E	WM	25	NW SE	23.8
10 S	20 E	WM	25	SW SE	2.5
10 S	20 E	WM	25	SE SE	21.6
10 S	20 E	WM	36	NE NE	0.2
10 S	21 E	WM	30	SW SW	5.5
10 S	21 E	WM	31	NE NW	3.3
10 S	21 E	WM	31	NW NW	9.5
Total					147.1

11. Certificate 13593 does not describe the location of the authorized point of diversion. The applicant has submitted information that the authorized point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
10 S	21 E	WM	6	NE NE	(SUTTON DITCH) - 590 FEET SOUTH AND 2160 FEET EAST FROM THE N¼ CORNER OF SECTION 6

12. Transfer Application T-14158 proposes an additional point of diversion approximately 0.28 mile downstream from the authorized point of diversion as follows:

Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Measured Distances
10 S	21 E	WM	31	SE SE	3600	NEW POD - 160 FEET NORTH AND 1850 FEET EAST FROM THE SOUTH 1/4 CORNER OF SECTION 31

13. The portion of the second right to be transferred is as follows:

Certificate: 96311 in the name of U.S. BUREAU OF LAND MANAGEMENT confirmed by Bridge Creek Decree, recorded at Special Order Volume 12, Page 388)

Use: IRRIGATION OF 43.3 ACRES AND DOMESTIC

Priority Date: 1868

Rate: 1.08 cubic feet per second (cfs) before June 15 and 0.54 cfs after June 15

Limit/Duty: The amount of water to which such right is entitled, for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes, and shall not exceed one-fortieth of one cubic foot per second per acre of land irrigated before June 15, and one-eightieth of one cubic foot per second per acre after June 15, during the irrigation season from March 1 to October 1 of each year, measured at the point of diversion from the stream.

Period of Use: MARCH 1 to OCTOBER 1

Source: BRIDGE CREEK, tributary to JOHN DAY RIVER

Authorized Points of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
11 S	21 E	WM	6	NE NE	ADDITIONAL POD - 590 FEET SOUTH AND 2160 FEET EAST FROM THE N1/4 CORNER OF SECTION 6
11 S	21 E	WM	9	NW NW	ADDITIONAL POD - 960 FEET SOUTH AND 780 FEET EAST FROM THE NW CORNER OF SECTION 9
11 S	21 E	WM	9	NE SW	ORIGINAL POD - LAST CHANCE OR CARROL DITCHES - 1650 FEET NORTH AND 80 FEET WEST FROM THE S1/4 CORNER OF SECTION 9

Authorized Place of Use:

IRRIGATION AND DOMESTIC					
Twp	Rng	Mer	Sec	Q-Q	Acres
10 S	21 E	WM	31	SW NE	11.0
10 S	21 E	WM	31	NW SE	22.8
10 S	21 E	WM	31	SW SE	0.1
10 S	21 E	WM	31	SE SE	9.4
Total					43.3

14. Transfer Application T-14158 proposes an additional point of diversion with approximate distances downstream from the authorized points of diversion as follows:

Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Measured Distances	Distance from Authorized POD (in miles)
10 S	21 E	WM	31	SE SE	3600	NEW POD - 160 FEET NORTH AND 1850 FEET EAST FROM THE SOUTH 1/4 CORNER OF SECTION 31	ADDITIONAL POD - 0.16 mi ADDITIONAL POD - 1.73 mi ORIGINAL POD - 2.3 mi

15. The Oregon Department of Fish and Wildlife (ODFW) has determined that a fish screen is necessary at the new point of diversion to prevent fish from entering the diversion and

that the diversion is not currently equipped with an appropriate fish screen. This diversion may be eligible for screening cost-share funds.

Transfer Review Criteria [OAR 690-380-0100(14), 690-380-4010(2) and 690-380-2110(2)]

16. Water has been used within the last five years according to the terms and conditions of the rights. There is no information in the record that would demonstrate that the rights are subject to forfeiture under ORS 540.610.
17. A water delivery system sufficient to use the full amount of water allowed under the existing rights was present within the five-year period prior to submittal of Transfer Application T-14158.
18. The water rights are subject to transfer as defined in ORS 540.505(4) and OAR 690-380-0100(14).
19. The proposed point of diversion diverts water from the same source of surface water as the authorized points of diversion, as required by OAR 690-380-2110(2).
20. The proposed changes, as conditioned, would not result in enlargement of the rights.
21. The proposed changes, as conditioned, would not result in injury to other existing water rights.

Partial Cancellation of a Water Right

22. The portion of the right to be cancelled is as follows:

Certificate: 13593 in the name of BEN TAYLOR (confirmed by Bridge Creek Decree, recorded at Special Order Volume 12, Page 388)

Use: IRRIGATION OF 12.0 ACRES

Priority Date: 1868

Rate: 0.3 cubic foot per second (cfs) before June 15 and 0.15 cfs after June 15

Limit/Duty: The amount of water to which such right is entitled; for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes, and shall not exceed one-fortieth of one cubic foot per second per acre of land irrigated before June 15, and one-eightieth of one cubic foot per second per acre after June 15, during the irrigation season from March 1 to October 1 of each year, measured at the point of diversion from the stream.

Period of Use: MARCH 1 to OCTOBER 1

Source: BRIDGE CREEK

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
10 S	20 E	WM	25	SE NE	0.9
10 S	20 E	WM	25	NE NW	0.2

IRRIGATION					
Twps	Rng	Mer	Sec	Q-Q	Acres
10 S	20 E	WM	25	NE SW	1.9
10 S	20 E	WM	25	NW SE	2.0
10 S	20 E	WM	25	SW SE	1.3
10 S	20 E	WM	25	SE SE	0.7
10 S	21 E	WM	30	SW SW	4.9
10 S	21 E	WM	31	NE NW	0.1
Total					12.0

Determination and Proposed Action

The additional points of diversion proposed in Transfer Application T-14158 appear to be consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000 and the abandoned portion of the right should be cancelled. If protests are not filed pursuant to OAR 690-380-4030, the transfer application will be approved, and the abandoned portion of the right will be cancelled.

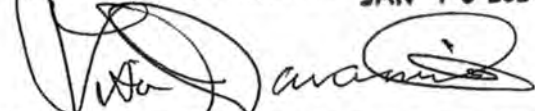
If Transfer Application T-14158 is approved, the final order will include the following:

- 1. The additional points of diversion proposed in Transfer Application T-14158 are approved. The portion of the right that has been abandoned is cancelled.*
- 2. The right to the use of the water is restricted to beneficial use at the place of use described and is subject to all other conditions and limitations contained in Certificates 13593 and 96311, and any related decree.*
- 3. Approval of this transfer application does not constitute nor grant legal access onto or through another person's property for purposes of accessing the new points of diversion.*
- 4. Water right Certificate 13593 is cancelled. A new certificate will be issued describing that portion of the right not affected by this transfer and cancellation.*
- 5. Water right Certificate 96311 is cancelled. A new certificate will be issued describing that portion of the right not affected by this transfer.*
- 6. Under water right Certificate 13593, the quantity of water diverted at the new additional point of diversion (NEW POD) together with that diverted at the original point of diversion (POD), shall not exceed the quantity of water lawfully available at the original point of diversion (POD).*
- 7. Under water right Certificate 96311, the quantity of water diverted at the new additional point of diversion (NEW POD) together with that diverted at the original points of diversion (ORIGINAL POD, ADDITIONAL POD, ADDITIONAL POD), shall not exceed the quantity of water lawfully available at the original point of diversion (ORIGINAL POD, ADDITIONAL POD, ADDITIONAL POD).*

8. *Water shall be acquired from the same source of surface water as the original points of diversion.*
9. *Water use measurement conditions:*
 - a. *Before water use may begin under this order, the water user shall install a totalizing flow meter, or, with prior approval of the Director, another suitable measuring device, at each point of diversion (new and existing).*
 - b. *The water user shall maintain the meters or measuring devices in good working order.*
 - c. *The water user shall allow the Watermaster access to the meters or measuring devices; provided however, where the meters or measuring devices are located within a private structure, the Watermaster shall request access upon reasonable notice.*
10. *Prior to diverting water, the water user shall install an approved fish screen at the new point of diversion and shall provide to the OWRD a written statement from Oregon Department of Fish and Wildlife (ODFW) that the installed screen meets the state's criteria, or that ODFW has determined a screen is not necessary.*

The water user shall operate and maintain the fish screen at the new point of diversion consistent with ODFW's operational and maintenance standards. If ODFW determines the screen is not functioning properly and is unsuccessful in working with the water user to meet ODFW standards, ODFW may request that OWRD regulate the use of water until OWRD receives notification from ODFW that the fish screen is functioning properly.
11. *Full beneficial use of the water shall be made, consistent with the terms of this order, on or before **October 1, 2028**. A Claim of Beneficial Use prepared by a Certified Water Right Examiner shall be submitted by the applicant to the Department within one year after the deadline for completion of the changes and full beneficial use of the water.*
12. *After satisfactory proof of beneficial use is received, new certificates confirming the rights transferred will be issued.*

Dated in Salem, Oregon on **JAN 19 2024**



Lisa J. Jaramillo, Transfer and Conservation Section Manager, for
DOUGLAS E. WOODCOCK, ACTING DIRECTOR
Oregon Water Resources Department

This Preliminary Determination was prepared by Arla L Davis. If you have questions about the information in this document, you may reach me at 503-979-3129 or Arla.L.Davis@water.oregon.gov.

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

In the Matter of Transfer Application) Protest of WaterWatch of Oregon
T-14158, Wheeler County)
)
(Application by Bridge Creek Ranch LLC))

WaterWatch of Oregon ("WaterWatch") hereby protests the application ("Application") by Bridge Creek Ranch LLC and the preliminary determination ("Preliminary Determination") of the Oregon Water Resources Department ("Department") in the above matter.

Pursuant to OAR 690-380-4030 and OAR 690-002-0030, WaterWatch states as follows:

A. Facts Showing WaterWatch Is Entitled to Relief.

1. Water right certificates 13593 and 96311 (collectively "Water Rights") authorize diversions of water from Bridge Creek, a tributary to the John Day River, for irrigation and domestic use. Certificate 13593 authorizes diversion of up to 3.68 cubic feet per second ("cfs") from March 1 through June 15 of each year and up to 1.84 cfs from June 15 to October 1 of each year. Certificate 96311 authorizes diversion of up to 1.08 cfs from March 1 through June 15 of each year and up to 0.54 cfs from June 15 to October 1 of each year. Each right has a priority date of 1868.

2. On or about January 24, 2023, Bridge Creek Ranch applied to the Oregon Water Resources Department ("OWRD") for an order allowing an additional point of diversion for each of the Water Rights. In the application, Bridge Creek Ranch stated:

This transfer application proposes to add an additional point of diversion (POD) on Bridge Creek in Section 31 as a POD for Certificates 13593 and 96311. The new POD will serve both of these water rights and will be located on Bridge Creek Ranch's (BCR) property, whereas the current POD which also currently

serves both water rights is located on U.S. Bureau of Land Management Property (BLM).

3. Under agreements, permits and/or regulatory requirements with and/or from the Bureau of Land Management (BLM), diversions of water from Bridge Creek at the point of diversion for the Water Rights on BLM land have been subject to a minimum flow requirement that prohibits or restricts diversions from Bridge Creek when flows in Bridge Creek are less than 10 cfs.¹

4. The instream flow requirement at the current point of diversion on Bridge Creek has limited diversions under the Water Rights at times when more water could otherwise have been diverted under the Water Rights.

5. Diversions of water under the Water Rights at the proposed additional point of diversion on Bridge Creek Ranch property will not be subject to the same instream flow requirements as diversions at the current point of diversion on BLM property. Thus, the proposed additional point of diversion will result in more water being diverted under the Water Rights than would have been diverted without the proposed additional point of diversion. That will constitute an enlargement of the Water Rights.

6. The Bureau of Land Management (BLM) has rights to divert water from Bridge Creek at the same point of diversion currently used by Bridge Creek Ranch for diversions under the Water Rights. According to the Application and other information, the BLM plans to lease its water rights for use as instream water rights within the next five years, and to no longer divert water from Bridge Creek at the shared point of diversion.

Received by OWRD

FEB 15 2024

Salem, OR

¹ The Application and Preliminary Determination identify the existing point of diversion for C13593 as being in Township 10 South, but the map accompanying the application indicates it is in Township 11 South (with the same range, section and additional location description).

7. C59780 is an instream water right protecting flows in Bridge Creek, in varying amounts depending on the time of year, from the mouth of Bear Creek to the mouth of Bridge Creek, which is downstream from both the existing and the proposed points of diversion from Bridge Creek. C59780 has a priority date of November 3, 1983, which is junior to the Water Rights.

8. By allowing Bridge Creek Ranch to divert more water from Bridge Creek under the Water Rights, the proposed additional points of appropriation for the Water Rights would injure other existing water rights, including but not limited to the instream water right reflected in C59780 and the instream water right created by the lease of BLM water rights for instream use. The other existing water rights would be injured because they would, at least at times, fail to receive previously available water to which they are legally entitled.

9. A reasonable opportunity for discovery and further investigation may show that Bridge Creek Ranch has not used the full amount of one or both Water Rights (even excluding the portion of one of the Water Rights to be voluntarily cancelled under the Preliminary Determination) for five successive years and was not ready, willing, and able to use the full amount of water allowed under one or both Water Rights.

B. How the Preliminary Determination Is in Error and Deficient (Not Required but Set Forth for Further Identification of Issues).

The facts set forth above show that the Preliminary Determination is in error and deficient for reasons including but not limited to the following:

1. The Preliminary Determination would enlarge the use of water under the Water Rights.
2. The Preliminary Determination would injure other existing water rights.

3. The Preliminary Determination would authorize additional points of diversion under the Water Rights, not a change in the point of diversion, which is not authorized by statute.

4. A reasonable opportunity for discovery and further investigation may show that the Preliminary Determination would allow transfer of water rights that have been forfeited, in whole or in part, by non-use.

C. Specific Relief or Action Requested.

Protestants request a final order denying the application or including a condition equivalent to the conditions on diversions from the current point of diversion on BLM land, under agreements, permits and/or regulatory requirements with and/or from the BLM.

D. Name, Address and Telephone Number of Protestant.

The name, address and telephone number of the Protestant is:

WaterWatch of Oregon
213 SW Ash Street, Suite 208
Portland, OR 97204
(503) 295-4039

E. Name and address of other person or persons necessary to, or having a direct interest in, the proceeding.

The following other persons are necessary to, or have a direct interest in, the proceeding:

Bridge Creek Ranch LLC
355 Goodpasture Island Road
Eugene, OR 97401

Elizabeth Howard and Lindsay Thane
Schwabe, Williamson & Wyatt
1211 SW 5th Ave., Suite 1900
Portland, OR 97204

Received by OWRD

FEB 15 2024

Salem, OR

F. Citation of Legal Authority.

Protestant relies on legal authorities including the following:

1. ORS 540.505 through ORS 540.580, including: ORS 540.510; ORS 540.520 and ORS 540.530.
2. ORS 540.610 and ORS 540.631.
3. OAR Chapter 690 Division 380, including: OAR 690-380-0100(2), (3); OAR 690-380-2110; OAR 690-380-4010; OAR 690-380-4030; OAR 690-380-5000; OAR 690-380-5140; OAR 690-380-6010.

G. Protest Fee.

Pursuant to ORS 536.050, the required fee of \$950 is included with this protest.

H. Request for Hearing.

Protestant requests a contested case hearing.

Dated: February 15, 2024

Respectfully submitted,

Brian Posewitz

Brian Posewitz
Staff Attorney
WaterWatch of Oregon
8508 SE 11th Ave.
Portland, OR 97202
brian@waterwatch.org

Received by OWRD

FEB 15 2024

Salem, OR

From: Rep Owens <Rep.MarkOwens@oregonlegislature.gov>
Sent: Tuesday, August 13, 2024 5:33 AM
To: Mike Freese
Cc: HUDSON Bryn * WRD
Subject: Re: Receipt Authority Question

Thanks Mike and Bryn.

Mark

Mistakes by I-Phone

Rep.MarkOwens@oregonlegislature.gov

From: Mike Freese <mfreese@RFlawlobby.com>
Sent: Friday, August 9, 2024 8:01:03 AM
To: Rep Owens <Rep.MarkOwens@oregonlegislature.gov>
Cc: HUDSON Bryn * WRD <Bryn.HUDSON@water.oregon.gov>
Subject: FW: Receipt Authority Question

CAUTION: This email originated from outside the Legislature. Use caution clicking any links or attachments.
--

Dear Rep Owens,

I wanted to close the loop on this issue and let you know that Bridge Creek Ranch and OWRD are moving forward on referring the transfer application protests to OAH using OWRD's receipts authority. I cannot tell you how much I appreciate OWRD and their work on this. They have been very helpful, responsive, and easy to work with on a relatively novel approach to helping solve our problems. I think we would all agree that OWRD should receive more financial support from the legislature so that the use of the receipts authority isn't necessary, but that's an issue for another day.

I wanted to thank you and Bryn (cc'd) for helping move this issue forward.

If you have any questions, please feel free to reach out to me.

Best,
Mike Freese

Date : 7/30/2024 11:24:56 AM
From : "Mike Freese" mfreese@RFlawlobby.com
To : "DAVIDSON Will D * WRD" Will.D.DAVIDSON@water.oregon.gov
Cc : "Howard, Elizabeth E." EHoward@SCHWABE.com
Subject : RE: Receipt Authority Question
Attachment : image001.jpg;image002.jpg;

Thanks, Will.

Elizabeth and I have talked to our client and we would like to schedule a meeting to talk through a few items. Do you have time this week or next week to talk through the agreement. We would also like to invite our client, Mike Pati to join the meeting.

Thanks again,
Mike

From: DAVIDSON Will D * WRD <Will.D.DAVIDSON@water.oregon.gov>
Sent: Tuesday, July 23, 2024 1:16 PM
To: Mike Freese <mfreese@RFlawlobby.com>
Cc: Howard, Elizabeth E. <EHoward@SCHWABE.com>
Subject: RE: Receipt Authority Question

Hi Mike,

We are working on a draft agreement and an estimate and should be ready to share them soon. Possibly as early as tomorrow, and certainly by the end of this week.

Will

From: Mike Freese <mfreese@RFlawlobby.com>
Sent: Tuesday, July 23, 2024 1:12 PM
To: DAVIDSON Will D * WRD <Will.D.DAVIDSON@water.oregon.gov>
Cc: Howard, Elizabeth E. <EHoward@SCHWABE.com>
Subject: RE: Receipt Authority Question

Hi Will,

I just wanted to follow up with you to see if OWRD has made any progress on the agency's use of the reimbursement authority and referral of the protest of Bridge Creek Ranch's transfer applications? We would like to share any potential agreement / cost estimates with our client and also understand what the agency can accommodate under its current budget vs need for reimbursement.

Thank you again for working on this with us. We really appreciate leaning into this.

Best,
Mike

BCR000237

From: DAVIDSON Will D * WRD <Will.D.DAVIDSON@water.oregon.gov>
Sent: Friday, July 5, 2024 11:34 AM
To: Mike Freese <mfreese@RFlawlobby.com>
Cc: Danelle Romain <domain@RFlawlobby.com>; FRENCH Dwight W * WRD <Dwight.W.FRENCH@water.oregon.gov>; Rep Owens <Rep.MarkOwens@oregonlegislature.gov>; HUDSON Bryn * WRD <Bryn.HUDSON@water.oregon.gov>; Howard, Elizabeth E. <EHoward@SCHWABE.com>; Ratcliffe Jesse D <Jesse.D.Ratcliffe@doj.oregon.gov>
Subject: RE: Receipt Authority Question

Mike,

Thank you for your email. I am responding because I am OWRD's Protest Program Coordinator and work with protested applications, including referring protested applications to OAH. I am copying Elizabeth Howard, an attorney with Schwabe, Williamson and Wyatt, because OWRD's understanding is that she also represents Bridge Creek Ranch with respect to transfer applications T-14158 and T-14170. I am copying Jesse Ratcliffe, an attorney with the Oregon Department of Justice, because Elizabeth has been communicating with Jesse about applications T-14158 and T-14170.

Based on your email of June 18, 2024, OWRD considered whether OWRD's reimbursement authority under ORS 536.055 would allow OWRD to provide a contested case hearing on a protested application on an expedited basis in exchange for a voluntary agreement by an applicant or other party to reimburse OWRD for the cost of providing the hearing. OWRD's preliminary conclusion is that ORS 536.055 likely allows OWRD to do so, and OWRD is interested in exploring the possibility of using reimbursement authority for protests. To that end, and based on Bridge Creek Ranch's strong interest in holding hearings on applications T-14158 and T-14170 as soon as possible, I have been preparing to reach out to Elizabeth Howard to ask if Bridge Creek Ranch is interested in exploring the possibility of using reimbursement authority to fund expedited hearings for applications T-14158 and T-14170. Based on your July 3 email, it appears Bridge Creek Ranch is interested in doing so.

If that is the case, I think it would be a good idea to have some further discussions about what this would entail and what the expectations for cost reimbursement would be. OWRD's costs for providing a contested case hearing fall into three broad categories: (1) the cost of OWRD staff's time preparing for and participating in the hearing; (2) the cost of Oregon Department of Justice attorneys representing OWRD in the hearing; and (3) the cost of paying the Office of Administrative Hearings for the time of the Administrative Law Judge and other staff that conduct the hearing. In the Department's experience, if a full hearing is held, the DOJ and OAH costs alone can be substantial. As Bryn noted, lack of resources to pay the DOJ and OAH costs associated with providing hearings is one of the main obstacles to OWRD referring more protested applications for hearings more quickly.

If Bridge Creek Ranch remains interested in exploring using reimbursement authority to provide hearings for T-14158 and T-14170, OWRD will move forward with investigating how we could implement that, but we cannot commit to using reimbursement authority for T-14158 and T-14170 or any other protested applications until we finish our investigation. In addition, because OWRD has not

used reimbursement authority for protests in the past, if OWRD decides to move forward with using reimbursement authority for T-14158 and T-14170, OWRD will need to develop a process for doing so, including developing estimates of the cost of providing hearings and creating draft reimbursement agreements.

I hope this information is helpful. Please let me know if you have questions. OWRD appreciates you bringing the idea of using reimbursement authority for protests to its attention, and we look forward to working with you and Bridge Creek Ranch's other representatives to explore using reimbursement authority to provide hearings for T-14158 and T-14170 if Bridge Creek Ranch remains interested in doing so.

Best,

Will Davidson

Protest Program Coordinator

Oregon Water Resources Department

725 Summer St NE Suite A | Salem, OR 97301 | Work Cell: (503) 507-2749

Email: will.d.davidson@water.oregon.gov

From: Mike Freese <mfreese@RFlawlobby.com>
Sent: Wednesday, July 3, 2024 10:50 AM
To: HUDSON Bryn * WRD <Bryn.HUDSON@water.oregon.gov>
Cc: Danelle Romain <dromain@RFlawlobby.com>; FRENCH Dwight W * WRD <Dwight.W.FRENCH@water.oregon.gov>; DAVIDSON Will D * WRD <Will.D.DAVIDSON@water.oregon.gov>; Rep Owens <Rep.MarkOwens@oregonlegislature.gov>
Subject: RE: Receipt Authority Question

Some people who received this message don't often get email from mfreese@rflawlobby.com. [Learn why this is important](#)

Hi Bryn,

I wanted to follow up on your email regarding OWRD's response to our request to refer the protests to transfer applications T-14158 and T-14170 to the Office of Administrative Hearings (OAH). As explained below, ORS 536.055 authorizes the department to enter into a voluntary agreement to collect necessary costs for expediting regulatory processes. Meaning, the cited lack of state resources is not a barrier or an excuse for inaction on OAH referrals. Our request is simply for the department to exercise its current reimbursement authority to move transfer applications T-14158 and T-14170 through the administrative process. We have no other administrative remedy and are otherwise held hostage by OWRD inaction.

Time is of the essence because these transfer applications allow Bridge Creek Ranch to move a point of diversion from federal land to private land at the request of the Bureau of Land Management (BLM) so that federal land managers can proceed on federal land rehabilitation projects. The current delay is causing issues for both Bridge Creek Ranch and the BLM. These can be easily resolved if the department would either refer these protest to OAH under what should be the normal course of action or enter into an agreement with Bridge Creek Ranch to

BCR000239

reimburse the department to cover the cost of a referral and then refer the protests to OAH. Either way, the department has both the legal authority and obligation to move this matter forward.

The Oregon Legislature enacted broad reimbursement authority for OWRD under ORS 536.055 through House Bill (HB) 2551 in 2003. ORS 536.055(1) grants WRD statutory authority to enter into an agreement: (1) “with any person;” (2) “that sets fees to be paid to the department;” (3) “for the purpose of enabling the department to expedite or enhance the regulatory process;” and (4) “to provide services voluntarily requested.” ORS 536.055(1). A proposal for voluntary payment for referral and contested case hearing expenses appears to easily meet these statutory elements for the following reasons:

- First, “person” is defined very broadly as including “individuals, corporations, associations, firms, partnerships, joint stock companies, public and municipal corporation, political subdivisions, the state and [its] agencies, and the federal government and [its] agencies.” ORS 536.007(6). Any imaginable applicant—and certainly a typical ranch operation— should be able to enter into a reimbursement authority agreement with WRD under this statute.
- Second, the statute specifies that the “fees [set in the agreement] to be paid to the department” may be used for the department to: “hire additional temporary staff members, contract for services or provide additional services to the person that are within the authority of the department to provide.” ORS 536.055(1). WRD has emphasized that contested case hearings require not only WRD protest staff time, but also DOJ and OAH staff time, and may also require “resources from a variety of staff, such as hydrologists, hydrogeologists, watermasters, caseworkers, protest coordinators, and their managers . . . and other agencies such as ODFW and DEQ.” *Update on Water Rights and Transfers Backlog Reduction Efforts*, Or. Water Res. Dep’t (Mar. 7, 2023). All of these named staff positions should fall within the “hir[ing],” “contract[ing],” or “provi[sion] [of] additional services” envisioned in ORS 536.055(1). As long as the agreement states the fees to be paid, the second prong of the statute should be met.
- Third, an agreement for an applicant to pay for contested case hearing expenses is centrally motivated by the desire to “expedite . . . the regulatory process,” particularly given the demonstrable history of WRD referral delays and the current delay with the transfer applications at issue (see Introduction and Background sections above). In addition, while the general public often associates the “regulatory process” with an agency’s enforcement of, or a private party’s compliance with, an existing regulation, here, WRD has a track record of interpreting it in the broader sense of an agency’s adjudicative function: receipt and review of an application, notice and comment opportunities, agency decision-making, protest opportunity, and final order decisions. Thus, WRD can also approach the “regulatory process” to include a protest referral and contested case hearing, both of which are necessary pre-requisites for WRD to issue a final order. Indeed, as WRD has indicated, it has authority to do so, but simply has chosen not to utilize it as of yet despite the fact that it continues to state that, without funding, it cannot move the transfer application through the required administrative processes.

- And fourth, an applicant is willingly and freely requesting a reimbursement authority agreement where it is offering to pay the expenses of the contested case process in order to receive a final order on the applied for transfer applications. This easily meets the fourth “voluntary” prong of the statute simply by definition.

Furthermore, OWRD’s reimbursement authority under ORS 536.055(3) provides the department exceptional flexibility to “modify processing priorities or schedules based on overall operating needs” and ORS 536.055(5) explicitly allows the department to use this authority even if it is not accustomed to using it for this purpose. In short, OWRD can and should use this authority to process applications—which here requires referring protests of preliminary decisions on two transfer applications—because there are no other readily available options to complete the transfer process in a reasonably timely manner.

My client is sandwiched between a federal agency that is requiring a ranch to move a point of diversion so that it can continue significant restoration efforts on a tributary to the Joh Day River – restoration efforts that my client supports and has participated in -- and a state agency that is prohibiting it – not because of environmental protection but rather because of unnecessary regulatory gridlock. Protester (WaterWatch) is a known antagonist and is using the protest process and lack of agency resources to stop lawful, environmental stewardship projects. The state cannot be complicit in those same motivations or actions. Please help by using your existing reimbursement authority to timely refer this matter to OAH as required by the administrative process.

We look forward to your response.

Sincerely,
Mike Freese

ROMAIN  **FREESE**
— LAWYERS & LOBBYISTS —

T : (503)226-8090 • C : (503) 991-2785 • RFlawlobby.com

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From: HUDSON Bryn * WRD <Bryn.HUDSON@water.oregon.gov>
Sent: Monday, June 24, 2024 12:05 PM
To: Mike Freese <mfreese@RFlawlobby.com>
Cc: Danelle Romain <dromain@RFlawlobby.com>; FRENCH Dwight W * WRD <DwightW.FRENCH@water.oregon.gov>; DAVIDSON Will D * WRD <Will.D.DAVIDSON@water.oregon.gov>
Subject: RE: Receipt Authority Question

Mike,

Thanks for your patience. I’m copying Will and Dwight in case you have other questions. In the past we have not used our reimbursement authority for protests. We are currently investigating the possibility of using RA for protests, but at this point in time it is not an

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option that we are currently offering.

In practice, it is likely that the Department would need to use the reimbursement authority not just for referral, but also for costs associated with the protest/OAH/DOJ/staff time, as resources to pay for OAH and DOJ is often the limiting factor for moving cases through the process.

If there are new developments on this front, I will be sure to let you know. Please let me know if you have further questions.

Thank you,

[Bryn Hudson](#) (she/her/hers)

Water Policy Analyst/Legislative Coordinator

725 Summer St NE Suite A | Salem OR 97301 | Direct: 503-302-7584 | General: 503-986-0900



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From: Mike Freese <mfreese@RFlawlobby.com>
Sent: Tuesday, June 18, 2024 9:08 PM
To: HUDSON Bryn * WRD <Bryn.HUDSON@water.oregon.gov>
Cc: Danelle Romain <domain@RFlawlobby.com>
Subject: RE: Receipt Authority Question

Thanks, Bryn. We have received an answer to transfer applications T-14158 and T-14170, but we are trying to figure out a way to speed up the OAH referral. Feel free to give me a call if you'd like. My cell is (503) 991-2785.

Thanks again!
 Mike

From: HUDSON Bryn * WRD <Bryn.HUDSON@water.oregon.gov>
Sent: Tuesday, June 18, 2024 12:51 PM
To: Mike Freese <mfreese@RFlawlobby.com>
Cc: Danelle Romain <domain@RFlawlobby.com>
Subject: RE: Receipt Authority Question

Mike,

Thanks for reaching out; I'll look into this and get back to you. Do you need an update as to where the case is at in the process (I presume you may already be queued into those details)? If so, please provide the application number.

I will get back to you soon,

[Bryn Hudson](#) (she/her/hers)

Water Policy Analyst/Legislative Coordinator

725 Summer St NE Suite A | Salem OR 97301 | Direct: 503-302-7584 | General: 503-986-0900

BCR000242



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From: Mike Freese <mfreese@RFlawlobby.com>
Sent: Tuesday, June 18, 2024 10:25 AM
To: HUDSON Bryn * WRD <Bryn.HUDSON@water.oregon.gov>
Cc: Danelle Romain <dromain@RFlawlobby.com>
Subject: Receipt Authority Question

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Hi Bryn,

I had a question that I was hoping you could help me with. I have a client that is trying to get their water transfer applications that have been protested by WaterWatch referred to OAH. I understand that the Department is unable/unwilling to refer those protests due to budget constraints. Probably like others in the queue, my client would like to expedite this referral, particularly because the arguments presented by WaterWatch have little to no merit. Do you know if OWRD has the authority that would allow an applicant to pay for some of the costs of the referral? For instance, DEQ has a "receipts" authority under ORS 468.073 which allows "the *Department* *** to enter into an agreement with any applicant, permittee or regulated entity *** for the purpose of enabling the department to expedite or enhance a regulatory process by contracting for services, hiring additional staff or covering costs of activities not otherwise provided during the ordinary course of department business ." I don't know if a similar authority exists for OWRD, but I was wondering if there was an option for an applicant to help defray some of the costs to move the referral to OAH ASAP.

Thanks for your help here.

Mike Freese
Romain Freese, LLC : *Lawyers & Lobbyists*
C : (503) 991-2785 • RFlawlobby.com

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BCR000243

From: DAVIDSON Will D * WRD
Sent: Wednesday, June 26, 2024 5:48 PM
To: GALL Ivan K * WRD; FRENCH Dwight W * WRD
Subject: RE: protest mtg

Thanks Ivan – we will reach out with preliminary questions, and, as Dwight indicated, make it clear that we are just exploring possibility of using reimbursement authority for protests, rather than making any commitment to do so.

Will Davidson

Protest Program Coordinator
 Oregon Water Resources Department
 725 Summer St NE Suite A | Salem, OR 97301 | Work Cell: (503) 507-2749
 Email: will.d.davidson@water.oregon.gov

From: GALL Ivan K * WRD <Ivan.K.GALL@water.oregon.gov>
Sent: Wednesday, June 26, 2024 11:26 AM
To: FRENCH Dwight W * WRD <Dwight.W.FRENCH@water.oregon.gov>; DAVIDSON Will D * WRD <Will.D.DAVIDSON@water.oregon.gov>
Subject: RE: protest mtg

I think it is good to explore the idea. I'm curious as to what costs we could get reimbursed; my main interest would be in the DOJ costs and OAH costs, and less in our own staff costs. That seems like a fair split and something that we could support given the lack of funds for DOJ and OAH. But they may just be thinking something like OAH or some other approach. Maybe reach out with some prelim questions and then we can further discuss?
 Thanks

Ivan Gall

INTERIM DEPUTY DIRECTOR – WATER MANAGEMENT
 725 Summer Street NE, Suite A Salem, OR 97301 | Mobile 971-283-6010
 Pronouns: he/him/his



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From: FRENCH Dwight W * WRD <Dwight.W.FRENCH@water.oregon.gov>
Sent: Wednesday, June 26, 2024 10:46 AM
To: DAVIDSON Will D * WRD <Will.D.DAVIDSON@water.oregon.gov>; GALL Ivan K * WRD

<Ivan.K.GALL@water.oregon.gov>

Subject: RE: protest mtg

I would characterize meetings with DOJ and Elizabeth H as exploratory – no commitments being made. Just trying to find out how and if RA with a referral to OAH and associated hearing costs would work.

Dwight

[Dwight French](#)

Water Right Services Division Administrator

Oregon Water Resources Department

725 Summer Street NE, Suite A Salem, OR 97301 | Phone 503-871-7292 (work cell)

Please change my email in your system to Dwight.W.French@water.oregon.gov if you haven't already. Thanks.



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From: DAVIDSON Will D * WRD <Will.D.DAVIDSON@water.oregon.gov>

Sent: Wednesday, June 26, 2024 9:42 AM

To: GALL Ivan K * WRD <Ivan.K.GALL@water.oregon.gov>; FRENCH Dwight W * WRD <Dwight.W.FRENCH@water.oregon.gov>

Subject: RE: protest mtg

Hi Ivan,

Thanks for letting us know.

There is one thing Dwight and I were planning to ask you and Doug about at this week's meeting: We have been considering the idea of using the Department's reimbursement authority to fund hearings on protested applications. We think doing so is a possibility, and we would like to identify a test case to try the process on. Because Bridge Creek Ranch's representative is the one that asked about using reimbursement authority for protests, and BCR is eager to have hearings held on WaterWatch's recent protests of BCR's transfer applications, we think a logical next step would be to reach out to Elizabeth Howard, BCR's attorney, to see if BCR is interested in obtaining hearings on an expedited basis by agreeing to pay OWRD's costs for providing the hearings through reimbursement authority. If BCR is interested, we could then work with Jesse Ratcliffe and/or Sarah Rowe to develop cost estimates and determine next steps.

Are you and Doug OK with us reaching out to Elizabeth Howard to ask if BCR would be interested in funding hearings on its protested applications through reimbursement

authority? We do not need an answer immediately – if you would prefer to discuss this issue at next week's protest meeting before responding that would be fine.

Thanks,

Will

Will Davidson

Protest Program Coordinator

Oregon Water Resources Department

725 Summer St NE Suite A | Salem, OR 97301 | Work Cell: (503) 507-2749

Email: will.davidson@water.oregon.gov

From: GALL Ivan K * WRD <Ivan.K.GALL@water.oregon.gov>

Sent: Wednesday, June 26, 2024 8:36 AM

To: DAVIDSON Will D * WRD <Will.D.DAVIDSON@water.oregon.gov>; FRENCH Dwight W * WRD <Dwight.W.FRENCH@water.oregon.gov>

Subject: protest mtg

Hi Will,

I won't make the protest meeting tomorrow. I don't think Doug will either.

If you need anything from us please let me know.

Thanks - Ivan

Ivan Gall

INTERIM DEPUTY DIRECTOR – WATER MANAGEMENT

725 Summer Street NE, Suite A Salem, OR 97301 | Mobile 971-283-6010

Pronouns: he/him/his



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**REIMBURSEMENT AUTHORITY
APPLICANT AGREEMENT
Contract Number: RH-1**

This Agreement is between the **Oregon Water Resources Department**, hereafter OWRD or Department, and Bridge Creek Ranch, LLC, hereafter Applicant, hereafter known together as the Parties.

OWRD Information		Applicant Information		Applicant Representative	
Contact:	Will Davidson	Contact:	Mike Pati	Contact:	
Title:	Protest Program Coordinator	Title:	President, Papé Properties, Inc., sole member of Bridge Creek Ranch, LLC	Title:	
Address:	725 Summer St NE, Suite A Salem, OR 97310-1266	Address:	355 Goodpasture Island Rd., Suite 300, Eugene, OR 97401	Address:	
Phone:	(503) 507-2749	Phone:	(541) 681-5332	Phone:	
Fax:	(503) 986-0901	Fax:	(541) 326-0346	Fax:	
Email:	will.d.davidson@water.oregon.gov	Email:	mpati@pape.com	Email:	

The purpose of this Agreement is to expedite the referral to the Office of Administrative Hearings of the contested case hearing on the Transfer Applications, Application Numbers: **T-14158 and T-14170**

1. AUTHORITY

OWRD has been authorized pursuant to [ORS 536.055](#) to enter into a voluntary Agreement with any applicant, permittee, or regulated entity for expediting or enhancing a regulatory process.

2. RESTRICTIONS

Applicant and OWRD agree that this Agreement shall not be construed to restrict in any way the decisions and actions by OWRD. OWRD shall be free to exercise independent judgment consistent with existing laws and regulations.

3. EFFECTIVE DATE

This Agreement shall become effective on the latest of the dates on which each party has signed the Agreement and on which the Applicant has paid the Deposit, as described in section 6 below.

4. COVERED COSTS

In consideration for expedited referral, the Applicant agrees to pay the following "Covered Costs." The Applicant agrees to pay as follows:

- 4.1** The full cost of time and materials expended by the Oregon Department of Justice (DOJ) and the Office of Administrative Hearings (OAH) from the referral of the subject matter to the OAH until the issuance of final orders.
- 4.2** If OWRD staff time in responding to requests for discovery exceeds 20 hours, OWRD, in its sole discretion, may require Applicant to pay the cost of OWRD staff time exceeding 20 hours and OWRD materials in responding to discovery requests.

5. COST ESTIMATE

Based on a review of costs of similar, recent contested case proceedings, OWRD estimates that the Covered Costs will be **\$133,000.00** ("Estimate"). The Applicant acknowledges and agrees that the costs of a contested case hearing are subject to considerable uncertainty. It is possible that one or more factors may cause the costs of a contested case to increase significantly, and the Applicant remains responsible for the payment of these additional costs, as further described herein. This Estimate is based on OAH and DOJ staff costs at the hourly rate schedule in effect at the time of this Agreement, with a nominal contingency built-in to account for unforeseen costs as well as potential increases to the hourly rate schedule.

6. PAYMENT AND REVISION TO ESTIMATE

Applicant must submit 25 percent (25%) of the Estimate upon execution of this Agreement ("Deposit"). The Deposit will be placed in an account administered by OWRD and held in reserve until such time that the Department has expended 75 percent (75%) of the Estimate, or until the Applicant becomes more than 30 days late in its payment of any one of OWRD's invoices. OWRD will invoice the Applicant monthly for actual costs and the Applicant will remit payment upon receipt. OWRD will continue to invoice the Applicant monthly until 75% of the Estimate has been expended. At that time, OWRD will access and draw down the Deposit and will send monthly statements to the Applicant, itemizing how the Deposit has been expended.

If the Covered Costs are expected to exceed the Estimate, OWRD shall prepare and provide to the Applicant a monthly invoice containing an itemized statement of excess costs and the Applicant shall pay the excess costs within 30 days after receipt of the monthly invoice.

Failure to pay invoices in a timely manner may result in OWRD accessing and drawing down the Deposit to obtain reimbursement for the past due invoices and may also result in a request for abeyance of the contested case hearing, a withdrawal of the matter from the Office of Administrative Hearings, or termination of this Agreement. OWRD's use of part, or all, of the Deposit to obtain reimbursement for the past due amount shall not affect the requirement to pay the past due amount. Any abeyance, withdrawal, or termination does not relieve the Applicant of the obligation to pay all expenses and fees incurred but not yet invoiced prior to the abeyance, withdrawal, or termination. If the Department uses part or all of the Deposit to offset any past due amounts, the Department will apply subsequent payment by the Applicant first to restore the deposit to the initial payment amount, and second to any invoices that are not yet past due.

7. CONFIDENTIALITY

Applicant agrees that any information provided to or acquired by OWRD under this Agreement will be subject to the Oregon Public Records Law and shall be considered public records.

8. INDEMNITY

Applicant shall defend, save, hold harmless, and indemnify the State of Oregon, OWRD, and their officers, employees, and agents from and against all claims, suits, actions, losses, damages, liabilities, costs, and expenses of any nature resulting from or arising out of, or relating to the activities of Applicant or its Representatives, officers, employees, contractors, or agents under this Agreement. The Applicant acknowledges that OWRD cannot and does not guarantee a favorable review under the subject regulatory process.

9. TERMINATION BY APPLICANT

Applicant may terminate this Agreement by providing notice to OWRD. The Applicant acknowledges that upon acknowledging receipt of the notice from the Applicant, the Department may withdraw the matter from the office of Administrative Hearings. If the matter is withdrawn, the matter will be re-referred in the ordinary course of the Department's business. The Applicant's termination of this Agreement does not relieve the Applicant of the obligation to reimburse OWRD for work already completed, including acknowledgement of request for termination.

10. TERMINATION BY OWRD

OWRD may terminate this Agreement immediately upon written notice by Department to Applicant if Department fails to receive funding, appropriations, limitations, allotments, or other expenditure authority at levels sufficient to conduct the work described in the Estimate. Any such cessation of work under this Agreement does not relieve the Applicant of the of the obligation to reimburse the Department for work already completed.

In addition to any other rights and remedies OWRD may have under this Agreement, OWRD may terminate this Agreement immediately upon written notice by OWRD to Applicant, or at such later date as Department may establish in such notice, if Applicant is in violation of its payment obligations described in section 6. Any such cessation under this Agreement does not relieve the obligation for the Applicant to reimburse OWRD for work already completed.

The Applicant acknowledges that upon termination under this section 10, OWRD may withdraw the matter from the office of Administrative Hearings. If the matter is withdrawn, the matter will be re-referred in the ordinary course of OWRD's business.

11. DURATION

This Agreement will terminate sixty (60) days after the Applicant has paid all expenses described in sections 4 and 5.

12. REFUND OF REMAINING BALANCE

OWRD, upon termination of this Agreement, will refund any unspent balance.

13. FUNDS AUTHORIZED AND AVAILABLE

By its execution of this Agreement, Applicant certifies that sufficient funds are authorized and available to cover the expenditures contemplated by this Agreement.

14. COMPLETION DATE

OWRD, by the execution of this Agreement, does not guarantee a completion date of the contested case hearing process or the issuance of final orders in this matter. The Applicant acknowledges that, while OWRD agrees to engage in this matter with reasonable diligence and will not seek unreasonable delay in the hearing process, certain matters pertaining to the scheduling of a contested case hearing are outside the control of OWRD.

15. CAPTIONS

The captions or headings in this Agreement are for convenience only and in no way define, limit, or describe the Scope, or intent, of any provision of this Agreement.

16. GOVERNING LAW

This Agreement shall be governed by the laws of the State of Oregon.

17. AMENDMENT AND MERGER

The terms of this Agreement shall not be waived, altered, modified, supplemented, or amended in any manner whatsoever, except by written instrument signed by both Parties. Such waiver, consent, modification, or change, if made, shall be effective only in the specific instance and for the specific purpose given. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement.

18. COUNTERPARTS

This Agreement may be executed in any number of counterparts. Delivery of an executed signature page of this Agreement by email to the other party shall be as effective as delivery of an original signed counterpart of this Agreement.

19. SIGNATURES

All Parties, by the authorized Representative's signature below, hereby acknowledge that they have read this Agreement, understand it, and agree to be bound by its terms and conditions.

Applicant:	 Name/Title	Mike Pati, President, Papé Properties, Inc., sole member of Bridge Creek Ranch, LLC	8/8/24 Date
OWRD:	 Name/Title	Digitally signed by Dwight French Date: 2024.08.09 08:29:48 -07'00'	Date

Mail or email signed Agreement to: Will Davidson, Oregon Water Resources Department, 725 Summer St. NE, Suite A, Salem, OR 97301-1266, will.davidson@water.oregon.gov

Mail deposit check to: Will Davidson, Oregon Water Resources Department, 725 Summer St. NE, Suite A, Salem, OR 97301-1266. The deposit check should reference the contract number.

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From: LOVRIEN Corie L * WRD <corie.l.lovrien@water.oregon.gov>
Sent: Tuesday, August 13, 2024 1:58 PM
To: ZELENKA Jake E * WRD <Jake.E.ZELENKA@water.oregon.gov>
Cc: FRENCH Dwight W * WRD <Dwight.W.FRENCH@water.oregon.gov>; RATCLIFFE Katie S * WRD <Katie.S.RATCLIFFE@water.oregon.gov>; REECE Nick A * WRD <Nick.A.REECE@water.oregon.gov>; DAVIDSON Will D * WRD <Will.D.DAVIDSON@water.oregon.gov>
Subject: FW: Reimbursement authority check for protest came in

Hi Jake,

We have a bit of a puzzle down here. CSG doesn't have a PCA code for the reimbursement authority program specific to protest fees. It looks like we only have ones for certificates, transfers, and extensions. Is that something that you can help us with? If you're not the appropriate person to reach out to, can you suggest who I should contact instead.

Thanks,
Corie

Corie Lovrien

Customer Service Representative
 Water Right Services Division
 725 Summer Street NE Ste A
 Salem, Oregon 97301
 (503) 986-0801



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NOTE: The Salem office is now open to the public. Given that many staff will continue teleworking remotely or have job duties that take them into the field on a regular basis, availability of staff in the office is not guaranteed 8 a.m. - 5 p.m. every day. The Salem office of OWRD is closed for customer service drop-ins from Noon – 1pm. **Customers and visitors are encouraged to schedule an appointment in advance if they wish to meet in person with specific staff members.** Alternative methods for meeting, such as by phone or virtually via Teams, are also available.

From: DAVIDSON Will D * WRD <Will.D.DAVIDSON@water.oregon.gov>
Sent: Tuesday, August 13, 2024 1:34 PM
To: RATCLIFFE Katie S * WRD <Katie.S.RATCLIFFE@water.oregon.gov>; FRENCH Dwight W * WRD

<Dwight.W.FRENCH@water.oregon.gov>

Cc: JARAMILLO Lisa J * WRD <Lisa.J.JARAMILLO@water.oregon.gov>; LOVRIEN Corie L * WRD <corie.l.lovrien@water.oregon.gov>; REECE Nick A * WRD <Nick.A.REECE@water.oregon.gov>

Subject: RE: Reimbursement authority check for protest came in

Hi Everyone,

I am not used to working with fees and accounts (other than looking at receipts for protest fees), so apologies if this is incorrect or confusing, but my understanding is that the deposit needs to be placed in its own special, separate account. I also understand that that is what Fiscal does with reimbursement authority payments for other types of reimbursement authority applications.

Will

Will Davidson

Protest Program Coordinator

Oregon Water Resources Department

725 Summer St NE Suite A | Salem, OR 97301 | Work Cell: (503) 507-2749

Email: will.d.davidson@water.oregon.gov

From: RATCLIFFE Katie S * WRD <Katie.S.RATCLIFFE@water.oregon.gov>

Sent: Tuesday, August 13, 2024 1:28 PM

To: FRENCH Dwight W * WRD <Dwight.W.FRENCH@water.oregon.gov>; DAVIDSON Will D * WRD <Will.D.DAVIDSON@water.oregon.gov>

Cc: JARAMILLO Lisa J * WRD <Lisa.J.JARAMILLO@water.oregon.gov>; LOVRIEN Corie L * WRD <corie.l.lovrien@water.oregon.gov>; REECE Nick A * WRD <Nick.A.REECE@water.oregon.gov>

Subject: Reimbursement authority check for protest came in

Hi Dwight and Will,

We received a roughly \$33,000 check that appears to be under Reimbursement Authority for the Bridge Creek Ranch application protest. The check is upstairs with fiscal. Corie or Nick will put the paperwork on Will's desk. The closest category we can think to use for the PCA is the protest fees PCA, so that's what they'll put on the pink slip unless you think there needs to be a different bucket.

In any case, this will help us determine the intake process for any future RA fees for protests.

Katie

Katie Ratcliffe

Water Rights Section Manager

11/20/24, 1:47 PM

Bridge CR Abv Coyote Canyon NR Mitchell, OR - USGS Water Data for the Nation

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MENU

IMPORTANT [Legacy real-time page](#) 

☐ 7 days ☐ 30 days ☐ 1 year

Scale Linear Log

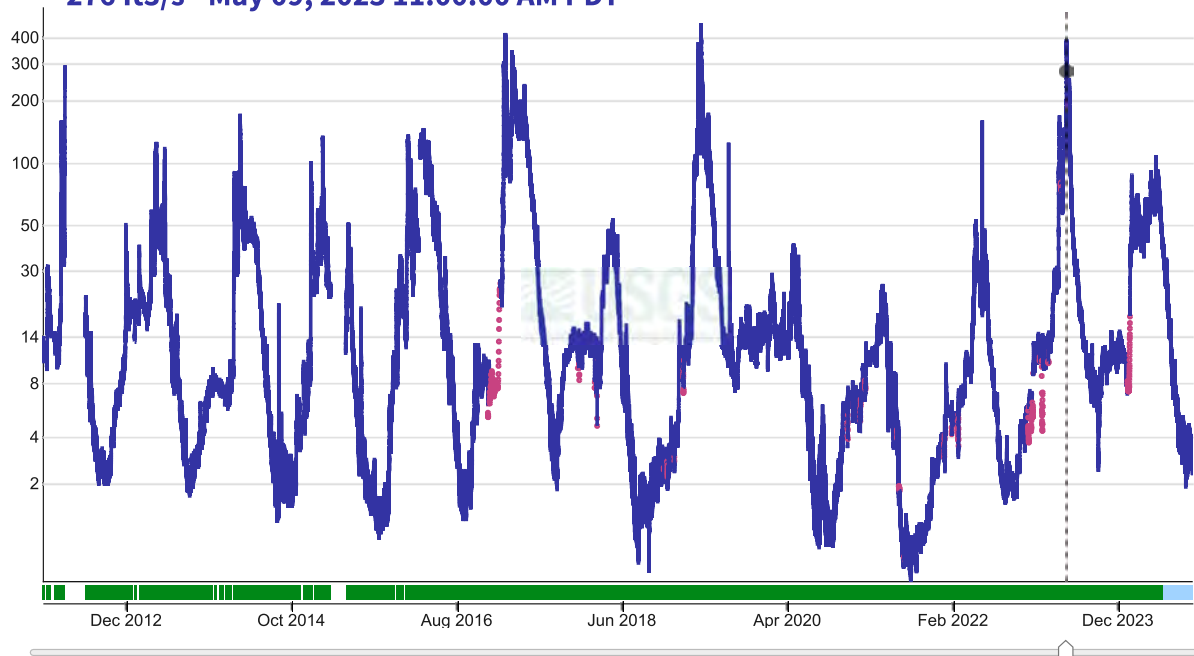
- using custom time span -

Bridge CR Abv Coyote Canyon NR Mitchell, OR - 14046778

January 1, 2012 - October 1, 2024

Discharge, cubic feet per second

276 ft³/s - May 09, 2023 11:00:00 AM PDT



IMPORTANT Data may be [provisional](#)

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[Hide graph details](#) ^

	Value	Status
● Latest Nov 20, 2024 11:30:00 AM PST	8.83	Provisional
● Selected May 09, 2023 11:00:00 AM PDT	276	Approved

 An official website of the United States government [Here's how you know](#)

MENU

Important for you to know:



- Water Data for the Nation is replacing NWISweb over the next 3 years. On Thursday, December 19th at 2 PM EST / 11 AM PST, join our Teams Live Event to learn more about the NWISweb decommission. Registration is required! Register for the event [here](#).

IMPORTANT [Legacy real-time page](#) 

☐ 7 days ☐ 30 days ☐ 1 year

Scale

Linear

 Log

- using custom time span -

Bridge CR Abv Coyote Canyon NR Mitchell, OR -
14046778

June 1, 2024 - October 31, 2024

Discharge, cubic feet per second

5.36 ft3/s - Oct 15, 2024 05:00:00 AM PDT



IMPORTANT Data may be [provisional](#)

Show legend 

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
FOR THE
OREGON WATER RESOURCES DEPARTMENT

IN THE MATTER OF:	) OAH Case Nos. 2024-OWRD-00163, 224-
	) OWRD-00165
Transfer Applications T-14158 and T-14170,	)
Wheeler County	) Agency Case Nos. T-14158, T-141170
	)
Bridge Creek Ranch, LLC,	) Assigned to ALJ Samantha A. Fair
Applicant,	)
	) WATERWATCH MOTION TO DENY
WaterWatch of Oregon,	) APPLICATIONS OR RETURN CASES TO
Protestant.	) AGENCY

I. MOTION

Protestant WaterWatch of Oregon (WaterWatch) moves for an order denying the applications in these cases or, in the alternative, returning the cases to the agency, on grounds the integrity of the contested case process has been compromised by an inappropriate payment arrangement between applicant Bridge Creek Ranch, LLC and the State of Oregon.

Pursuant to OAR 137-003-0630(2), WaterWatch emailed other counsel in the case on December 30 (just before 5 p.m.) to confer before filing this motion. The email included a detailed description of the issues raised below and asked for counsel's availability to discuss the issues the following day. Understandably considering the holidays, WaterWatch heard from the Oregon Water Resources Department that its counsel was out until after January 1 and did not hear back from counsel for Bridge Creek Ranch. WaterWatch is nevertheless filing this motion because it believes it is important to put the issues in the record as soon as possible and before any further rulings in the case. WaterWatch will amend the motion as appropriate based on any further discussions with other counsel.

II. INTRODUCTION

WaterWatch has learned only from documents produced recently by Bridge Creek Ranch that these cases apparently are proceeding under a payment arrangement in which Bridge Creek Ranch is paying an estimated \$133,000 for services of the Oregon Department of Justice (DOJ) and the Oregon Office of Administrative Hearings (OAH), and some of the expenses incurred by the Oregon Water Resources Department (OWRD). Bridge Creek Ranch agreed to do that so it could skip to the front of the line of contested cases waiting for referral to OAH. As discussed below, the arrangement is not authorized by statute, gives the agencies impermissible conflicts of interests, and creates a significant appearance of impropriety. The cases are now irrevocably tainted under the present referral such that the only remedy is to deny the applications. In the alternative, the cases should be sent back to OWRD for referral in the ordinary course, without Bridge Creek Ranch receiving preferential treatment in the referral process in exchange for payment of money.

III. SUMMARY OF FACTS

These contested cases were initiated on October 23, 2023 (T-14170), and February 15, 2024 (T-14158), respectively, when WaterWatch filed “protests” of preliminary determinations by OWRD to approve changes (i.e., “transfers”) to water rights held by Bridge Creek Ranch. (See referral packets.) The protests required referrals to OAH for contested case hearings.

OWRD has many contested cases waiting for referral to OAH. (See Posewitz Decl.,¹ Ex. 1, p. 7.) While OWRD has no standard timeline for referral or any publicly disclosed objective criteria for deciding on the order of referral, it generally takes OWRD more than a year, and often several years to refer a contested case to OAH. (Some protests of proposed

¹ References to “Posewitz Decl.” in this motion are to the accompanying Declaration of Brian Posewitz.

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
OREGON WATER RESOURCES DEPARTMENT**

In the Matter of Transfer Applications	)	RULING DENYING MOTION TO DENY
T-14158 and T-14170	)	APPLICATIONS OR REQUIRE
	)	WITHDRAWAL OF REFERRALS
BRIDGE CREEK RANCH LLC,	)	
Applicant	)	
	)	OAH Reference Nos. 2024-OWRD-00163 and
and	)	2024-OWRD-00165
	)	
WATERWATCH OF OREGON,	)	Agency Case Nos. T-14158 and T-14170
Protestant	)	

HISTORY OF CONTESTED CASE PROCEEDING

On September 25, 2023, the Oregon Water Resources Department (OWRD) issued a Preliminary Determination Proposing Approval of an Additional Point of Diversion in the matter of the Transfer Application T-14170 (PD T-14170) filed by Bridge Creek Ranch LLC (Applicant).¹ On October 23, 2023, OWRD received the Protest filed by WaterWatch of Oregon (Protestant).

On January 19, 2024, OWRD issued a Preliminary Determination Proposing Approval of Additional Points of Diversion and Partial Cancellation of Water Right in the matter of the Transfer Application T-14158 (PD T-14158) filed by Applicant.² On February 15, 2024, OWRD received Protestant's Protest of PD T-14158.

On August 14, 2024, OWRD referred the matters to the Office of Administrative Hearings (OAH).³ The OAH assigned Administrative Law Judge (ALJ) Samantha Fair to preside over the matters. On September 16, 2024, ALJ Fair convened a prehearing conference. Attorney Brian Posewitz represented Protestant. Attorney Elizabeth Howard represented Applicant. Senior Assistant Attorney General Sarah Rowe represented OWRD. Will Davidson also appeared on behalf of OWRD. ALJ Fair scheduled the matters for a prehearing conference on February 6, 2025, for the review of exhibits and for a video conference hearing on February 11 through 14, 2025. The ALJ also set deadlines for the submission of issue statements,

¹ The transfer application involves Certificate 68553.

² The transfer application involves Certificates 13593 and 96311.

³ Prior to the referral, the parties agreed to consolidate the two matters for hearing. The OAH assigned reference number 2024-OWRD-00163 to the matter involving PD T-14158 and reference number 2024-OWRD-00165 to the matter involving PD T-14170.

motions, witness lists, and exhibits.

On September 18, 2024, Applicant requested new hearing dates. ALJ Fair rescheduled the hearing for February 18 through 21, 2025.

On October 7, 2024, OWRD filed Stipulations Regarding the Statement of Issues. Later that day, Protestant filed a Statement Regarding Stipulated Issues. On October 10, 2024, OWRD filed a Response to [Protestant's] Statement Regarding Stipulated Issues. On October 22, 2024, the OAH issued a Ruling on Motion Regarding Statement of Issues, in which the ALJ adopted the issues for hearing as stated in the October 7, 2024 Stipulations Regarding the Statement of Issues.

On November 15, 2024, Applicant filed a Motion for Summary Determination, seeking a dispositive ruling on four of the issues for hearing. On November 27, 2024, OWRD filed a Response to [Applicant's] Motion for Summary Determination.

On December 2, 2024, Protestant requested an extension of the deadline for its response to the Motion. On December 3, 2024, the ALJ granted the request and extended the deadline to December 13, 2024. On December 13, 2024, Protestant filed a Response to Bridge Creek Ranch's Motion for Summary Determination.

On December 31, 2024, Protestant filed a Motion to Deny Applications or Return Cases to Agency (Motion). On January 7, 2025, OWRD filed a Response to [Protestant's] Motion to Deny Applications or Return Cases to Agency (Response).

On January 13, 2025, Applicant requested an extension on a submission deadline for the hearing and a rescheduling of the prehearing conference. The ALJ granted the extension and rescheduled the prehearing conference to February 12, 2025.

On January 15, 2025, the OAH issued a Ruling on Motion for Summary Determination, in which the ALJ granted the motion, in part, and denied it, in part.

ISSUE

Whether OWRD must deny the transfer applications or withdraw the referral of the contested cases from the OAH.

CONCLUSION OF LAW and OPINION

OAR 137-003-0630(1) provides:

A request for any order or other relief may be made by filing a motion in writing. The motion need not be in any particular form.

Protestant filed the Motion, seeking a denial of the applications or the return of the referral of the contested cases to OWRD "on grounds the integrity of the contested case process

In the Matter of Transfer Applications T-14158 and T-14170 - OAH Case Nos. 2024-OWRD-00163 and 2024-OWRD-00165

Ruling Denying Motion to Deny Applications or Require Withdrawal of Referrals

Page 2 of 7

has been compromised by an inappropriate payment arrangement between” Applicant and OWRD. Motion at 1.

On September 25, 2023, OWRD issued PD T-14170, approving Applicant’s transfer application for Certificate 68553. On October 23, 2023, OWRD received Protestant’s Protest, objecting to PD T-14170. On January 19, 2024, OWRD issued PD T-14158, approving Applicant’s transfer application for Certificates 13593 and 96311. On February 15, 2024, OWRD received Protestant’s Protest, objecting to PD T-14158. On June 18, 2024, a lobbyist contacted OWRD, inquiring whether Applicant could expedite the referral of a contested case to the OAH by paying some of the costs of the referral. Exhibit 1 at 6-7. Although OWRD initially responded that such arrangements were not an option utilized by OWRD, by August 9, 2024, Applicant and OWRD had an executed copy of a Reimbursement Authority Agreement that required Applicant to reimburse OWRD for costs (estimated at \$133,000), including costs billed to OWRD from the Department of Justice (DOJ) and the OAH. Exhibits 1 at 5-6 and 2 at 4. The agreement cited ORS 536.055 as the authority for the agreement and required an initial payment (25 percent of the estimate) by Applicant upon execution of the agreement. Exhibit 2 at 5. On August 13, 2024, Applicant deposited \$33,250 with OWRD. Exhibit 3 at 1-2. Subsequently, on August 14, 2024, OWRD referred the contested cases to the OAH.

Authorization for Reimbursement Authority Agreement

A contested case is a proceeding before an agency in which parties may be represented by counsel and present evidence and arguments. A fully-litigated contested case results in the issuance of an order on “all issues properly before the presiding officer.” ORS 187.417. For purposes of a water right transfer application, persons may file protests “against approval of the application,” and hearings on such protests shall be held as a contested case pursuant to ORS chapter 183. ORS 540.520.

Protestant argues that ORS 536.055⁴ does not authorize OWRD to enter into an agreement such as the Reimbursement Authority Agreement. OWRD asserts that such an issue is beyond the scope of the ALJ’s jurisdiction. OWRD is correct. The ALJ’s jurisdiction is limited to issues involving OWRD’s approval of Applicant’s transfer application. ORS 540.530 provides that OWRD shall approve the transfer if the change can “be effected without injury to existing water rights.” ORS 540.530(1). OAR 690-380-5000 further provides that OWRD shall approve the transfer if the following criteria are met: (1) the water right is a water use subject to transfer; (2) the water right is not cancelled; (3) the transfer would not result in enlargement; and (4) any other requirements are met. Whether the Reimbursement Authority Agreement is a valid

⁴ ORS 536.055(1) provides:

The Water Resources Department may, with any person, enter into an agreement that sets fees to be paid to the department for the purpose of enabling the department to expedite or enhance the regulatory process to provide services voluntarily requested under the agreement. Pursuant to the agreement, the department may hire additional temporary staff members, contract for services or provide additional services to the person that are within the authority of the department to provide.

contract (*i.e.*, whether OWRD is authorized to enter into such agreements) does not impact the matters at issue in a transfer application contested case proceeding (injury, enlargement, subject use, etc.). The ALJ's jurisdiction is confined to matters at issue for the approval, modification, or denial of a transfer application, which does not include a determination of the validity of a contract made between OWRD and Applicant for the reimbursement of costs/fees incurred by OWRD for the contested case proceeding.

Bias or Impropriety

ORS 183.635(1) and OAR 690-002-0000 provides that contested case hearings for OWRD are heard by administrative law judges from the OAH.

ORS 183.605(1) provides, in part:

(1) The Office of Administrative Hearings is established within the Employment Department. The office shall be managed by the chief administrative law judge appointed under ORS 183.610. The office shall make administrative law judges available to agencies under ORS 183.605 to 183.690. Administrative law judges assigned from the office under ORS 183.605 to 183.690 may:

(a) Conduct contested case proceedings on behalf of agencies in the manner provided by ORS 183.605 to 183.690[.]

ORS 183.615(1) provides:

An administrative law judge employed by or contracting with the chief administrative law judge shall conduct hearings on behalf of agencies as assigned by the chief administrative law judge. An administrative law judge shall be impartial in the performance of the administrative law judge's duties and shall remain fair in all hearings conducted by the administrative law judge. An administrative law judge shall develop the record in contested case proceedings in the manner provided by ORS 183.417 (8).

ORS 183.417(8) provides:

The officer presiding at the hearing shall ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the presiding officer in the case and the correct application of the law to those facts.

Pursuant to OAR 137-003-0645(1), the ALJ shall issue a proposed order. Pursuant to OAR 137-003-0655 and OAR 690-002-0175(4) and (5), after consideration of any exceptions

received by OWRD, the Water Resources Commission⁵ shall issue a final order. Thus, both the ALJ and the Water Resources Commission (or Director if so delegated) are decision-makers in this contested case proceeding and issue orders based upon the evidence gathered by an impartial ALJ after a full and fair inquiry into the facts.

Protestant argues that the reimbursements are “highly likely to impact, consciously or subconsciously, the judgment and decision making of OWRD, DOJ and OAH.” Motion at 7. Protestant also argues that there is an appearance of impropriety when OWRD accepts payments from a party and allows that party “to skip to the front of the line for contested case referral.”⁶ Motion at 8. The ALJ is unpersuaded by Protestant’s arguments. As noted by OWRD, other state agencies, such as the Energy Facility Siting Council⁷ and the Department of Geology and Mineral Industries,⁸ have statutory authority to recover all costs incurred by the state agency from an applicant. Numerous state licensing agencies have statutory provisions that allow them to assess the costs of disciplinary proceedings brought via contested case notices against

⁵ The Water Resources Commission’s function is to establish the policies for the operation of OWRD and may delegate its power to the Water Resources Director of OWRD. ORS 536.025(1) and (2) and ORS 536.032.

⁶ Protestant notes that it “generally takes OWRD more than a year, and often several years to refer a contested case to OAH” with some protests waiting in excess of 30 years for a referral. Declaration of Brian Posewitz at 3.

⁷ ORS 469.421(1) provides:

(1) Subject to the provisions of ORS 469.441, any person submitting a notice of intent, a request for exemption under ORS 469.320, a request for an expedited review under ORS 469.370, a request for an expedited review under ORS 469.373, a request for the State Department of Energy to approve a pipeline under ORS 469.405 (3), an application for a site certificate or a request to amend a site certificate shall pay all expenses incurred by the Energy Facility Siting Council and the department related to the review and decision of the council. Expenses under this subsection may include:

- (a) Legal expenses;
- (b) Expenses incurred in processing and evaluating the application;
- (c) Expenses incurred in issuing a final order or site certificate;
- (d) Expenses incurred in commissioning an independent study under ORS 469.360;
- (e) Compensation paid to a state agency, a tribe or a local government pursuant to a written contract or agreement relating to compensation as provided for in ORS 469.360; or
- (f) Expenses incurred by the council in making rule changes that are specifically required and related to the particular site certificate.

⁸ ORS 517.753(3) provides:

Subject to the provisions of subsection (5) of this section, the prospective applicant or applicant shall pay all expenses incurred by the department and the permitting and cooperating agencies related to the consolidated application process under ORS 517.952 to 517.989. These expenses may include legal expenses, expenses incurred in processing and evaluating the consolidated application, issuing a permit or final order and expenses of hiring a third party contractor under ORS 517.979 and 517.980.

licensees. See ORS 684.100(9)(g) (assessment of costs against chiropractors); ORS 679.140(5)(j) (assessment of costs against dentists); ORS 686.150(5) (assessment of costs against veterinarians); ORS 687.081(6) (assessment of costs against massage therapists). Thus, the Oregon Legislature implicitly recognizes that such actions (reimbursement of costs from a party) do not, *per se*, result in biased decision-making by the state agency or the ALJ that issue orders potentially in the paying party's favor or against a licensee (which would allow the agency to recoup the agency's costs).

Oregon caselaw also discusses the existence of unwarranted bias in decision-making. "In an agency proceeding, an action lacking the appearance of fairness is not enough to warrant its reversal." *W.A.S. v. Teacher Standards and Practices Commission*, 314 Or App 274, 277 (2021) (internal citations omitted.) Instead, a party "must demonstrate actual bias on the part of the decision-maker." *Shicor v. Board of Speech Language Pathology and Audiology*, 291 Or App 369, 374 (internal citations omitted.) In a matter involving prejudgment, as Protestant claims here, Protestant must establish that the decision-maker has "so prejudged the particular matter as to be incapable of determining its merits on the basis of the evidence and arguments presented." *Id.* (internal citations omitted.) The mere fact that OWRD's costs, including those costs for the ALJ's services billed to the agency by the OAH, will be paid by one party does not demonstrate an actual bias even though such a payment arrangement may appear unfair or improper.

OWRD does not have to deny the transfer applications and does not have to withdraw the referral of the contested cases from the OAH because of the execution of the Reimbursement Authority Agreement. Protestant's Motion is denied.

RULING

Protestant's Motion to Deny Applications or Return Cases to Agency is DENIED.

/s/Samantha A. Fair

Senior Administrative Law Judge
Office of Administrative Hearings

IN THE COURT OF APPEALS OF THE STATE OF OREGON

WaterWATCH OF OREGON, INC., Petitioner, v. BRIDGE CREEK RANCH, LLC, and WATER RESOURCES DEPARTMENT, Respondents.	Agency Case No. 20240WRD00163 Appellate Court No. A189353
WaterWATCH OF OREGON, INC., Petitioner, v. BRIDGE CREEK RANCH, LLC, and WATER RESOURCES DEPARTMENT, Respondents.	Agency Case No. 20240WRD00165 Appellate Court No. A189355 CORRECTED TRANSCRIPT INDEX

ITEM	DESCRIPTION	PAGE
1	Transcript of February 12, 2025 Prehearing Conference	5
2	Transcript of February 18-19, 2025 Hearing	91

END

1 Creek Ranch uses to divert water from Bridge
2 Creek?

3 **A.** Yes.

4 **Q.** Okay. And where does Bridge Creek Ranch
5 divert its water from currently for Bridge -- just
6 for Bridge Creek Ranch? Or, excuse me, just --
7 let me ask that again, that was really confusing.
8 Where does Bridge Creek Ranch divert its water
9 from on Bridge Creek?

10 **A.** Sections -- the Section 6 POD.

11 **Q.** And is that Section 6 POD located on property
12 owned by the Bureau of Land Management?

13 **A.** Yes.

14 **Q.** And the new point of diversion that's proposed
15 by the two transfers, where is that point of
16 diversion located?

17 **A.** That one is two -- it is downstream in Section
18 31, 10 South, Range 21 East, Section 31 in the
19 Southeast of the Southeast.

20 **Q.** Okay. And is it your understanding that if
21 these transfers were approved, that Bridge Creek
22 Ranch would divert all of its water from Bridge
23 Creek through the new point of diversion?

24 **A.** That's my understanding.

25 **Q.** Okay. And you mentioned water rights for

1 and that that's under review, correct?

2 **A.** Correct.

3 **Q.** And how long of an extension has Bridge Creek
4 Ranch applied for?

5 **A.** I don't recall the duration of what we've
6 applied for.

7 **Q.** Has BLM communicated a willingness to consider
8 that extension?

9 **A.** Yes.

10 **Q.** Have they communicated that that extension
11 will also have this requirement that water not be
12 diverted when flows are below 10 cubic feet per
13 second?

14 **A.** We haven't received any specific communication
15 to my knowledge about conditions of an extension.

16 **Q.** And you were asked -- okay, let's see. Does
17 Bridge Creek Ranch plan -- and, well, let me back
18 up. At the new point of diversion, Section 31
19 point of diversion, does Bridge Creek Ranch plan
20 to divert water at that point of diversion, even
21 when flows in Bridge Creek are below 10 cubic feet
22 per second?

23 **A.** Yes.

24 **Q.** You mentioned a -- you said that the Section 6
25 POD had been used by the predecessor to Bridge

1 Creek Ranch, correct?

2 **A.** Yes.

3 **Q.** Who was the predecessor?

4 **A.** I believe it was Smith family.

5 **Q.** Okay. Is that -- that sounds like a
6 shorthand. Do you know the technical legal name
7 of the owner?

8 **A.** I don't know the technical legal name.

9 **Q.** The -- you said the land at the current points
10 of diversion for the water rights that are being
11 transferred in these cases, that are proposed for
12 transfer in these cases, that that land is all
13 owned by the BLM. Is that correct?

14 **A.** That's correct.

15 **Q.** Did BLM own that land when the current owners
16 of Bridge Creek Ranch bought it in 2008?

17 **A.** Yes.

18 **Q.** And you talked about the voluntary
19 cancellation of a portion of one of the water
20 rights. Do you recall that?

21 **A.** Yes, I do.

22 **Q.** And what -- and did you say two acres? Is
23 that correct?

24 **A.** No, I said I think it's approximately 12 acres
25 in total.

1 water may be diverted when the stream flow drops
2 below 10 cfs in Bridge Creek as measured at the
3 Bridge Creek gauge station near the mouth of
4 Bridge Creek."

5 **Q.** Okay. And if we could go back to page three
6 of the document. Okay. And so what -- do you
7 recall the negotiation and execution of this
8 agreement? Were you involved in that?

9 **A.** Yes.

10 **Q.** How did it come about? What's your
11 recollection of that?

12 **A.** Could you ask a more specific question?

13 **Q.** Yeah, yeah, yeah, yeah, yeah. Actually, that
14 was a bad question. I agree.

15 Okay. So, apparently at some point the BLM
16 recognized the need to have a written
17 authorization for Bridge Creek Ranch's use of that
18 point of diversion, is that correct?

19 **A.** Yes.

20 **Q.** Okay. And how did that happen? What caused
21 that issue to come up?

22 **A.** Yes. So I think these conversations started
23 before I was in my position as a land manager for
24 the Central Oregon Field Office. I recollect
25 conversations with Elizabeth Howard, obviously

1 present attorney, regarding their interest in
2 using that point of diversion. We had a field
3 meeting in which we talked about that point of
4 diversion, because there were confusions between
5 what we now refer to as the Section 6 point of
6 diversion and the Section 9 point of diversion and
7 we needed to create clarity on which diversion was
8 irrigating which fields and which authorizations
9 were necessary. And then we -- at some point we
10 recognized that Bridge Creek Ranch did not have an
11 authorization to use that point of diversion, and
12 we requested an application so that that could be
13 authorized.

14 **Q.** Okay. And --

15 **A.** In summary.

16 **Q.** Okay. And why was there not a written
17 authorization for that point of -- use of that
18 point of diversion earlier?

19 **A.** I can't -- I don't know the answer to that.

20 **Q.** Okay. The -- I think you said -- you called
21 them stipulations that we just looked at, is that
22 the right term?

23 **A.** Yes.

24 **Q.** Okay. The stipulation about no withdrawals
25 from Bridge Creek when flows are below 10 cubic

1 feet per second, does that reflect a broader
2 policy of the Bureau of Land Management?

3 **A.** Yes. Policy may not be the right word, but
4 it's established in our resource management plan
5 that there needs to be a 10 cfs limitation for any
6 water coming out of Bridge Creek.

7 **Q.** And you said policy may not be the right word
8 for it, what word would you use?

9 **A.** It's a requirement in our resource management
10 plan that if we're going to issue an
11 authorization, that that stipulation be in place.

12 **Q.** Okay. And can you find Exhibit P, as in Paul,
13 12? Are you able to access that?

14 **A.** Maybe. Yes.

15 **Q.** Okay. And it looks like maybe --

16 **A.** I've got it.

17 **Q.** Okay. Great.

18 ALJ FAIR: Which exhibit is this again?

19 MR. POSEWITZ: P, as in Paul, 12.

20 MR. POSEWITZ:

21 **Q.** So, is P12, can you identify that as selected
22 pages of the resource management plan and the
23 record of decision adopting that?

24 **A.** Yes.

25 **Q.** Okay. And if you go to page 12 of the

1 you there?

2 **A.** Are you asking me?

3 **Q.** Yeah, are you -- I just want to make sure
4 you're on page three. Oh, I guess that's the one
5 where you can only see it on the screen, right?

6 **A.** So far, yes.

7 **Q.** Okay. Okay.

8 ALJ FAIR: Mr. Conor, can you enhance it a
9 bit, make it easier for her to read? And lower it
10 to the bottom part. There.

11 MR. POSEWITZ: Yeah.

12 MR. POSEWITZ:

13 **Q.** Okay. So this document has a term, it ends
14 December 31st, 2024, right?

15 **A.** Yes.

16 **Q.** And it says may not be renewed, right?
17 There's a box checked --

18 **A.** Correct.

19 **Q.** Okay. Why was it set up with a limited
20 duration and a "may not be renewed" box check?

21 **A.** Yeah. So, BLM's process to issue rights-of-
22 ways or to take any action on public land requires
23 NEPA analysis. In conversation with Bridge Creek
24 Ranch and in our -- in the -- their interest and
25 our interest of putting an -- getting an

1 authorization in place, the best tool that we had
2 to put an authorization in place for a short
3 period of time was through a temporary
4 authorization. If we were to go through a term
5 for a longer authorization, say with a 30-year
6 duration, it would have required a higher level of
7 NEPA analysis, it would have required more costs
8 and much more staff time, and it would have taken
9 more time in order to do that. And in
10 conversation, we understood this was going to be
11 the best -- the authorization that suited the need
12 the best.

13 **Q.** Okay. And you refer to NEPA, which can you
14 explain what NEPA is?

15 **A.** Sure. It's the National Environmental Policy
16 Act, and it's the process that the BLM and other
17 federal entities go through in order to make land
18 use decisions.

19 **Q.** Got it. Did Bridge Creek Ranch ever request a
20 longer term of agreement?

21 **A.** I don't recall.

22 **Q.** Did it ever -- well, let me rephrase. Did
23 Bridge Creek Ranch ever apply for an agreement
24 with a longer term?

25 **A.** Not that I'm aware of.

1 **Q.** Did it ever apply for a renewable as opposed
2 to a non-renewable grant?

3 **A.** This is the first -- for this specific use,
4 this is the first authorization that BLM issued,
5 and we have since received a subsequent
6 application that we're reviewing.

7 **Q.** Okay. And just before I forget, what does the
8 subsequent application ask for?

9 **A.** I think it's nearly identical. I'm not
10 familiar with it.

11 **Q.** Okay. And what --

12 **A.** Now that I'm in the -- a different position
13 than I was then.

14 **Q.** What is the position of the BLM with respect
15 to whether a continued agreement would have the 10
16 cfs condition in it?

17 **A.** A continued -- it wouldn't be a continued
18 agreement, it would be a new authorization. Just
19 to be clear, it would be a new temporary
20 authorization if we were to issue it. It's an
21 application that I understand we're evaluating and
22 processing. The 10 cfs limitation would exist
23 given the resource management plan.

24 **Q.** Okay. And so I guess what I was getting at
25 is, do you recall -- were you having conversations

1 directly with Bridge Creek Ranch when this Exhibit
2 R3 was negotiated?

3 **A.** Yes.

4 **Q.** Okay. Do you recall them ever saying that
5 they wanted a longer term agreement or a renewable
6 agreement?

7 **A.** I recall conversations that this was going to
8 be the best tool to suit the needs at the moment.
9 I don't recall them requesting a longer -- a
10 request for a longer authorization from BLM.

11 **Q.** Did the BLM ever tell Bridge Creek Ranch that
12 it -- that the BLM wanted Bridge Creek Ranch to
13 stop using the Section 6 -- let me back up. If I
14 say the Section 6 point of diversion, do you know
15 what I'm talking about?

16 **A.** Yes.

17 **Q.** Okay. Did the BLM ever tell Bridge Creek
18 Ranch that it wanted Bridge Creek Ranch to stop
19 using the Section 6 point of diversion?

20 **A.** At different times BLM notified Bridge Creek
21 Ranch that the flows were below 10 cfs. This is
22 prior to an authorization. And we requested that
23 they cease irrigating at 10 cfs. I would not
24 classify that as stop using the point of
25 diversion, right, that's infrastructure, but to

1 stop irrigating. I would also say that we issued
2 a trespass notice, yes, clearly asking them to
3 stop using the point of diversion.

4 Q. Okay. And the trespass notice was before this
5 right-of-way agreement was negotiated, correct?

6 A. Before it was finalized or before the
7 authorization was issued, yes.

8 Q. Yeah, I'm sorry. Bad question. The trespass
9 notices were issued before this right-of-way
10 agreement was finalized, correct?

11 A. Yes.

12 Q. Okay. This is a better way to ask what I was
13 getting at. If Bridge Creek Ranch had sought a
14 longer term right-of-way agreement, is that
15 something the BLM would have considered?

16 A. Yes.

17 Q. And if Bridge Creek Ranch had sought a
18 renewable right-of-way agreement, is that
19 something that the BLM would have considered?

20 A. We would have considered any application from
21 Bridge Creek Ranch.

22 Q. And the 10 cfs condition in the agreement, did
23 the BLM in fact enforce that condition?

24 A. Can you define "enforce" for me, please?

25 Q. Yeah. Did it -- what did the BLM do, if

1 anything, to make sure Bridge Creek Ranch abided
2 by the requirement to stop diversions below 10
3 cubic feet per second?

4 **A.** So, BLM has a documented history of calling
5 users who have points of diversion from Bridge
6 Creek Ranch asking them to stop irrigating almost
7 on an annual basis when the flows of the creek got
8 below 10 cfs. So sometimes it was a phone call,
9 sometimes it was more formal, and in one instance
10 it was a trespass notice.

11 **Q.** Okay. Did Bridge Creek Ranch ever express to
12 you any -- sorry, let me back up. Did Bridge
13 Creek Ranch ever express to you anything about
14 whether it, you know, liked or didn't like that 10
15 cfs condition?

16 **A.** Yes --

17 MS. HOWARD: Objection, Your Honor,
18 relevance. It doesn't matter whether they liked
19 it or didn't like it, there was a 10 cfs
20 limitation in the right-of-way agreement. And
21 this -- again, this line of questioning, I think,
22 is far afield from the issues in this case.

23 ALJ FAIR: I'm going to go ahead and
24 overrule and allow her to answer.

25 MS. ROBERTS: Could you please repeat the

1 question?

2 MR. POSEWITZ:

3 Q. Yeah. Did Bridge Creek Ranch ever express to
4 you any feelings it had about the 10 cfs right-of-
5 way condition?

6 A. Bridge Creek Ranch expressed, yes, that they
7 did not believe that the 10 cfs limitation applied
8 on private lands, and that it wouldn't work for
9 the ranch, yes.

10 Q. Okay. Okay. And first of all, what was the
11 BLM response to that it didn't apply on private
12 lands?

13 A. Through our research, because there is an
14 authorization required for the point of diversion
15 that is on BLM managed public lands, our --
16 because that authorization comes from BLM, we
17 believe that the stipulation does apply and
18 communicated that to Bridge Creek Ranch.

19 Q. Okay. And then I think you said something
20 that -- to the effect that they said that it
21 didn't work for the ranch. Do you recall making
22 that -- is that -- did I recount that correctly?
23 That was part of your answer?

24 A. I'm paraphrasing, but in both e-mails and in
25 conversations that was communicated to us, yes.

1 Q. And can you be more specific --

2 A. Communicated to me.

3 Q. Can you be more specific? What did they
4 communicate in that regard?

5 A. They communicated that they were irrigating
6 alfalfa. And this is my recollection, that they
7 communicated they were irrigating alfalfa and that
8 they needed to continue irrigating to be able to
9 harvest that crop. That's one instance.

10 And another -- and that was a conversation
11 with Gordon. And then in another conversation, it
12 was more vague on why it wouldn't work for the
13 ranch.

14 Q. Okay. And you said the first thing you
15 recounted was a conversation with Gordon. That's
16 Gordon Tolton?

17 A. Correct. That's what we have documentation of
18 when we called to indicate our request that they
19 stop irrigating at 10 cfs prior to the
20 authorization.

21 Q. Okay. And then you said -- you referred to
22 another communication that I think you said was
23 less specific. What -- and who was that with and
24 what do you recall about that?

25 A. Yeah. In an e-mail from Elizabeth Howard and

1 in conversations with Elizabeth Howard.

2 Q. Okay. Switching gears, does the BLM have
3 water rights on Bridge Creek?

4 A. Yes.

5 Q. And are those -- and how many, can you say?

6 A. Six is my understanding.

7 Q. Are they upstream or downstream of the Bridge
8 Creek Ranch, Section 6 POD?

9 A. I don't know the answer.

10 Q. Are any of those water rights leased for in-
11 stream use?

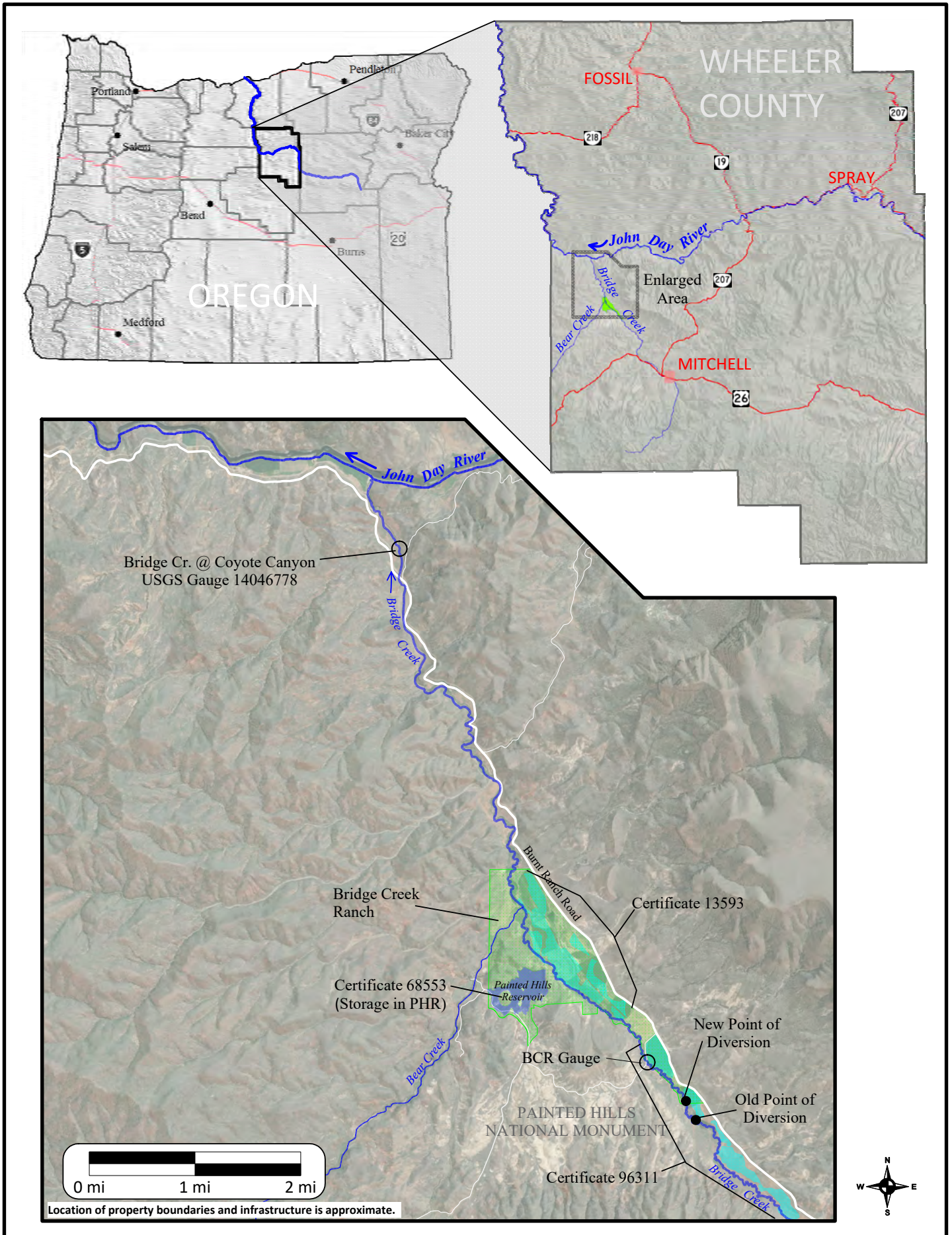
12 A. Yes.

13 Q. And can you explain with that means?

14 A. That we lease them in-stream. Instead of
15 using them for reclamation, which is -- or for the
16 irrigating the public lands that we acquired
17 ownership of, we lease those. I'm not a water
18 rights expert. We lease those back in-stream for
19 beneficial use for fish habitat. It's how I
20 understand it.

21 Q. All right. And you said -- are any of the BLM
22 water rights downstream from the Bridge Creek
23 Ranch Section 6 POD, do you know?

24 A. I don't know. I can name the fields that
25 they're on, but I'd have to look at a map to tell



BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
FOR THE
OREGON WATER RESOURCES DEPARTMENT

IN THE MATTER OF:	)	OAH Case Nos. 2024-OWRD-00165
	)	
Transfer Applications T-14158 and T-14170,	)	Agency Case No. T-14158
Wheeler County	)	
	)	Assigned to ALJ Samantha A. Fair
Bridge Creek Ranch, LLC,	)	
Applicant,	)	WATERWATCH EXCEPTIONS TO
	)	PROPOSED ORDER
WaterWatch of Oregon,	)	
Protestant.	)	

Pursuant to OAR 137-003-0650 and OAR 690-002-0175, WaterWatch of Oregon (WaterWatch) submits the following exceptions to the administrative law judge's (ALJ's) proposed order.

PREHEARING DECISIONS

1. WaterWatch excepts to the ALJ's granting of Bridge Creek Ranch (BCR's) motion for summary determination as to issues B (injury with respect to C-59780) and C (whether a transfer can add a point of diversion instead of changing it). In support of these exceptions, WaterWatch incorporates by reference its response to the motion for summary determination on these issues, including the accompanying declaration.

2. WaterWatch excepts to the ALJ's denial of its motion to deny the applications or return the protests to the agency on grounds BCR is paying the state's expenses, including fees charged by the Office of Administrative Hearings and the Department of Justice. In support of this exception, WaterWatch incorporates by reference its motion and the accompanying declaration. WaterWatch also attaches additional relevant documents, which

1 were not produced to WaterWatch by the Oregon Water Resources Department (OWRD)
 2 until OWRD until January 23, 2025, which was after the motion was filed.

4 EVIDENTIARY RULINGS

5 3. WaterWatch excepts to admission of Exhibit R11, which consists of copies of
 6 letters from the BLM to Gordon Tolton of “White Butte Ranch.” BCR offered them to
 7 support its claim that, before BCR signed the right of way agreement in 2021, the BLM never
 8 required it to stop irrigating its own fields even from points of diversion on BLM land.¹
 9 However, as noted, the letters are not even addressed to Bridge Creek Ranch. Nor do they
 10 refer to any particular water right or point of diversion. The only “foundation” offered for the
 11 exhibit was testimony from Mike Pati, who merely speculated that the name of the recipient
 12 entity was a mistake. Tellingly, BCR did not ask Goldon Tolton about the document. Exhibit
 13 11 is therefore irrelevant and should not have been admitted.

15 Exhibit R11 also should have been excluded because it was not included in the
 16 exhibit exchange required to take place, under the ALJ’s pretrial order of September 16,
 17 2024, by January 17, 2025. (WaterWatch also objected on that basis and excepts to the AJL’s
 18 failure to include that objection on Page 4 of the proposed order.) BCR claimed the exhibit
 19 was to rebut the testimony of Amanda Roberts, a witness called by WaterWatch, but BCR
 20 had already claimed in its own case that the BLM did not require it to stop diverting water
 21

24 ¹ Even if the issue of when BLM began requiring diversions to stop below 10 cfs is not
 25 technically relevant to the ultimate issues in dispute, BCR has made it an issue by suggesting
 26 it would be unfair to require BCR to conform to what it was required by BLM to do only for
 a short time. More importantly, BCR made it an issue in its case in chief, not just in response
 to the testimony of Amanda Roberts.

12. WaterWatch excepts to the absence of a finding that BCR has applied for an extension of the right of way agreement and that the BLM is considering it. (Pati Test., 2:0:11:15, 2:0:22:30.)

13. WaterWatch excepts to the conclusion that “[a]pproval of the transfer would not enlarge the subject water right.” In support of this exception, WaterWatch incorporates the points made on this issue in its Closing Brief, Closing Argument Response Brief, and response to BCR’s motion for summary determination.

15. WaterWatch excepts to the conclusion that “OWRD did not exceed its statutory authority by approving an additional point of diversion (as opposed to approval of a change from one point of diversion to another point of diversion).” In support of this exception, WaterWatch incorporates its response to BCR’s motion for summary determination.

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
FOR THE
OREGON WATER RESOURCES DEPARTMENT

IN THE MATTER OF:	)	OAH Case Nos. 2024-OWRD-00165
	)	
Transfer Applications T-14158 and T-14170,	)	Agency Case No. T-14170
Wheeler County	)	
	)	Assigned to ALJ Samantha A. Fair
Bridge Creek Ranch, LLC,	)	
Applicant,	)	WATERWATCH EXCEPTIONS TO
	)	PROPOSED ORDER
WaterWatch of Oregon,	)	
Protestant.	)	

Pursuant to OAR 137-003-0650 and OAR 690-002-0175, WaterWatch of Oregon (WaterWatch) submits the following exceptions to the administrative law judge's (ALJ's) proposed order.

PREHEARING DECISIONS

1. WaterWatch excepts to the ALJ's granting of Bridge Creek Ranch (BCR's) motion for summary determination as to issues B (injury with respect to C-59780) and C (whether a transfer can add a point of diversion instead of changing it). To the extent necessary to preserve the issue for appeal, WaterWatch also excepts to granting of the motion with respect to issue G (whether the water right reflected in C68553 is a water use subject to transfer). In support of these exceptions, WaterWatch incorporates by reference its response to the motion for summary determination on these issues, including the accompanying declaration.

2. WaterWatch excepts to the ALJ's denial of its motion to deny the applications or return the protests to the agency on grounds BCR is paying the state's expenses, including

fees charged by the Office of Administrative Hearings and the Department of Justice. In support of this exception, WaterWatch incorporates by reference its motion and the accompanying declaration. WaterWatch also attaches additional relevant documents, which were not produced to WaterWatch by the Oregon Water Resources Department (OWRD) until OWRD until January 23, 2025, which was after the motion was filed.

EVIDENTIARY RULINGS

3. WaterWatch excepts to admission of Exhibit R11, which consists of copies of letters from the BLM to Gordon Tolton of “White Butte Ranch.” BCR offered them to support its claim that, before BCR signed the right of way agreement in 2021, the BLM never required it to stop irrigating its own fields even from points of diversion on BLM land.¹ However, as noted, the letters are not even addressed to Bridge Creek Ranch. Nor do they refer to any particular water right or point of diversion. The only “foundation” offered for the exhibit was testimony from Mike Pati, who merely speculated that the name of the recipient entity was a mistake. Tellingly, BCR did not ask Goldon Tolton about the document. Exhibit 11 is therefore irrelevant and should not have been admitted.

Exhibit R11 also should have been excluded because it was not included in the exhibit exchange required to take place, under the ALJ’s pretrial order of September 16, 2024, by January 17, 2025. (WaterWatch also objected on that basis and excepts to the AJL’s

¹ Even if the issue of when BLM began requiring diversions to stop below 10 cfs is not technically relevant to the ultimate issues in dispute, BCR has made it an issue by suggesting it would be unfair to require BCR to conform to what it was required by BLM to do only for a short time. More importantly, BCR made it an issue in its case in chief, not just in response to the testimony of Amanda Roberts.

1 in determining how much water was “lawfully available” to BCR at the existing points of
 2 diversion. (Ex. P49, pp. 6-7 (including the answer “No”).)

3 11. WaterWatch excepts to the absence of a finding that the BLM would have
 4 considered a longer term right of way agreement with BCR if BCR had requested it. (Roberts
 5 Test., 3:1:12:00.)
 6

7 12. WaterWatch excepts to the absence of a finding that BCR has applied for an
 8 extension of the right of way agreement and that the BLM is considering it. (Pati Test.,
 9 2:0:11:15, 2:0:22:30.)
 10

11 **CONCLUSIONS OF LAW**

12 13. WaterWatch excepts to the conclusion that “[a]pproval of the transfer would
 13 not enlarge the subject water right.” In support of this exception, WaterWatch incorporates
 14 the points made on this issue in its Closing Brief, Closing Argument Response Brief, and
 15 response to BCR’s motion for summary determination.
 16

17 14. WaterWatch excepts to the conclusion that “[a]pproval of the transfer would
 18 not injure other existing water rights.” In support of this exception, WaterWatch incorporates
 19 the points made on this issue in its Closing Brief, Closing Argument Response Brief, and
 20 response to BCR’s motion for summary determination.
 21

22 15. WaterWatch excepts to the conclusion that “OWRD did not exceed its
 23 statutory authority by approving an additional point of diversion (as opposed to approval of a
 24 change from one point of diversion to another point of diversion).” Pursuant to the Further
 25 Stipulation Regarding Issues for Hearing, this issue was not before the ALJ with respect to T-
 26 14170 at the time of the proposed order. The extent it was properly addressed in the proposed

1 order, WaterWatch excepts for the reasons given in its response to BCR's motion for
2 summary determination.

3 16. WaterWatch excepts to the conclusion that "[t]he subject water right for T-
4 14170, which is a water storage right, is a water use subject to transfer." In support of this
5 exception, WaterWatch incorporates the points made on this issue in its response to BCR's
6 motion for summary determination.
7

8 **OPINION**

9 17. WaterWatch excepts to the "Opinion" section in its entirety on grounds it
10 reaches incorrect findings and conclusions as discussed above. In support of this exception,
11 WaterWatch incorporates its Closing Brief, Closing Argument Response Brief and Response
12 to BCR's motion for summary determination.
13

14 WaterWatch also excepts, without limitation, to specific portions of the opinion as
15 follows.

16 18. WaterWatch excepts to the AJL's analysis on "enlargement" on grounds it
17 considers only one nonexclusive example given in OAR 690-380-0100(2) of what constitutes
18 "enlargement" and fails to consider the broader question of whether the proposed transfer
19 would result in "an expansion" of the subject water right(s). (Proposed order at 17
20 (considering only (d) "pertinent in this matter").)
21

22 19. WaterWatch excepts to the ALJ's interpretation of "legally available" in OAR
23 690-380-0100(2)(d) to require consideration only of "Oregon statutes and rules and the terms
24 of the certificated water right at issue, without regard to any third-party agreements or federal
25 law," and to the AJL's findings and conclusions that that OWRD interpreted the rule this way
26 and that OWRD's interpretation is "plausible." (Proposed order at 17-18.) In support of this

**BEFORE THE
OREGON WATER RESOURCES DEPARTMENT**

In the Matter of Transfer Application T-14158	)	FINAL ORDER IN CONTESTED CASE
	)	
	)	
BRIDGE CREEK RANCH LLC,	)	OAH Reference No. 2024-OWRD-00163
<i>Applicant</i>	)	
	)	Agency Case No. T-14158
and	)	
	)	
WATERWATCH OF OREGON,	)	
<i>Protestant</i>	)	

HISTORY OF CONTESTED CASE PROCEEDINGS

On September 25, 2023, the Oregon Water Resources Department (OWRD) issued a Preliminary Determination Proposing Approval of an Additional Point of Diversion in the matter of Transfer Application T-14170 (PD T-14170) filed by Bridge Creek Ranch LLC (Applicant).¹ On October 23, 2023, OWRD received the Protest filed by WaterWatch of Oregon (Protestant).

On January 19, 2024, OWRD issued a Preliminary Determination Proposing Approval of Additional Points of Diversion and Partial Cancellation of Water Right in the matter of Transfer Application T-14158 (PD T-14158) filed by Applicant.² On February 15, 2024, OWRD received Protestant's Protest of PD T-14158.

On August 14, 2024, OWRD referred the matters to the Office of Administrative Hearings (OAH).³ The OAH assigned Administrative Law Judge (ALJ) Samantha Fair to preside over the matters. On September 16, 2024, ALJ Fair convened a prehearing conference. Attorney Brian Posewitz represented Protestant. Attorney Elizabeth Howard represented Applicant. Senior Assistant Attorney General Sarah Rowe represented OWRD. Will Davidson also appeared on behalf of OWRD. ALJ Fair scheduled the matters for a prehearing conference on February 6, 2025, for the review of exhibits and for a video hearing on February 11 through 14, 2025. The ALJ also set deadlines for the submission of issue statements, motions, witness lists, and exhibits.

On September 18, 2024, Applicant requested new hearing dates. ALJ Fair rescheduled

¹ PD T-14170 involves Certificate of Water Right (Certificate) 68553.

² PD T-14158 involves Certificates 13593 and 96311.

³ Prior to the referral, the parties agreed to consolidate the two matters for hearing. The OAH assigned reference number 2024-OWRD-00163 to the matter involving PD T-14158 and reference number 2024-OWRD-00165 to the matter involving PD T-14170.

the hearing for February 18 through 21, 2025.

On October 7, 2024, the parties filed Stipulations Regarding the Statement of Issues. Later that day, Protestant filed a Statement Regarding Stipulated Issues. On October 10, 2024, OWRD filed a Response to [Protestant's] Statement Regarding Stipulated Issues. On October 22, 2024, the OAH issued a Ruling on Motion Regarding Statement of Issues, in which the ALJ adopted the issues for hearing as stated in the October 7, 2024 Stipulations Regarding the Statement of Issues.

On November 15, 2024, Applicant filed a Motion for Summary Determination, seeking a dispositive ruling on four of the seven issues for hearing. On November 27, 2024, OWRD filed a Response to [Applicant's] Motion for Summary Determination.

On December 2, 2024, Protestant requested an extension of the deadline for its response to the Motion. On December 3, 2024, the ALJ granted the request and extended the deadline to December 13, 2024. On December 13, 2024, Protestant filed a Response to [Applicant's] Motion for Summary Determination.

On December 31, 2024, Protestant filed a Motion to Deny Applications or Return Cases to Agency. On January 7, 2025, OWRD filed a Response to [Protestant's] Motion to Deny Applications or Return Cases to Agency.

On January 13, 2025, Applicant requested an extension on a submission deadline for the hearing and a rescheduling of the prehearing conference. The ALJ granted the extension and rescheduled the prehearing conference to February 12, 2025.

On January 15, 2025, the OAH issued a Ruling on Motion for Summary Determination, in which the ALJ granted the motion, in part, and denied it, in part.

On January 27, 2025, the OAH issued a Ruling Denying Motion to Deny Applications or Require Withdrawal of Referrals.

On February 4, 2025, the parties filed a Further Stipulations Regarding Issues for Hearing that included final stipulations on the contested case issues that identified the remaining issues for the evidentiary hearing.

On February 4, 2025, Applicant filed a Motion to Quash Subpoenas (Motion) to Randall Jordan Papé and Jake Tolton. On February 10, 2025, Protestant filed a Response to Motion to Quash Subpoenas (Response).

On February 11, 2025, Applicant filed a Motion in Limine, objecting to some of Protestant's exhibits and a witness.⁴

On February 12, 2025, ALJ Fair convened a telephone prehearing conference to review

⁴ The ALJ did not issue a written ruling in response to this motion. Applicant's objections were addressed individually during the February 12, 2025 prehearing conference and during the evidentiary hearing.

exhibits and other hearing matters. Ms. Howard, Conor Butkus,⁵ Mr. Posewitz, Senior Assistant Attorney General Jesse Ratcliffe,⁶ and Mr. Davidson appeared.⁷

On February 13, 2025, the OAH issued a Ruling on Motion to Quash Subpoenas, in which ALJ Fair granted the motion regarding prospective witness Randall Jordan Papé and denied the motion regarding prospective witness Jake Tolton.⁸

On February 18 and 19, 2025, ALJ Fair convened a video hearing. Ms. Howard and Mr. Butkus represented Applicant with Mike Pati, president of Papé Properties, Inc.,⁹ as the client representative. Mr. Posewitz represented Protestant. Mr. Ratcliffe represented OWRD with Mr. Davidson as the agency representative. Lisa Jaramillo, the manager of OWRD's transfer and conservation section, and Kenneth Thiemann, OWRD's watermaster for District 21, testified on behalf of OWRD and Protestant. Mr. Pati, Gordon Tolton, Applicant's ranch manager, and Gabriel Williams, owner and principal engineer for Resource Specialist, Inc.,¹⁰ testified on behalf of Applicant and Protestant. Amanda Roberts, United States Department of the Interior Bureau of Land Management's district manager for the Prineville District,¹¹ and Jake Tolton, Applicant's assistant ranch manager, testified on behalf of Protestant. The evidentiary record closed at the conclusion of the hearing. The record was left open through April 11, 2025, for the receipt of closing briefs.

On March 21, 2025, the parties filed their initial written closing briefs and arguments. On April 11, 2025, the parties filed their written rebuttal closing briefs and arguments.

On May 28, 2025, ALJ Fair issued a Proposed Order in 2025-OWRD-00163/T-14158 proposing that OWRD approve Transfer Application T-14158 as conditioned in the January 19, 2024 Preliminary Determination Proposing Approval of Additional Points of Diversion and Partial Cancellation of Water Right with the following correction of a typographical error in materials submitted by the Applicant that was repeated in the Preliminary Determination:

- The Township description of 10S for the current authorized point of diversion for Certificate 13593 noted in Paragraph 11 on Page 3 of the Preliminary Determination is changed to 11S.

⁵ Mr. Butkus is co-counsel with Ms. Howard for Applicant.

⁶ On November 12, 2024, OWRD changed counsel from Ms. Rowe to Mr. Ratcliffe.

⁷ Andrew Archer, a law student working for OWRD, also appeared for training purposes.

⁸ The ALJ informed the parties of her ruling during the February 12, 2025 prehearing conference.

⁹ Papé Properties, Inc., is the sole member of Applicant.

¹⁰ Mr. Williams performs services for Applicant as a natural resource consultant and engineer.

¹¹ Brad Grenham, an attorney with the U.S. Department of the Interior, appeared during Ms. Roberts' testimony.

The Proposed Order stated that any party to the proceeding or OWRD could file exceptions to the Proposed Order no later than 30 days after service of the order.

Applicant and Protestant timely filed exceptions to the Proposed Order, and Applicant timely filed responses to Protestant's exceptions. OWRD did not file exceptions to the Proposed Order or responses to the parties' exceptions.

Now, OWRD's Director (Director) considers the exceptions and responses to exceptions, allows the exceptions in part and denies them in part, and issues this final order approving Transfer Application T-14158 as conditioned in the Preliminary Determination. The "History of the Case," "Issue," "Evidentiary Ruling," "Findings of Fact," "Conclusion of Law," "Opinion," and "Order" sections of this final order set forth the ALJ's Proposed Order as modified by the Director in response to the exceptions and on the Director's own motion. The "Consideration of Exceptions" and "Director's Amendments to the Proposed Order" sections identify and explain the Director's modifications of the ALJ's Proposed Order.

ISSUES¹²

Issue A. Whether approval of the transfer would enlarge the subject water right. OAR 690-380-4010.

Issue B. Whether approval of the transfer would injure other existing water rights. ORS 540.530(1)(a).

Issue C. Whether OWRD exceeded its statutory authority by approving an additional point of diversion (as opposed to approval of a change from one point of diversion to another point of diversion) in PD T-14158. ORS 540.510(1)(a).

EVIDENTIARY RULINGS

OWRD submitted Exhibits A1 through A6. OWRD withdrew Exhibits A3 through A5. Exhibits A1, A2, and A6 were admitted into the record without objection.

Applicant submitted Exhibits R1 through R11. Applicant never offered Exhibits R5 through R10. Exhibits R1 through R4 were admitted into the record without objection.¹³ Protestant raised a relevancy objection to Exhibit R11. The ALJ overruled the objection and admitted Exhibit R11 into the record.

Protestant submitted Exhibits P1 through P52. Protestant withdrew Exhibit P11. Protestant did not offer Exhibits P19, P32, P36, P41, P45, P46, and P52. Protestant offered page

¹² Protestant withdrew its claims that formed the bases of Issues D through F. Therefore, those issues were no longer subjects of these contested case proceedings.

¹³ Protestant initially raised foundation objections to Exhibits R1 and R2 but withdrew the objections after Applicant presented foundational evidence.

8 of Exhibit P47 that was admitted without objection. Exhibits P6, P29, P31, P33, P34, P35, P40, P42, and P43 were admitted into the record without objection.

Applicant raised relevancy objections to Exhibits P1, P2, P4, P5, and P25. The ALJ overruled the objections and admitted the exhibits into the record.

OWRD raised a duplicative objection to Exhibit P3. The ALJ overruled the objection and admitted Exhibit P3 into the record.

Applicant and OWRD raised relevancy objections to Exhibits P7, P9, P10, P12, P13, P14, P15, P17, P18, P21, P22, P23, P24, P26, P27, P28, P37, P38, P49, P50, and P51. The ALJ overruled the objections and admitted the exhibits into the record.

FINDINGS OF FACT

1. On December 10, 2008, Applicant filed Articles of Organization with the Oregon Secretary of State. (Ex. R4 at 22.)

2. On December 22, 2008, a Special Warranty Deed was recorded in Wheeler County, Oregon, for the conveyance of real property located in Sections (Sec./Sects.) 24, 25, and 36 in Township (T) 10 South (S), Range (R) 20 East (E) of the Willamette Meridian (WM) and in Sects. 30 and 31 in T10S, R21E, WM (collectively, the Property) to Applicant. (Ex. A1 at 78-80.) The Property is located in Wheeler County, Oregon. Bridge Creek, a tributary of the John Day River,¹⁴ runs through and adjacent to the Property. Applicant engages in ranch operations and other agriculture uses on the Property. (Exs. A1 at 12; R2 at 1; R4 at 3-4.)

3. Applicant holds Certificates of Water Right (Certificates) 13593 and 96311 that divert water from Bridge Creek. The priority date of both Certificates is 1868. (Ex. A1 at 67-68.) The portion of Certificate 13593 to be transferred under Application T-14158 provides water for irrigation and domestic purposes for approximately 147.1 acres of the Property.¹⁵ (*Id.* at 23, 24, 136-137.) The portion of Certificate 96311 to be transferred under Application T-14158 provides water for irrigation and domestic purposes on approximately 43.3 acres of the Property.¹⁶ (*Id.* at 25, 138.) As described in Certificates 13593 and 96311, the duty limit for diverted water shall not exceed 1/40th of one cubic feet per second (cfs) per acre before June 15

¹⁴ Pursuant to the John Day River Decree, OWRD does not regulate the tributaries for any calls on the John Day River. (Test. of Thiemann.)

¹⁵ The portion of Certificate 13593 to be transferred under Application T-14158 provides a rate of water use of 3.68 cfs before June 15 and 1.84 cfs after June 15 from Bridge Creek in Sec. 6, T11S, R21E, WM for irrigation and domestic use in Sects. 24, 25, and 36, T10S, R20E, WM and Sects. 30 and 31, T10S, R21E, WM. (Ex. A1 at 41, 137-138.)

¹⁶ The portion of Certificate 96311 to be transferred under Application T-14158 provides a rate of water use of 1.08 cfs before June 15 and 0.54 cfs after June 15 from Bridge Creek in Sects. 6 and 9, T11S, R21E, WM for irrigation and domestic use in Sec. 21, T10S, R21E, WM. (Ex. A1 at 41, 138.)

and 1/80th of one cfs per acre after June 15 during the annual irrigation seasons of March 1 to October 1. (*Id.* at 67-68.)

4. Certificates 13593 and 96311 have a shared point of diversion (POD) as part of the water delivery system. The shared POD (BLM POD) is located in Sec. 6, T11S, R21E, WM on land owned by the Department of Interior, Bureau of Land Management (BLM).¹⁷ (Ex. A1 at 105, 110, 113, 118, 137-138; R2 at 1; test. of Thiemann.) In addition to serving as Applicant's historical POD for these certificates,¹⁸ the BLM POD also serves eight acres of BLM land. (Test. of Pati.)

5. The irrigation season for Applicant's Property is approximately April 15 to October 1. (Test. of G. Tolton.) The amount of water diverted by Applicant at the BLM POD varies depending upon seasonal conditions with the wetness of the spring as the biggest factor. (Test. of G. Tolton.)

6. In April 2015, the BLM, in accordance with the Federal Land Policy and Management Act and the National Environmental Policy Act, published a Record of Decision that approved a Resource Management Plan for the John Day Basin (JDBRMP).¹⁹ (Ex. P12 at 3, 8.) BLM's Management Actions included the requirement of rights-of-way (ROWs) to convey surface water across BLM land. For Bridge Creek, the JDBRMP required the cessation of water withdrawals from stream channels when stream flows drop below 10 cfs for the purposes of fish protection, recreation, and pollution abatement. (*Id.* at 10.) The JDBRMP further required any ROWs issued by BLM to include the 10 cfs limitation for water diversions from Bridge Creek. (Test. of Roberts.)

7. Prior to 2020, BLM's field manager sent annual letters to Applicant, reminding Applicant to cease diverting water from Bridge Creek for BLM-leased agricultural fields when Bridge Creek stream flows dropped below 10 cfs. The annual letters did not request that Applicant cease diverting water from Bridge Creek for use on the Property. (Ex. R11 at 1-7.) Prior to 2020 and in compliance with the annual letters, Applicant ceased diverting water for the BLM fields when Bridge Creek stream flows dropped below 10 cfs. Applicant continued to divert water at the BLM POD as needed for the Property even when Bridge Creek stream flows dropped below 10 cfs. (Test. of Pati and G. Tolton.)

8. In 2019, discussions occurred between Applicant and BLM about Applicant's use of the PODs on BLM lands. The discussions included the need for a ROW from BLM for Applicant to access the BLM PODs and BLM's intent to prohibit all water diversions when Bridge Creek stream flows are less than 10 cfs. (Ex. R4 at 1.) BLM endorsed the idea that

¹⁷ Certificate 96311 has two additional PODs located in Sec. 9, T11S, R21E, WM. (Ex. A1 at 134.)

¹⁸ The BLM POD is also the historical POD for Applicant's Certificate 68553 that is the subject of the related transfer application in 2024-OWRD-00165. (Test. of Pati.)

¹⁹ The JDBRMP addressed the management of approximately 456,600 acres of public land in eight counties in central Oregon. (Ex. P12 at 3.)

Applicant use a POD on the Property and cease using the BLM POD. If Applicant secured another POD, BLM intended to decommission the BLM POD and convert BLM's water right to instream use. (Test. of Pati.)

9. By letter dated January 27, 2020, Applicant filed a ROW application with BLM to obtain access to the BLM POD. In the letter, Applicant objected to the application of BLM's 10 cfs limitation to the Applicant's Property, asserting that such limitation only applied to the BLM lands that received water from the BLM POD.²⁰ (Ex. R4 at 1.)

10. On July 18, 2020, BLM contacted Applicant about ceasing water diversion from the BLM POD because Bridge Creek stream flows had dropped below 10 cfs. (Ex. P17 at 1.)

11. In May 2021, BLM issued a Trespass Notice to Applicant for Applicant's use of the BLM POD, instructing Applicant to cease all activities associated with the BLM POD unless BLM issues a ROW.²¹ (Ex. P23 at 1-2.) BLM was aware that restrictions on Applicant's use of the BLM POD would negatively impact their agricultural operations. BLM continued to insist that any use of the BLM POD would include the requirement to cease all water withdrawals when Bridge Creek stream flows dropped below 10 cfs for the benefit of steelhead²² and other sensitive species. (Ex. P22 at 1-2.)

12. In September 2021, Applicant and BLM signed a Right-of-Way Grant/Temporary Use Permit (BLM ROW). The BLM ROW, issued pursuant to 43 USC 1761, granted Applicant the right to operate the BLM POD. The BLM ROW was effective September 29, 2021, and would terminate on December 31, 2024. Paragraph 2(d) of the BLM ROW provided that the BLM ROW was not subject to renewal.²³ (Ex. R3 at 1-4.) Paragraph 4.25 of Exhibit A of the BLM ROW provided "No water may be diverted when the stream flow drops below 10 cfs in Bridge Creek, as measured at the Bridge Creek gauge station near the mouth of Bridge Creek."²⁴ (*Id.* at 10.) BLM would not issue the BLM ROW without this limitation and would not provide any exceptions to the limitation. (Exs. P26 at 1; P27 at 1; test. of Roberts.)

²⁰ The application was also to obtain access to one of the additional PODs for Certificate 96311. (Ex. R4 at 3.)

²¹ BLM had not yet processed Applicant's application for a ROW because of Applicant's nonpayment of the processing fee. (Ex. P23 at 1.)

²² Mid-Columbia River steelhead are a threatened species listed in the Endangered Species Act. (Ex. P22 at 1.)

²³ There is a longer and more costly process that can result in the BLM issuing a long-term ROW. As the goal was for Applicant to add a POD located on the Property and cease using the BLM POD, BLM determined the temporary ROW best suited Applicant's needs. (Test. of Roberts.)

²⁴ On October 6, 2021, BLM closed the Trespass Notice matter with no further action because Applicant had obtained the BLM ROW. (Ex. P23 at 2-3.)

13. In compliance with the BLM ROW, Applicant ceased diverting water from the BLM POD for various periods when Bridge Creek stream flows had dropped below 10 cfs during the years following the entry of the BLM ROW.²⁵ (Exs. P37 at 1; P47 at 8; test. of Pati, J. Tolton, and G. Tolton.) Applicant supplemented the loss of water diversion from the BLM ROW with water stored at the Painted Hills Reservoir. (Test. of Pati, Williams, J. Tolton, and G. Tolton.)

14. On January 24, 2023, Applicant filed a transfer application for Certificates 13593 and 96311 with OWRD, seeking to add a POD (New POD) located on Applicant's Property to its water delivery system. (Exs. A1 at 98-134; R2 at 1.) After approval of the transfer, a portion of the infrastructure for the BLM POD will be removed, leaving a diversion structure with a fish screen; water diversions will continue for irrigation until revegetation is established; after revegetation, BLM intends to lease the water right for its eight acres for instream use. (Ex. A1 at 135-136.) Applicant intends to divert water, as needed, from Bridge Creek at the New POD per the terms of the certificated water rights even when stream flows drop below 10 cfs. (Test. of Pati.)

15. The New POD is located in Sec. 31, T10S, R21E, WM, approximately 1,110 feet downstream of the BLM POD. (Exs. A1 at 133; R2 at 1; A2 at 110; test. of Williams and Thiemann.) There are no natural water bodies or drainages that join Bridge Creek between the New POD and the BLM POD. There are no PODs between the New POD and the BLM POD. (Ex. R2 at 1; test. of G. Tolton, Thiemann, and Williams.) The New POD's water diversion capacity is equivalent to the water diversion capacity of the BLM POD that has the capacity for Applicant to maximize the certificated water rights. There are no discernable differences between the Bridge Creek stream flows at the BLM POD and the New POD. (Test. of Williams and G. Tolton.)

16. On April 21, 2023, OWRD's regional watermaster concluded that the transfer application would not cause injury to other water rights because the change in PODs would not cause additional regulation of the downstream water rights junior to Applicant's water rights. The watermaster sought Applicant's voluntary cancellation of acres not associated with the transfer of Certificate 13593 to prevent enlargement of the water right. The watermaster further recommended the installation of a totalizing flow meter at the associated PODs. The totalizing flow meters would verify that Applicant diverted water at the rate provided by the original certificated water right. (Ex. P33 at 3-4; test. of Thiemann.) Because OWRD lacks authority to and does not regulate water use based on third-party agreements like the BLM ROW, the watermaster considered the BLM ROW irrelevant to the issues of injury and enlargement and did not consider the 10 cfs limitation in his injury and enlargement analysis. (Test. of Thiemann.)

17. On June 26, 2023, Applicant filed with OWRD a partial voluntary cancellation of water right for Certificate 13593, cancelling the use of water from Certificate 13593 to

²⁵ BLM notified Applicant when to cease Bridge Creek water diversions as OWRD does not regulate for the BLM ROW. (Test. of G. Tolton and Thiemann.)

approximately 12 acres (in five separate parcels) that were serviced by the BLM POD.²⁶ (Ex. A1 at 71-77.) Applicant filed the partial cancellation to prevent a potential enlargement of the water right as recommended by OWRD's regional watermaster. (Test. of Thiemann and Pati.) Because Applicant will no longer divert water for the cancelled 12 acres and for the 8 BLM acres, Applicant's overall water usage will be less at the New POD than the BLM POD. (Test. of Williams.)

18. On January 19, 2024, OWRD issued PD T-14158, proposing to approve the addition of the New POD with the same rate of use and duty limit as originally provided by the Certificates and a restriction that the quantity of diverted water shall not exceed the quantity of water lawfully available at the original POD(s) (the BLM POD for Certificate 13593 and the BLM POD for Certificate 96311 plus the two additional PODs). PD T-14158 requires the installation of a totalizing flow meter at all PODs and the installation of a fish screen at the New POD. PD T- 14158 further requires the full beneficial use of water to occur by October 1, 2028.²⁷ (Ex. A1 at 135-144.)

19. In PD T-14158, when referring to the transfer for Certificate 13593, OWRD describes the BLM POD's location as T10S, instead of T11S.²⁸ (Ex. A1 at 137.)

20. PD T-14158 includes conditions for Certificates 13593 and 96311 that limit the quantity of water diverted at the New POD together with any water diverted at the original POD(s) (the BLM POD plus, in the case of Certificate 96311, water diverted at the two additional PODs) "shall not exceed the quantity of water lawfully available at the original" POD(s). (Ex. A1 at 140.) Such a condition is a standard provision of OWRD's approval of transfer applications to prevent enlargement of the water right at issue and prevent injury to other existing water rights. The condition prevents any future collective water diversions from exceeding the water diversions available under the original water right. (Test. of Jaramillo.)

21. On February 15, 2024, Protestant filed a protest, seeking the denial of the transfer application or the inclusion of a condition equivalent to the limitation imposed by the BLM ROW. (Ex. A1 at 149-155.)

22. There is only one person who holds a certificated water right to Bridge Creek waters that is senior to Certificates 13593 and 96311. The senior water right holder, who holds lands near the mouth of Bridge Creek, has made calls for the water right that required Applicant to

²⁶ Upon discontinuance of Applicant's use of the BLM POD, there will no longer be a POD to serve these 12 acres. (Ex. A1 at 85.)

²⁷ On December 12, 2023, Applicant suggested the October 1, 2028 date rather than OWRD's originally proposed October 1, 2025 date in anticipation of delays in the issuance of the Final Order. (Ex. A1 at 93.)

²⁸ In the body of the transfer application, a typographical error identified the BLM POD for Certificate 13593 as located in T10S, instead of T11S. (Ex. A1 at 105; test. of Williams.)

cease water diversions at the BLM POD in response to the calls.²⁹ These calls are made when Bridge Creek stream flows drop to 2 cfs. Applicant has never made a call for Certificates 13593 and 96311. (Test. of G. Tolton and Thiemann.)

23. A Certificate of Water Right (Certificate 13575) was recorded on July 1, 1941, granting John Manning the right to divert Bridge Creek waters for irrigation with a priority date of 1882. (Ex. P1 at 1.) A Certificate of Water Right (Certificate 13592) was recorded on July 1, 1941, granting Ben Taylor the right to divert Bridge Creek waters for irrigation and domestic use with a priority date of 1868.³⁰ (Ex. P2 at 1.) A Certificate of Water Right (Certificate 66609) was recorded on August 12, 1991, granting instream water rights for the John Day River to support aquatic life and minimize pollution with a priority date of May 24, 1962. (Ex. P5 at 1.) A Certificate of Water Right (Certificate 68553) was recorded on August 14, 1995, granting William Smith Properties, Inc., the right to divert Bridge Creek and Bear Creek waters for storage with a priority date of October 17, 1983. (Ex. P6 at 1.) A Certificate of Water Right (Certificate 75800) was recorded on September 21, 1998, granting S. J. Connolly the right to divert Bridge Creek waters for irrigation with a priority date of 1882. (Ex. P7 at 1.)

24. On April 15, 2008, OWRD published a Technical Operations Manual (Manual) that includes OWRD's policies and practices, such as Section 11.01 titled "Water Right Transfer Reviews." (Ex. A6 at 1; test. of Jaramillo.) Regarding injury to water rights caused by a transfer, the Manual provides, in part:

Water rights that are junior to a transferred right generally are the rights that are most susceptible to being injured by a transfer. * * *.

The concept of "maximization" of the existing right is fundamental to injury evaluations. Many water rights are not used as efficiently or intensively as possible. * * *. When evaluating a transfer, the Department evaluates the proposed changes to determine whether the impacts of the change are greater than could reasonably occur as a result of more efficient or intensive use of the right. Injury results only if the impacts on other water rights resulting from the transfer are greater than the impacts that would result from efficient and intensive use under the existing right.

(Ex. A6 at 2.)

25. Regarding enlargement of a water right, the Manual provides, in part:

Water law does not allow the enlargement of a water right. A water right may only be exercised at the authorized place of use for the specific use described in

²⁹ These calls rarely affect Applicant as regulation begins with the most junior waters being shut off by priority dates until the senior water right holder is satisfied. (Test. of Thiemann.)

³⁰ On July 31, 2006, Certificate 13592 was cancelled as part of the grant of a transfer application. (Ex. P10 at 1-4.)

the right. In addition, the use of water under a right is limited to the amount needed to satisfy the beneficial purpose for which the right was issued. Prior to adoption of the Division 380 rules, enlargement was considered as an element of injury. To clarify that a water right cannot be enlarged regardless of whether another right would be injured, the Division 380 rules establish injury and enlargement as two separate criteria used in reviewing transfer applications.

For example, the enlargement of a water right calling on the Columbia River likely would not injure other water rights. However, the Department would not approve the transfer of the right if doing so would allow enlargement of the right.

(Ex. A6 at 8.) OWRD considers any expansion of water use attributes from the certificated water right, such as the number of acres receiving water or amount of diverted water, to be an enlargement of the water right. (Test. of Jaramillo.)

26. OWRD defines “lawfully available” to refer “solely to water that may be legally diverted pursuant to OWRD’s statutes and rules. It does not refer to private conveyance agreements that may or may not be entered into between owners of the land on which diversion works are located and water right holders.” (Ex. P49 at 7.) In transfer applications, OWRD evaluates the water right at issue as defined by the certificate. The amount of water lawfully available after a POD transfer would be the amount of water an applicant would be legally entitled to divert at the originally authorized POD per the terms of the certificated right. (Test. of Jaramillo.)

Bridge Creek Stream Flows

27. Water temperatures decrease with higher stream flows. Water temperatures regularly exceed 25°C when stream flows are lower than 10 cfs. Juvenile steelhead cannot survive in water temperatures higher than 25°C. (Ex. P21 at 1.)

28. A Bridge Creek survey conducted in June 1992 showed a stream flow of 9.7 cfs. A Bridge Creek survey in August 1996 showed a stream flow of 9.5 cfs. (P9 at 1.)

29. In August 2005, a BLM hydrologist observed Bridge Creek stream flows dropping below 10 cfs “about the first week of July and stay below 8 cfs the rest of the summer, probably dipping below 5 during the first week of August.” (Ex. P9 at 1.)

30. For the period of June through August of the years 2006 through 2019, Bridge Creek gauge readings showed stream flows from just above 1 cfs to 200 cfs with a significant cluster of readings around 10 cfs and a second smaller significant cluster of readings around 3 cfs. (Ex. P13 at 1.)

31. In June 2021, Bridge Creek stream flows were at 4 cfs. (Ex. P26 at 1.)

32. The Bridge Creek stream flow was 3.39 cfs on August 5, 2022. (Ex. P38 at 1-2.)

33. On August 8, 2023, BLM noted that Bridge Creek stayed above 10 cfs during the hottest part of the 2023 summer. The stream flow on August 5, 2023, was 10.7 cfs. (Ex. P38 at 1-2.)

34. In the last 13 years, Bridge Creek stream flows typically dip below 10 cfs every summer. (Test. of Thiemann.)

CONCLUSIONS OF LAW

Issue A. Approval of the transfer would not enlarge the subject water right.

Issue B. Approval of the transfer would not injure other existing water rights.

Issue C. OWRD did not exceed its statutory authority by approving an additional point of diversion (as opposed to approval of a change from one point of diversion to another point of diversion).

OPINION

Burden and Standard of Proof

“[A]ssignment of the burden of proof is a way to declare which party loses if the evidence on an issue appears to be equally balanced or if the factfinder cannot say upon which side the evidence weighs more heavily.” *Marvin Wood Products v. Callow*, 171 Or App 175, 179 (2000). “[F]ailure to produce evidence at all, or the failure of the evidence to persuade the factfinder, will be fatal to the party with the burden of proof.” *Id.* at 180.

Under ORS 183.450(2), the burden of proof in contested cases “falls on ‘the proponent of a fact or position, the party who would be unsuccessful if no evidence were introduced on either side.’” *McDowell v. Employment Department*, 348 Or 605, 610 n.2 (2010) (quoting *Harris v. SAIF*, 292 Or 683, 690 (1982)); ORS 183.450(2) (“The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position.”). In contested cases involving water right transfer applications, OWRD cannot approve the application unless the record includes sufficient evidence for OWRD to make certain findings, including that the transfer will not result in injury or enlargement. *See* ORS 540.530(1); OAR 690-380-5000(1). As such, the applicant will be unsuccessful if no evidence is introduced, and the applicant bears the burden of proof. However, where there is sufficient evidence in the record to make a *prima facie* case that the criteria for approval have been met, a party asserting that the criteria have not been met bears the burden of producing evidence to support its position. *See Benz v. Water Resources Com’n*, 94 Or App 73, 78 (1988).

The standard of proof in contested cases is the preponderance of the evidence. ORS 183.450(5); *Gallant v. Board of Medical Examiners*, 159 Or App 175, 183 (1999) (finding that in enacting ORS

183.450(5) the legislature intended to prescribe a standard of proof that corresponded to the preponderance of the evidence standard); *Dixon v. Board of Nursing*, 291 Or App 207, 213 (2018) (in administrative actions, the standard of proof that generally applies in agency proceedings is the preponderance standard). Proof by a preponderance of the evidence means the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

Applicable Law for Water Right Transfers

Via the enactment of the Water Rights Act in 1909 (Or Laws 1909, ch 216), the doctrine of prior appropriation became the prevailing water law of Oregon.³¹ *Fort Vannoy Irr. Dist. v. Water Resources Com'n*, 345 Or 56, 64 (2008). This means that, in times of low stream flows, the water right holder with the oldest priority date can demand the water specified in their water right without regard for the needs of junior users. If there is a surplus beyond what is necessary to fulfill the senior right, the water right holder with the next senior priority date can take what is available to satisfy their needs under their water right. This continues down the line until there is no surplus or until all rights are satisfied. See *Klamath Irrigation Dist. v. U.S.*, 348 Or 15, 23-24 (2010); see also *In re Sucker Creek*, 83 Or 228, 235 (1917).

Prior to 1909, the priority date was based upon the date of an appropriator's public notice of their intent to appropriate water so long as diversion and beneficial use of the diverted water occurred in a reasonable time. *Klamath Irrigation*, 348 Or at 24. With the passage of the Water Rights Act in 1909, subject to prior rights existing at the time of passage of the Act, waters of the state may be appropriated for beneficial use under a permit issued by OWRD with the date of the application for the permit designated the priority date of the right. See ORS 537.120 and ORS 537.130.

ORS 537.120 provides:

Subject to existing rights, and except as otherwise provided in ORS chapter 538, all waters within the state may be appropriated for beneficial use, as provided in the Water Rights Act and not otherwise; but nothing contained in the Water Rights Act shall be so construed as to take away or impair the vested right of any person to any water or to the use of any water.

ORS 537.130 provides, in part:

(1) Except for a use exempted under ORS 537.040, 537.141, 537.142, 537.143 or 537.800 or under the registration system set forth in ORS 537.132, any person intending to acquire the right to the beneficial use of any of the surface waters of this state shall, before beginning construction, enlargement or extension of any ditch, canal or other distributing or controlling works, or performing any work in connection with the construction, or proposed appropriation, make an application to the Water Resources Department for a

³¹ The riparian and appropriation doctrines were once both recognized in Oregon. Riparian rights are based on a party's ownership of land adjacent to a water source and feature equality, with the right of each appropriator correlated with the rights of other appropriators. *Fort Vannoy*, 345 Or at 64; *In re Sucker Creek*, 83 Or 228, 235 (1917).

permit to make the appropriation.

- (2) Except for a use exempted under ORS 537.040, 537.141, 537.142, 537.143 or 537.800 or under the registration system set forth in ORS 537.132, a person may not use, store or divert any waters until after the department issues a permit to appropriate the waters[.]

ORS 540.510(1) provides, in part:

(a) Except as provided in subsections (2) to (8) of this section, all water used in this state for any purpose shall remain appurtenant to the premises upon which it is used and no change in use or place of use of any water for any purpose may be made without compliance with the provisions of ORS 540.520 and 540.530. However, the holder of any water use subject to transfer may, upon compliance with the provisions of ORS 540.520 and 540.530, change the use and place of use, the point of diversion or the use of the water without losing priority of the right.[.]

ORS 540.520 provides, in part:

(1)(a) Except when the application is made under ORS 541.327 or when an application for a temporary transfer is made under ORS 540.523, if the holder of a water use subject to transfer for irrigation, domestic use, manufacturing purposes, or other use, for any reason desires to change the place of use, the point of diversion, or the use made of the water, an application to make such change, as the case may be, shall be filed with the Water Resources Department.

* * * * *

(4) If the application is to change the point of diversion, the transfer shall include a condition that the holder of the water right provide a proper fish screen at the new point of diversion, if requested by the State Department of Fish and Wildlife.

* * * * *

(7) If a timely protest is filed, or in the opinion of the Water Resources Director a hearing is necessary to determine whether the proposed changes as described by the application would result in injury to existing water rights, the department shall hold a hearing on the matter[.]

ORS 540.505(4)³² provides:

“Water use subject to transfer” means a water use established by:

³² OWRD’s operative rule, OAR 690-380-0100(14), provides the same definition for “water use subject to transfer” as ORS 540.505(4).

- (a) An adjudication under ORS chapter 539 as evidenced by a court decree;
- (b) A water right certificate;
- (c) A water use permit for which a request for issuance of a water right certificate under ORS 537.250 has been received and approved by the Water Resources Commission under ORS 537.250; or
- (d) A transfer application for which an order approving the change has been issued under ORS 540.530 and for which proper proof of completion of the change has been filed with the Water Resources Commission.

ORS 540.530 provides, in part:

(1)(a) If, after hearing or examination, the Water Resources Commission finds that a proposed change can be effected without injury to existing water rights, the commission shall make an order approving the transfer and fixing a time limit within which the approved changes may be completed.

* * * * *

(2)(a) If a certificate covering the water right has been previously issued, the commission shall cancel the previous certificate or, if for an irrigation district, the commission may modify the previous certificate and, when proper proof of completion of the authorized changes has been filed with the commission, issue a new certificate or, if for an irrigation district, modify the previous certificate, preserving the previously established priority of rights and covering the authorized changes. If only a portion of the water right covered by the previous certificate is affected by the changes, a separate new certificate may be issued to cover the unaffected portion of the water right[.]

OAR 690-380-2110 provides, in part:

- (1) No change in point of diversion³³ or appropriation may be made except as described under OAR 690-380-0010 or as approved or recognized by the Department through a water right transfer, permit amendment under ORS 537.211, or certificate of registration modification under OAR chapter 690, division 382.
- (2) Except as provided in ORS 540.531 and OAR 690-380-2130, a change in point of diversion is restricted to the same source of surface water. A change in

³³ OAR 690-380-0100(7) provides:

“Point of diversion” means the place at which surface water is diverted from a surface water source as specified in the water right. It may be the head of a ditch, a pump suction line, the center line of a dam, or other point at which control is taken of surface water.

point of appropriation under a water right or certificate of registration modification is restricted to the same aquifer[.]

OAR 690-380-4010(2) provides:

The Department's preliminary determination shall include an assessment of whether:

- (a) The right has been used over the past five years according to the terms and conditions of the right and that the right is not subject to forfeiture under ORS 540.610;
- (b) The water user is ready, willing and able to use the full amount of water allowed under the right;
- (c) The proposed transfer would result in enlargement;
- (d) The proposed transfer would result in injury; and
- (e) Any other requirements for water right transfers are met.

OAR 690-380-0100 defines relevant terms for OAR 690-380-4010(2) and provides, in part:

(2) "Enlargement" means an expansion of a water right and includes, but is not limited to:

- (a) Using a greater rate or duty of water per acre than currently allowed under a right;
- (b) Increasing the acreage irrigated under a right;
- (c) Failing to keep the original place of use from receiving water from the same source; or
- (d) Diverting more water at the new point of diversion or appropriation than is legally available to that right at the original point of diversion or appropriation.

(3) "Injury" or "Injury to an existing water right" means a proposed transfer would result in another, existing water right not receiving previously available water to which it is legally entitled[.]

OAR 690-380-5000 provides:

(1) A transfer application shall be approved if the Department determines that:

(a) The water right affected by the proposed transfer is a water use subject to transfer as defined in ORS 540.505(4) and OAR 690-380-0100(14) * * *;

* * * * *

(c) The proposed transfer would not result in enlargement as defined in OAR 690-380-0100(2);

(d) Except as provided in OAR 690-380-5030, the proposed transfer would not result in injury as defined in 690-380-0100(3); and

(e) Any other requirements for water right transfers are met.

Issue A – Enlargement of a Water Right

As a condition of approval of Applicant's transfer application, the change in the POD cannot result in the enlargement of the existing water rights. OAR 690-380-5000(1)(c).

Protestant asserts that the water rights would be enlarged in two ways: (1) the New POD would not include the 10 cfs limitation contained in the BLM ROW; and (2) the Certificates would include a larger number of PODs than currently authorized.

ORS 540.530(1)(a) requires OWRD to approve the transfer of a water right if the proposed change can be effected without injury to existing water rights. OWRD administrative rules reiterate that requirement and add a requirement that the proposed transfer not result in enlargement of the water right. OAR 690-380-5000(1)(c) and (d). Originally, enlargement was considered an element of injury. In response to circumstances in which a water right could be enlarged and yet not cause injury, OWRD established injury and enlargement as two separate criteria used in evaluating transfer applications. OAR 690-380-4010(2). OWRD defined enlargement in OAR 690-380-0100(2) to include, as pertinent in this matter:

(d) Diverting more water at the new point of diversion or appropriation than is *legally available* to that right at the original point of diversion or appropriation.

Emphasis added. Protestant argues that, because of the 10 cfs limitation in the BLM ROW is required by the JDBRMP (developed pursuant to federal law), no water is legally available to Applicant at the original POD (BLM POD) when Bridge Creek stream flows drop below 10 cfs and, therefore, that same limitation should apply to Applicant's prospective water diversions from the New POD.

In PD T-14158, OWRD restricted Applicant's water diversion at the New POD for both certificates to water diversions that "shall not exceed the quantity of water lawfully available at the original" POD(s). Exhibit A1 at 140. However, OWRD's use of the term legally/lawfully available does not include any restrictions created by third-party agreements, such as the BLM ROW. OWRD evaluates the water right certificate to determine the amount of water lawfully available to an applicant under Oregon law. Specifically, OWRD finds the amount of water lawfully available after a POD transfer to be the amount of water an applicant would be legally entitled to appropriate or divert by Oregon law at the originally authorized POD per the terms of the certificated right. As stated in the Manual, to prevent enlargement, the diverted water may only be exercised at the authorized place of

use and in the amount needed to satisfy the beneficial use as described in the certificated water right. Exhibit A6 at 8. In this matter, the Certificates do not include a 10 cfs limitation.

The Oregon Supreme Court has held that where “the agency’s plausible interpretation of its own rule cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule’s context, or with any other source of law, there is no basis * * * [to] assert that the rule has been interpreted ‘erroneously.’” See *Don’t Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142 (1994). Protestant argued that OWRD’s interpretation of OAR 690-380-0100(2)(d) is implausible. The ALJ disagrees and further finds compelling Applicant’s argument that OWRD properly rejects consideration of third-party agreements when evaluating a water transfer application.

As noted above, the Water Rights Act made the doctrine of prior appropriation the prevailing water law of Oregon. That doctrine encourages the full use of vested water rights based upon the seniority of the existing water rights. ORS 537.120 provides that nothing in the Water Rights Act³⁴ is “to take away or impair the vested right of any person to any water or to the use of any water.” This same statute authorizes OWRD to review the appropriation of water for beneficial use as provided in the Water Rights Act, “and not otherwise.” ORS 537.120. Additionally, the water right certificate defines the terms (priority and extent) of the appropriation. ORS 537.270 (A water right certificate “shall be conclusive evidence of the priority and extent of the appropriation therein described.”) Finally, ORS 540.045(1)(a) provides that OWRD shall “regulate the distribution of water among the various users of water from any natural surface or ground water supply in accordance with the water users’ existing water rights of record in the Water Resources Department. Thus, OWRD’s interpretation to restrict the review of “legally available” to OWRD’s statutes and rules and the terms of the certificated water right at issue, without regard to any third-party agreements or federal law, is plausible within the context of this statutory scheme, which provides that water is to be distributed based on water rights of record and that a water right certificate is conclusive evidence of the extent of the water right the certificate describes.³⁵

As Applicant further notes, the statutes concerning the transfer of a state water right certificate provide for OWRD’s review of the transfer application under various state laws, such as ORS 540.505(4), 540.510, 540.520, and ORS 540.530. These statutes do not provide for OWRD’s transfer

³⁴ Under ORS 537.010, “Water Rights Act” as used in ORS chapter 537, “means and embraces ORS 536.050, 537.120, 537.130, 537.140 to 537.252, 537.390 to 537.400, 538.420, 540.010 to 540.120, 540.210 to 540.230, 540.310 to 540.430, 540.443 to 540.491, 540.505 to 540.585 and 540.710 to 540.750.” As such, “Water Rights Act,” as used in ORS chapter 537, includes the portions of ORS chapter 540 governing water right transfers (ORS 540.505 to 540.585).

³⁵ Protestant argues, based on ORS 537.140(1)(a)(E), 537.139(1), 164.245(1) and 164.205(3) that “legally available,” as used in OAR 690-380-0100(2)(d), must include restrictions imposed by third-party agreements granting authorization to use non-owned land. ORS 537.140(1)(a)(E) requires applications for permits to appropriate surface water to include “[a] statement declaring whether the applicant has written authorization or an easement permitting access to non-owned land crossed by the ditch, canal or other work.” ORS 537.139(1) provides that, where the acquisition of ownership of or authorization to use non-owned land is required for issuance of a permit to appropriate water, failure to obtain such ownership or authorization is grounds for refusal to issue the permit. ORS 164.245(1) and 164.205(3) concern criminal trespass. None of these statutes provide that the amount of water available under an Oregon water right is defined by third-party agreements concerning land use or contradict the general thrust of the statutory scheme that: (1) water should be distributed based on water rights of record; and (2) the extent of a certificated water right is defined by the water right certificate.

application review to include consideration of federal law, federal resource management plans, or third-party agreements. In sum, a review of the text of the rule within the rule's context supports OWRD's interpretation. Therefore, the addition of the New POD that is not subject to the 10 cfs limitation contained in the BLM ROW to the water delivery system for Certificates 13593 and 96311 is not an enlargement of the water right. The Applicant will simply renew using the full amount of its certificated water right, as it did prior to the entry of the BLM ROW.

Protestant also asserts that the addition of the New POD is an enlargement of the certificated water rights. Essentially, Protestant argues that the numerical increase in the number of the available PODs from one POD to two PODs (Certificate 13593) and from three PODs to four PODs (Certificate 96311) is an enlargement. Although there is a numerical increase in the PODs from which Applicant is authorized to divert water, the priority, source, place of use, type of use, and extent of the water right remains unchanged by the increase in PODs. These items (priority, source, place of use, type of use, and extent) are attributes that go to the heart of a water right – the beneficial use of water. The POD is merely part of the water delivery system and not part of the beneficial use of the water. *See Russell-Smith v. Water Resources Dept.*, 152 Or App 88, 96-99 (1998). PD T-14158 contains the limitation that the Applicant cannot divert more water from the available PODs than it could divert from the original POD(s). That limitation prevents any enlargement from the change in the water delivery system sought in Applicant's transfer application. Items such as the source of the water, the acres receiving the water, the type of use and the rate and duty remain unchanged.

Finally, protestant argues that even if approval of the proposed transfer will not result in Applicant diverting more water at the New POD than is legally available at the existing points of diversion, approving the transfer without including the 10 cfs limitation will cause "an expansion" of the subject water rights and result in enlargement under OAR 690-380-0100(2). The proposed transfer will not result in any of the other types of "expansion" listed in OAR 690-380-0100(2). It will not allow the use of a greater rate or duty of water per acre than currently allowed, increase the acreage irrigated, or change the place of use. Nor will it allow for any other type of expansion of the *terms of the water right*. It will not change the type of use or priority date, and the right will remain subject to the additional limit that water use may not exceed the amount of water needed to satisfy the beneficial uses described in the certificates. The proposed transfer will not result in enlargement as defined in OAR 690-380-0100(2).

In sum, the preponderance of the evidence shows that the approval of the New POD and cancellation of certain acres as noted in PD T-14158 will not cause enlargement.

Issue B – Injury to Water Rights

Certificate 59780 is an instream water right with a priority date of November 3, 1983, that Protestant specifically identified in its Protest as a water right that would be injured by the proposed change in POD. In its Protest, Protestant suggested that "other existing water rights," without identifying any water right other than Certificate 59780, would be injured by the proposed change in POD. At hearing, Protestant submitted Certificates of junior water rights on the John Day River and Bridge Creek.

On January 15, 2025, the OAH issued a Ruling on Motion for Summary Determination, in which ALJ Fair granted Applicant's motion regarding Issue B and the junior water right contained in Certificate 59780. Because the Ruling resolved that issue, it is attached and incorporated into this

Proposed and Final Order. Based upon the findings in that Ruling, OWRD's approval of the transfer application would not injure the water right contained in Certificate 59780. The findings in that Ruling would also be applicable to any other junior water rights and are so adopted herein as attached.

Additionally, the ALJ is not persuaded of the existence of any injury to other water rights by the evidence developed at hearing. First, Protestant presented no evidence that any holder of an existing water right objected to the proposed change or asserted that their water right would be injured. Second, although Protestant presented copies of some Certificates, the statuses of those water rights are unknown. A copy of a Certificate does not establish that the certificated water right still exists. For example, Certificate 13592 was cancelled in 2006 as part of the grant of a transfer application. It also does not establish that the holder of the Certificate continues to use the water right. Essentially, the evidentiary record is silent on any recognizable injury to a junior water right holder.³⁶

The evidence established that there are active water rights junior to Applicant's water right as some of these rights have been shut off in response to the call by the holder of the only water right to Bridge Creek waters senior to Applicant. The evidence also established that, prior to the implementation of the 10 cfs limitation on Applicant's lands, Applicant never made a call for its own water rights. This evidence supports a finding that Applicant's resumption of its water rights without the 10 cfs limitation will not result on calls on junior water holders.

Protestant presented uncontroverted evidence that larger stream flows improve the health of Bridge Creek for steelhead and other sensitive species. Similarly, Protestant presented uncontroverted evidence that temperatures exceed safe levels for aquatic life when Bridge Creek stream flows drop below 10 cfs. However, this matter involves a transfer application, specifically the addition of the New POD, filed by Applicant. For purposes of a transfer application, OWRD must grant the transfer application when certain conditions are satisfied, such as no enlargement of the water right, water use is subject to transfer, and no injury to existing water rights. Protestant's environmental concerns are not a factor for OWRD's consideration when evaluating a transfer application.

In this matter, Applicant sought to add the New POD, located on the Property, to its current water delivery system. The New POD is located a short distance downstream from the BLM POD. There are no tributaries or drainage systems connecting to Bridge Creek between the BLM POD and the New POD. There are no other PODs between these PODs. The water diversion capacity at the New POD is equivalent to the BLM POD. Bridge Creek stream flows at the New POD are similar to the stream flows at the BLM POD. Ultimately, the requested change is as uneventful and innocuous a change as the ALJ can imagine.

In conclusion, there is no evidence in the record of any injury to existing water rights caused by the addition of the New POD to Certificates 13593 and 96311, and the preponderance of the evidence shows that the addition of the NEW POD will not cause injury to existing water rights.

Issue C – Approval of an Additional POD

On January 15, 2025, the OAH issued a Ruling on Motion for Summary Determination, in

³⁶ The ALJ rejects the assumption that injury to junior water right holders automatically occurs just because Applicant resumes diverting water, as needed, when Bridge Creek stream flows drop below 10 cfs as it did prior to 2020.

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which ALJ Fair granted Applicant's motion regarding Issue C. Because the Ruling resolved that issue, it is attached and incorporated into this Proposed and Final Order. Based upon the findings in that Ruling, approving an additional point of diversion (as opposed to approving a change from one point of diversion to another point of diversion) as proposed in PD T-14158 does not exceed OWRD's statutory authority.

CONSIDERATION OF EXCEPTIONS

The Director has considered Applicant's and Protestant's exceptions to the Proposed Order and Applicant's response to Protestant's exceptions. The Director's disposition of certain of the exceptions is discussed below. All exceptions not discussed below are denied.

The Director finds that to the extent any of the changes to the Proposed Order described in this section constitute changes to a finding of historical fact as "finding of historical fact" is defined in ORS 183.650(3) and OAR 137-003-0665(4), the changes are supported by clear and convincing evidence in the record. Additions to the text of the Proposed Order are shown in underline, and deletions are shown in ~~strikeout~~.

Exception 1: Applicant objects to the statement in the first sentence of Finding of Fact 15 that the New POD is "approximately 0.28 miles downstream from the BLM POD" and argues that Exhibit R2 at 1, Mr. William's testimony, and Exhibit A2 at 110 (the preliminary determination for transfer application T-14170) show that the New POD is actually approximately 1,110 feet downstream from the BLM POD.

Disposition: The exception is allowed. For the reasons stated in Applicant's exceptions, the Director agrees that the evidence shows that the New POD is approximately 1,110 feet downstream from the BLM POD. In addition to the evidence discussed in Applicant's exceptions, the scale on the map at Exhibit A1 at 133 and the testimony of Watermaster Kenneth Thiemann also show that the New POD is approximately 1,110 feet downstream from the BLM POD. The first sentence of Finding of Fact 15 is amended as follows:

The New POD is located in Sec. 31, T10S, R21E, WM, approximately 1,110 feet~~0.28-~~
~~miles~~ downstream of the BLM POD. (Exs. A1 at 133-134; R2 at 1; A2 at 110; test. of
Williams and Thiemann.)

Exception 2: Applicant objects to the final sentence of the Proposed Order's Finding of Fact 16, which reads "Because OWRD does not regulate for the BLM ROW, the lack of the 10 cfs limitation on Applicant's use of the New POD was not part of the watermaster's injury and enlargement analysis. (Test. of Thiemann.)" Applicant argues that the following statement more accurately summarizes Watermaster Kenneth Thiemann's testimony: "Because OWRD does not have the authority to consider third-party agreements like the BLM ROW when evaluating water transfer applications, the watermaster did not consider the 10 cfs limitation in his injury and enlargement analysis."

Disposition: The exception is denied. Finding of Fact 16 discusses Mr. Thiemann's testimony. While Mr. Thiemann's testimony is not inconsistent with the statement "OWRD does not have authority to consider third-party agreements like the BLM ROW when evaluating water transfer applications," Mr. Thiemann did not make such a statement in his testimony. Instead, as Finding of

Fact 16 notes, Mr. Thiemann emphasized that OWRD does not regulate for the BLM ROW. As such, Mr. Thiemann's testimony does not provide a basis for Applicant's requested change. However, to provide a more complete summary of Mr. Thiemann's testimony concerning the BLM ROW and his injury and enlargement analysis, the Director has amended the sentence to which Applicant objects as follows:

"Because OWRD ~~lacks authority to and~~ does not regulate ~~for water use based on third-party agreements like~~ the BLM ROW, ~~the lack of the 10 cfs limitation on Applicant's use of the New POD was not part of the watermaster's injury and enlargement analysis~~ the watermaster considered the BLM ROW irrelevant to the issues of injury and enlargement and did not consider the 10 cfs limitation in his injury and enlargement analysis. (Test. of Thiemann.)"

Exception 3: Applicant requests that the Director add ORS 540.520(1)(a), ORS 540.505(4), and ORS 537.270 to the Proposed Order's list of statutes that do not provide authority for OWRD to consider federal law, federal resource management plans, or third party agreements when evaluating the legal availability of water under a water right certificate.

Disposition: The exception is denied. The Proposed Order already references ORS 540.520 and 537.270 to support the proposition that the statutory scheme is consistent with OWRD's interpretation of "legally available," as used in OAR 690-380-0100(2)(d), to mean the amount of water available under OWRD's statutes and rules and the terms of the subject water right certificate, without regard to federal law, federal resource management plans, or third-party agreements. It is not necessary to add additional references to those statutes. However, the first sentence of the fourth-to-last paragraph of the Opinion section's enlargement analysis is amended as shown below to add a reference to ORS 540.505(4). That statute defines "Water Use Subject to Transfer," in part, as "[a] water right certificate," indicating that the water use which may be transferred is defined by the water right certificate, without regard to federal law, federal resource management plans, or third-party agreements.

As Applicant further notes, the statutes concerning the transfer of a state water right certificate provide for OWRD's review of the transfer application under various state laws, such as ORS 540.505(4), 540.510, 540.520, and ORS 540.530.

Exception 4: Protestant objects to the Proposed Order's enlargement analysis because the analysis does not address Protestant's argument that the proposed transfer will enlarge the subject water rights by causing "an expansion" of the rights of a type not covered by the four non-exclusive examples of enlargement/expansion provided in OAR 690-380-0100(2).

Disposition: The Director has added the penultimate paragraph of the Opinion's enlargement analysis to this final order to address Protestant's argument.

Exception 5: Protestant objects to the Proposed Order's enlargement analysis because the analysis does not address Protestant's arguments based on ORS 537.140(1)(a)(E), 537.139(1), 164.245(1) and 164.205(3).

Disposition: The Director has added footnote 35 to this final order to address Protestant's argument.

DIRECTOR'S AMENDMENTS TO THE PROPOSED ORDER

In addition to the changes discussed in the Consideration of Exceptions section, the Director has amended the Proposed Order as described below. The Director finds that to the extent any of the changes to the Proposed Order described in this section constitute changes to a finding of historical fact as “finding of historical fact” is defined in ORS 183.650(3) and OAR 137-003-0665(4), the changes are supported by clear and convincing evidence in the record. Additions to the text of the Proposed Order are shown in underline, and deletions are shown in ~~strikeout~~.

Amendment 1: The Proposed Order is amended to correct typographical errors.

Amendment 2: The History of the Case section is updated to reflect issuance of the Proposed Order, the filing and consideration of exceptions, and issuance of this final order.

Amendment 3: Finding of Fact 3, including footnotes 15 and 16, are amended as shown below to clarify that the acreages identified in Finding of Fact 3 and the flow rates identified in footnotes 15 and 16 are the acreages and flow rates associated with the portions of Certificates 13593 and 96311 to be transferred under Application T-14158, rather than the acreages and flow rates associated with the entire water rights represented by Certificates 13593 and 96311. (*Compare* Ex. A1 at 136-138 (reciting acreages and flow rates associated with the portions of Certificates 13593 and 96311 to be transferred) *to* Ex. A1 at 67-68 (showing acreages and flowrates associated with entirety of Certificates 13593 and 96311)).

Finding of Fact 3 is also amended as shown below to reflect that the priority date of Certificates 13593 and 96311 is 1868 rather than December 31, 1868. Page 12 of the January 31, 2023 public notice document at pages 1 through 15 of Exhibit A1 lists the certificates' priority date as December 31, 1868, because OWRD's computer systems represent priority dates that only include a year as the final day of that year, such that an 1868 priority date is represented as “December 31, 1868.” The certificate documents themselves, at Exhibit A1 pages 67 and 68, list the priority date as “1868.”

Finding of Fact 3: Applicant holds Certificates of Water Right (Certificates) 13593 and 96311 that divert water from Bridge Creek. The priority date of both Certificates is ~~December 31, 1868.~~ (Ex. A1 at ~~42~~, 67-68.) The portion of Certificate 13593 to be transferred under Application T-14158 provides water for irrigation and domestic purposes for approximately 147.1 acres of the Property. (*Id.* at 23, ~~and 24~~, 136-137.) The portion of Certificate 96311 to be transferred under Application T-14158 provides water for irrigation and domestic purposes on approximately 43.3 acres of the Property. (*Id.* at 25, 138.) As described in Certificates 13593 and 96311, the duty limit for diverted water shall not exceed 1/40th of one cubic feet per second (cfs) per acre before June 15 and 1/80th of one cfs per acre after June 15 during the annual irrigation seasons of March 1 to October 1. (*Id.* at 67-68.)

Footnote 15: The portion of Certificate 13593 to be transferred under Application T-14158 provides a rate of water use of 3.68 cfs before June 15 and 1.84 cfs after June 15 from Bridge Creek in Sec. 6, T11S, R21E, WM for irrigation and domestic use in Sects. 24, 25, and 36, T10S, R20E, WM and Sects. 30 and 31, T10S, R21E, WM. (Ex. A1 at 41, ~~137-13767~~.)

Footnote 16: The portion of Certificate 96311 to be transferred under Application T-14158 provides a rate of water use of 1.08 cfs before June 15 and 0.54 cfs after June 15 from Bridge Creek in Sects. 6 and 9, T11S, R21E, WM for irrigation and domestic use in Sec. 21, T10S, R21E, WM. (Ex. A1 at 41, ~~13868~~.)

Amendment 4: Finding of Fact 18 is amended as shown below to correct a typographical error and to reflect that the Preliminary Determination for Application T-14158 proposed to approve the application, rather than approved the application. (Ex A1 at 135, 140.) Similar amendments are made throughout the final order.

On January 19, 2024, OWRD issued PD T-14158, proposing to approve ~~approving~~ the addition of the New POD with the same rate of use and duty limit as originally provided by the Certificates and a restriction that the quantity of diverted water shall not exceed the quantity of water lawfully available at the original POD(s) (the BLM POD for Certificate 13593 and the BLM POD for Certificate 96311 plus the two additional PODs). PD T-14158 requires the installation of a totalizing flow meter at all PODs and the installation of a fish screen at the New POD. PD T-14158 further requires the full beneficial use of water to occur by October 1, 2028. (Ex. A1 at 135-144.)

Amendment 5: The first sentence of Finding of Fact 22 is amended as shown below to clarify that only one water right *to Bridge Creek waters* is senior to Certificates 13593 and 96311. The relevant portions of George Tolton’s and Kenneth Thiemann’s testimony concerned only the relative seniority of water rights to Bridge Creek waters. Similar amendments are made throughout the final order.

There is only one person who holds a certificated water right to Bridge Creek waters that is senior to Certificates 13593 and 96311.

Amendment 6: The Opinion section is amended to replace the statements concerning the burden and standard of proof that appear in the Proposed Order with the statements that appear in this final order. The purpose of the change is to provide additional information concerning the purpose and effect of assignment of the burden of proof and to provide a full statement of the burden and standard of proof applied in this final order. Given the nature of the record and the issues in dispute in this matter, the clarification of the burden and standard of proof does not require the modification of any findings of fact.

Amendment 7: The Proposed Order’s Footnote 35 is deleted because the information in the footnote is not relevant to the issues to be determined in this case.

Amendment 8: The fifth paragraph in the Opinion section’s enlargement analysis is amended as shown below to do the following: (1) clarify that ORS 537.120 provides that nothing *in the Water Rights Act* is to take away or impair the vested right of any person to any water or to the use of any water; (2) clarify that ORS 537.120 provides for the review of appropriation of water for beneficial use under the Water Rights Act, rather than under ORS chapter 538; (3) add footnote 34 providing the definition of “Water Rights Act”; (4) provide clarification concerning OWRD’s interpretation of “legally available” based on OWRD’s responses to Protestant’s interrogatories (Ex. P49 at 7); and (5) provide additional support for the conclusion that OWRD’s interpretation of “legally available” is plausible within the context of the statutory scheme.

The changes related to ORS 537.120 are supported by the text of that statute, which provides in full: “Subject to existing rights, and except as otherwise provided in ORS chapter 538, all waters within the state may be appropriated for beneficial use, as provided in the Water Rights Act and not otherwise; but nothing contained in the Water Rights Act shall be so construed as to take away or impair the vested right of any person to any water or to the use of any water.” These changes are further supported by the fact that ORS chapter 538 does not provide instructions for reviewing applications to appropriate water or to transfer water rights but instead consists largely of a list of water sources that are withdrawn from appropriation. See ORS 538.010 to 538.450.

Changes to Opinion paragraph: As noted above, the Water Rights Act made the doctrine of prior appropriation the prevailing water law of Oregon. That doctrine encourages the full use of vested water rights based upon the seniority of the existing water rights. ORS 537.120 provides that nothing in the Water Rights Act³⁵ is “to take away or impair the vested right of any person to any water or to the use of any water.” This same statute authorizes OWRD to review the appropriation of water for beneficial use as provided in the Water Rights Act ~~ORS chapter 538~~, “and not otherwise.” ORS 537.120. Additionally, the water right certificate defines the terms (priority and extent) of the appropriation. ORS 537.270 (A water right certificate “shall be conclusive evidence of the priority and extent of the appropriation therein described.”) Finally, ORS 540.045(1)(a) provides that OWRD shall “regulate the distribution of water among the various users of water from any natural surface or ground water supply in accordance with the water users’ existing water rights of record in the Water Resources Department. Thus, OWRD’s interpretation to restrict the review of “legally available” to ~~Oregon~~ OWRD’s statutes and rules and the terms of the certificated water right at issue, without regard to any third-party agreements or federal law, is plausible within the context of this statutory scheme.

New footnote 34: ORS 537.010 provides that, as used in ORS chapter 537, “‘Water Rights Act’ means and embraces ORS 536.050, 537.120, 537.130, 537.140 to 537.252, 537.390 to 537.400, 538.420, 540.010 to 540.120, 540.210 to 540.230, 540.310 to 540.430, 540.443 to 540.491, 540.505 to 540.585 and 540.710 to 540.750.” As such, “Water Rights Act,” as used in ORS chapter 537, includes the portions of ORS chapter 540 governing water right transfers (ORS 540.505 to 540.585).

Amendment 9: The third-to-last paragraph of the Opinion section’s enlargement analysis is amended as shown below to reflect that approval of Transfer Application T-14158 will not change the place of use and type of use of the subject water rights, and that place of use and type of use are attributes that are closely related to the beneficial use of water.

Protestant also asserts that the addition of the New POD is an enlargement of the certificated water rights. Essentially, Protestant argues that the numerical increase in the number of the available PODs from one POD to two PODs (Certificate 13593) and from three PODs to four PODs (Certificate 96311) is an enlargement. Although there is a numerical increase in the PODs from which Applicant is authorized to divert water, the priority, source, place of use, type of use and extent of the water right remains unchanged by the increase in PODs. These items (priority, source, place of use, type of use and extent) are attributes that go to the heart of a water right – the beneficial use of water. The POD is merely part of the water delivery system and not part of the beneficial use of

the water. *See Russell-Smith v. Water Resources Dept.*, 152 Or App 88, 96-99 (1998). PD T-14158 contains the limitation that the Applicant cannot divert more water from the available PODs than it could divert from the original POD(s). That limitation prevents any enlargement from the change in the water delivery system sought in Applicant's transfer application. Items such as the source of the water, the acres receiving the water, the type of use and the rate and duty remain unchanged.

Amendment 10: The conclusion paragraphs of the Opinion section's enlargement and injury analyses are amended as shown below to reflect the Director's evaluation of the record. Given the legal conclusions concerning the nature of enlargement and injury stated in this final order, there is no evidence in the record showing that approval of transfer application T-14158 will enlarge the subject water rights or injure existing water rights. In addition, the evidence showing that the rate, duty, place of use, and type of use of the subject water rights will not change, and that diversions at the New POD will be limited to the amount of water lawfully available at the existing points of diversion, demonstrates that the proposed transfer will not cause injury or enlargement. As such, the preponderance of the evidence shows that approval of transfer application T-14158 will not cause injury or enlargement.

Changes to enlargement conclusion: In sum, the preponderance of the evidence shows evidence fails to demonstrate that the approval of the New POD and cancellation of certain acres as noted in PD T-14158 will not cause enlargement.

Changes to injury conclusion: In conclusion, there is no evidence in the record of any injury to existing water rights caused by the addition of the New POD to Certificates 13593 and 96311, and the preponderance of the evidence shows that the addition of the New POD will not cause injury to existing water rights.

Amendment 11: The Order section is amended to include information and conditions from the Preliminary Determination so that the Order section fully describes the consequences of approving Transfer Application T-14158 as conditioned in the Preliminary Determination. The Order section is also amended to reflect that the Preliminary Determination proposed to approve Transfer Application T-14158 rather than approving the application, such that this final order must approve the application, not affirm the Preliminary Determination.

ORDER

Now, therefore, it is ORDERED:

1. The portion of Certificate 13593 described in Attachment 1 to this Final Order has been abandoned and is cancelled based Applicant's June 26, 2023 affidavit of voluntary cancellation.
2. The additional points of diversion proposed in Transfer Application T-14158 and described in Attachment 2 to this Final Order are approved.
3. The right to the use of the water is restricted to beneficial use at the place of use described and is subject to all other conditions and limitations contained in this order and Certificates 13593 and 96311, and any related decree.

4. Approval of this transfer application does not constitute nor grant legal access onto or through another person's property for purposes of accessing the new points of diversion.
5. Water right Certificate 13593 is cancelled. A new certificate will be issued describing that portion of the right not affected by this transfer and cancellation.
6. Water Right Certificate 96311 is cancelled. A new certificate will be issued describing that portion of the right not affected by this transfer.
7. Under water right Certificate 13593, the quantity of water diverted at the new additional point of diversion (NEW POD) together with that diverted at the original point of diversion (POD), shall not exceed the quantity of water lawfully available at the original point of diversion (POD).
8. Under water right Certificate 96311, the quantity of water diverted at the new additional point of diversion (NEW POD) together with that diverted at the original points of diversion (ORIGINAL POD, ADDITIONAL POD, ADDITIONAL POD), shall not exceed the quantity of water lawfully available at the original point of diversion (ORIGINAL POD).
9. Water shall be acquired from the same source of surface water as the original points of diversion.
10. Water use measurement conditions:
 - a. Before water use may begin under this order, the water user shall install a totalizing flow meter, or, with prior approval of the Director, another suitable measuring device, at each point of diversion (new and existing).
 - b. The water user shall maintain the meters or measuring devices in good working order.
 - c. The water user shall allow the Watermaster access to the meters or measuring devices; provided however, where the meters or measuring devices are located within a private structure, the Watermaster shall request access upon reasonable notice.
11. Prior to diverting water, the water user shall install an approved fish screen at the new point of diversion and shall provide to the OWRD a written statement from Oregon Department of Fish and Wildlife (ODFW) that the installed screen meets the state's criteria, or that ODFW has determined a screen is not necessary.

The water user shall operate and maintain the fish screen at the new point of diversion consistent with ODFW's operational and maintenance standards. If ODFW determines the screen is not functioning properly and is unsuccessful in working with the water user to meet ODFW standards, ODFW may request that OWRD regulate the use of water until OWRD receives notification from ODFW that the fish screen is functioning properly.

12. Full beneficial use of the water shall be made, consistent with the terms of this order, on or before **October 1, 2028**. A Claim of Beneficial Use prepared by a Certified Water Right Examiner shall be submitted by the Applicant to the Department within one year after the deadline for completion of the changes and full beneficial use of the water.
13. After satisfactory proof of beneficial use is received, new certificates confirming the rights transferred will be issued.

In the Matter of Transfer Application T-14158 - OAH Ref. No. 2024-OWRD-00163

Dated in Salem, Oregon on October 22, 2025.



Lisa J. Jaramillo, Transfer and Conservation Section Manager, for
IVAN GALL, DIRECTOR
Oregon Water Resources Department

NOTICE

Appeal of this order is to the Oregon Court of Appeals pursuant to ORS 183.482 and ORS 536.075(2). Petitions for judicial review of this order must be filed with the Court of Appeals within 60 days from the day this order was served. If the order was mailed, the date of service is the day it was mailed. Failure to file a petition for judicial review within the 60-day time period will waive your right of appeal. Alternatively, under OAR 137-003-0675, a party may petition OWRD for reconsideration or rehearing of this order within 60 days from the day this order was served. Petitions for reconsideration or rehearing shall be filed by emailing to will.d.davidson@water.oregon.gov

ATTACHMENT 1

The portion of the water right represented by Certificate 13593 to be cancelled is as follows:

Certificate: 13593 in the name of BEN TAYLOR (confirmed by Bridge Creek Decree, recorded at Special Order Volume 12, Page 388)
Use: IRRIGATION OF 12.0 ACRES
Priority Date: 1868
Rate: 0.3 cubic foot per second (cfs) before June 15 and 0.15 cfs after June 15
Limit/Duty: The amount of water to which such right is entitled; for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes, and shall not exceed one-fortieth of one cubic foot per second per acre of land irrigated before June 15, and one-eightieth of one cubic foot per second per acre after June 15, during the irrigation season from March 1 to October 1 of each year, measured at the point of diversion from the stream.
Period of Use: MARCH 1 to OCTOBER 1
Source: BRIDGE CREEK

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
11 S	20 E	WM	25	SE NE	0.9
10 S	20 E	WM	25	NE NW	0.2
10 S	20 E	WM	25	NE SW	1.9
10 S	20 E	WM	25	NW SE	2.0
10 S	20 E	WM	25	SW SE	1.3
10 S	20 E	WM	25	SE SE	0.7
10 S	21 E	WM	30	SW SW	4.9
10 S	21 E	WM	31	NE NW	0.1
Total					12.0

ATTACHMENT 2

The portion of the water right represented by Certificate 13593 to be transferred is as follows:

Certificate: 13593 in the name of BEN TAYLOR (confirmed by Bridge Creek Decree, recorded at Special Order Volume 12, Page 388)
Use: IRRIGATION OF 147.1 ACRES AND DOMESTIC
Priority Date: 1868
Rate: 3.68 cubic feet per second (cfs) before June 15 and 1.84 cfs after June 15
Limit/Duty: The amount of water to which such right is entitled; for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes, and shall not exceed one-fortieth of one cubic foot per second per acre of land irrigated before June 15, and one-eightieth of one cubic foot per second per acre after June 15, during the irrigation season from March 1 to October 1 of each year, measured at the point of diversion from the stream.
Period of Use: MARCH 1 to OCTOBER 1
Source: BRIDGE CREEK

Authorized Point of Diversion: Certificate 13593 does not describe the location of the authorized point of diversion. The Applicant submitted information that the authorized point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
11 S	21 E	WM	6	NE NE	(SUTTON DITCH) - 590 FEET SOUTH AND 2160 FEET EAST FROM THE N¼ CORNER OF SECTION 6

Authorized Place of Use:

IRRIGATION AND DOMESTIC					
Twp	Rng	Mer	Sec	Q-Q	Acres
10 S	20 E	WM	24	SE SW	13.2
10 S	20 E	WM	25	NW NE	4.0
10 S	20 E	WM	25	SW NE	10.6
10 S	20 E	WM	25	SE NE	5.2
10 S	20 E	WM	25	NE NW	18.3
10 S	20 E	WM	25	SE NW	13.3
10 S	20 E	WM	25	NE SW	1.5
10 S	20 E	WM	25	NE SE	14.6
10 S	20 E	WM	25	NW SE	23.8
10 S	20 E	WM	25	SW SE	2.5
10 S	20 E	WM	25	SE SE	21.6
10 S	20 E	WM	36	NE NE	0.2
10 S	21 E	WM	30	SW SW	5.5
10 S	21 E	WM	31	NE NW	3.3
10 S	21 E	WM	31	NW NW	9.5
Total					147.1

Approval of Transfer Application T-14158 adds an additional point of diversion approximately 1,110 feet downstream from the authorized point of diversion as follows:

In the Matter of Transfer Application T-14158 - OAH Ref. No. 2024-OWRD-00163

Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Measured Distances
10 S	21 E	WM	31	SE SE	3600	NEW POD – 160 FEET NORTH AND 1850 FEET EAST FROM THE SOUTH 1/4 CORNER OF SECTION 31

The portion of the water right represented by Certificate 96311 to be transferred is as follows:

Certificate: 96311 in the name of U.S. BUREAU OF LAND MANAGEMENT confirmed by Bridge Creek Decree, recorded at Special Order Volume 12, Page 388)

Use: IRRIGATION OF 43.3 ACRES AND DOMESTIC

Priority Date: 1868

Rate: 1.08 cubic feet per second (cfs) before June 15 and 0.54 cfs after June 15

Limit/Duty: The amount of water to which such right is entitled, for the purposes aforesaid, is limited to an amount actually beneficially used for said purposes, and shall not exceed one-fortieth of one cubic foot per second per acre of land irrigated before June 15, and one-eightieth of one cubic foot per second per acre after June 15, during the irrigation season from March 1 to October 1 of each year, measured at the point of diversion from the stream.

Period of Use: MARCH 1 to OCTOBER 1

Source: BRIDGE CREEK, tributary to JOHN DAY RIVER

Authorized Points of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
11 S	21 E	WM	6	NE NE	ADDITIONAL POD - 590 FEET SOUTH AND 2160 FEET EAST FROM THE N1/4 CORNER OF SECTION 6
11 S	21 E	WM	9	NW NW	ADDITIONAL POD - 960 FEET SOUTH AND 780 FEET EAST FROM THE NW CORNER OF SECTION 9
11 S	21 E	WM	9	NE SW	ORIGINAL POD – LAST CHANCE OR CARROL DITCHES - 1650 FEET NORTH AND 80 FEET WEST FROM THE S1/4 CORNER OF SECTION 9

Authorized Place of Use:

IRRIGATION AND DOMESTIC					
Twp	Rng	Mer	Sec	Q-Q	Acres
10 S	21 E	WM	31	SW NE	11.0
10 S	21 E	WM	31	NW SE	22.8
10 S	21 E	WM	31	SW SE	0.1
10 S	21 E	WM	31	SE SE	9.4
Total					43.3

Approval of Transfer Application T-14158 adds an additional point of diversion with approximate distances downstream from the authorized points of diversion as follows:

Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Measured Distances	Distance from Authorized POD (in miles)
10 S	21 E	WM	31	SE SE	3600	NEW POD – 160 FEET NORTH AND 1850 FEET EAST FROM THE SOUTH 1/4 CORNER OF SECTION 31	ADDITIONAL POD – 1,110 feet ADDITIONAL POD - 1.73 mi ORIGINAL POD - 2.3 mi

CERTIFICATE OF FILING/SERVICE

I certify that on October 22, 2025, I filed the foregoing Final Order in Contested Case with the Office of Administrative Hearings and served true and correct copies as set forth below:

Jesse D Ratcliffe
Oregon Department of Justice
1162 Court St. NE
Salem, OR 97301
Jesse.d.ratcliffe@doj.oregon.gov

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☐ by hand-delivery
☐ by facsimile # _____
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☒ Other: Email

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☐ by hand-delivery
☐ by facsimile # _____
☐ by certified mail # _____
☒ Other: Email

/s/ Will Davidson

Will Davidson, Agency Representative,
 OREGON WATER RESOURCES DEPARTMENT

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
OREGON WATER RESOURCES DEPARTMENT**

In the Matter of Transfer Applications	)	RULING ON MOTION FOR SUMMARY
T-14158 and T-14170	)	DETERMINATION
	)	
BRIDGE CREEK RANCH LLC,	)	
Applicant	)	OAH Reference Nos. 2024-OWRD-00163 and
	)	2024-OWRD-00165
and	)	
	)	Agency Case Nos. T-14158 and T-14170
WATERWATCH OF OREGON,	)	
Protestant	)	

PROCEDURAL HISTORY

On September 25, 2023, the Oregon Water Resources Department (OWRD) issued a Preliminary Determination Proposing Approval of an Additional Point of Diversion in the matter of the Transfer Application T-14170 (PD T-14170) filed by Bridge Creek Ranch LLC (Applicant).¹ On October 23, 2023, OWRD received the Protest filed by WaterWatch of Oregon (Protestant).

On January 19, 2024, OWRD issued a Preliminary Determination Proposing Approval of Additional Points of Diversion and Partial Cancellation of Water Right in the matter of the Transfer Application T-14158 (PD T-14158) filed by Applicant.² On February 15, 2024, OWRD received Protestant's Protest of PD T-14158.

On August 14, 2024, OWRD referred the matters to the Office of Administrative Hearings (OAH).³ The OAH assigned Administrative Law Judge (ALJ) Samantha Fair to preside over the matters. On September 16, 2024, ALJ Fair convened a prehearing conference. Attorney Brian Posewitz represented Protestant. Attorney Elizabeth Howard represented Applicant. Senior Assistant Attorney General Sarah Rowe represented OWRD. Will Davidson also appeared on behalf of OWRD. ALJ Fair scheduled the matters for a prehearing conference on February 6, 2025, for the review of exhibits and a video conference hearing on February 11 through 14, 2025. The ALJ also set deadlines for the submission of issue statements, motions, witness lists, and exhibits.

¹ The transfer application involves Certificate 68553.

² The transfer application involves Certificates 13593 and 96311.

³ Prior to the referral, the parties agreed to consolidate the two matters for hearing. The OAH assigned reference number 2024-OWRD-00163 to the matter involving PD T-14158 and reference number 2024-OWRD-00165 to the matter involving PD T-14170.

On September 18, 2024, Applicant requested new hearing dates. ALJ Fair rescheduled the hearing for February 18 through 21, 2025.

On October 7, 2024, OWRD filed Stipulations Regarding the Statement of Issues. Later that day, Protestant filed a Statement Regarding Stipulated Issues. On October 10, 2024, OWRD filed a Response to [Protestant's] Statement Regarding Stipulated Issues. On October 22, 2024, the OAH issued a Ruling on Motion Regarding Statement of Issues, in which the ALJ adopted the issues for hearing as stated in the October 7, 2024 Stipulations Regarding the Statement of Issues.

On November 15, 2024, Applicant filed a Motion for Summary Determination (Motion),⁴ seeking a dispositive ruling on four of the issues for hearing. On November 27, 2024, OWRD filed a Response to [Applicant's] Motion for Summary Determination (OWRD Response).

On December 2, 2024, Protestant requested an extension of the deadline for its response to the Motion. On December 3, 2024, the ALJ granted the request and extended the deadline to December 13, 2024. On December 13, 2024, Protestant filed a Response to Bridge Creek Ranch's Motion for Summary Determination (WW Response).

On December 31, 2024, Protestant filed a Motion to Deny Applications or Return Cases to Agency. On January 7, 2025, OWRD filed a Response to [Protestant's] Motion to Deny Applications or Return Cases to Agency.

On January 13, 2025, Applicant requested an extension on a submission deadline for the hearing and a rescheduling of the prehearing conference. The ALJ granted the extension and rescheduled the prehearing conference for February 12, 2025.

ISSUES

Whether there are any genuine issues as to any material facts and, if not, whether Applicant is entitled to a favorable ruling as a matter of law, on the following issues:

- Issue A. Whether approval of the transfers would enlarge the subject water right. OAR 690-380-4010.
- Issue B. Whether approval of the transfers would injure the water rights for Certificate 59780. ORS 540.530(1)(a).
- Issue C. Whether OWRD exceeded its statutory authority by approving an additional point of diversion (as opposed to approval of a change from one point of diversion to another point of diversion) in PD T-14158. ORS 540.510(1)(a).
- Issue G. Whether the subject water right for T-14170, which is a water storage right,

⁴ The Motion is a partial motion for summary determination, seeking favorable rulings on Issues A, B, C, and G of the seven issues for hearing.

is a water use subject to transfer. ORS 540.510(1)(a).

OAR 137-003-0580.

UNDISPUTED STATEMENTS OF FACT

1. Bridge Creek is a tributary of the John Day River, located in Wheeler County, Oregon. (Ex. 1 at 1.)

2. Applicant holds Certificates 13593 and 96311 for irrigation and domestic use of surface waters from Bridge Creek with priority dates from 1868. (Ex. A at 10, 15, 19, 21, 22, 24, 27-32.) Applicant also holds Certificate 68553 for storage of water diverted from Bridge and Bear Creeks into the Painted Hills Reservoir with a priority date of October 17, 1983. (Ex. B at 8, 10.)

3. On February 1, 1989, Certificate 59780 with a priority date of November 3, 1983, was issued for the right to use Bridge Creek waters to maintain an instream flow from the mouth of Bear Creek to the mouth of Bridge Creek for the purpose of supporting aquatic life and minimizing pollution. Certificate 59780 protects waters rights for a maximum flow volume as follows:

Oct. 1 – Oct 31	6 cubic feet per second (cfs)
Nov 1 – Feb 15	25 cfs
Feb. 16 - May 31	40 cfs
June 1 – June 30	25 cfs
July 1 – July 15	15 cfs
July 16 – Sept. 30	6 cfs

(Ex. 1 at 1.)

4. On September 2, 2021, the Bureau of Land Management granted Applicants a right-of-way permit (BLM ROW) to operate and maintain a point of diversion (POD) on public lands in Section 6 of Bridge Creek, including pipeline, headgate, and screen (BLM POD). (Ex. D at 1.) The grant included the following diversion restriction:

No water may be diverted when the stream flow drops below 10 cfs in Bridge Creek, as measured at the Bridge Creek gauge station near the mouth of Bridge Creek.

Id. at 8. Applicant diverts water at the BLM POD for the irrigation and storage water rights described in Certificates 13593, 96311, and 68553.⁵ (Exs. A at 8, 13; B at 8.)

5. On January 24, 2023, Applicant filed a transfer application for Certificates 13593 and 96311, with OWRD, seeking to add a POD located on Bridge Creek in Section 31 (New POD) to

⁵ Applicant also diverts water at other PODs for Certificates 96311 and 68553. (Exs. A at 13; B at 8.)

its delivery system.⁶ (Ex. A at 1, 4.) On February 9, 2023, Applicant filed a transfer application for Certificate 68553, seeking to add the New POD to its delivery system.⁷ (Ex. B at 1, 8, 18.)

CONCLUSIONS OF LAW

There are no genuine issues as to any material facts, and Applicant is entitled to a favorable ruling as a matter of law, on the following issues:

- Issue B. Approval of the transfers would not injure the water rights for Certificate 59780.
- Issue C. OWRD did not exceed its statutory authority by approving an additional point of diversion (as opposed to approval of a change from one point of diversion to another point of diversion) in PD T-14158.
- Issue G. The subject water right for T-14170, which is a water storage right, is a water use subject to transfer.

There are genuine issues of material fact and Applicant is not entitled to a favorable ruling on Issue A (enlargement).

OPINION

Standard of Review for Motion for Summary Determination

OAR 137-003-0580 addresses motions for summary determination. It provides, in relevant part:

(6) The administrative law judge shall grant the motion for a summary determination if:

(a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and

(b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.

(7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.

⁶ The New POD would be located on Applicant's property. (Ex. A 1, 4.)

⁷ Applicant originally filed this application on December 8, 2021, and re-filed it on February 9, 2023, with new signatures in compliance with Marion County Circuit Court Judge Broyles' ruling in a mandamus action filed by Applicants against OWRD. (Ex. B at 1, 5-6, 22, 26, 36.)

(8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing.

* * * * *

(11) The administrative law judge's ruling may be rendered on a single issue and need not resolve all issues in the contested case[.]

Pursuant to OAR 137-003-0580(6)(a), in issuing this ruling, the ALJ considered the following:

- The Motion, the Declaration of Elizabeth Howard, and Exhibits A through I, submitted by Applicant;
- OWRD Response and the Declaration of Lisa J. Jaramillo, submitted by OWRD;
- WW Response, the Declaration of Brian Posewitz, and Exhibits 1 through 28, submitted by Protestant; and
- The pleadings.

In this matter, Protestant asserts the Department erred in finding the proposed transfer would not enlarge the existing water right (Issue A) and would not cause injury to the existing water rights provided by Certificate 59780 (Issue B). Protestant further asserts that the water right for PD T-14170 was not subject to transfer (Issue G), and OWRD's action in granting Applicant an additional POD exceeded its jurisdiction (Issue C). Pursuant to OAR 137-003-0580(7), I reviewed the evidence in the light most favorable to Protestants and OWRD,⁸ the non-moving parties. I determined there are no genuine issues as to the material facts that are relevant to resolution of Issues B (regarding Certificate 59780), C (regarding PD T-14158), and G. Applicant is entitled to a favorable ruling for those issues.

Issue A involves Protestant's assertion that the Applicant's addition of a POD will result in the enlargement of Applicant's water right. OAR 690-380-5000(1)(c) requires OWRD to determine that the granting of a transfer application would not result in enlargement as defined by OAR 690-380-0100(2). OAR 690-380-0100(2) provides, in part:

"Enlargement" means an expansion of a water right and includes, but is not limited to:

* * * * *

(d) Diverting more water at the new point of diversion or appropriation than is legally available to that right at the original point of diversion or appropriation.

⁸ OWRD agreed with Applicant's Motion; however, because OWRD did not file its own motion for summary determination, the agency is a non-moving party for purposes of this ruling.

In the WW Response, Protestant raises several areas of material dispute, including conflicting information with OWRD's interpretation of OAR 690-380-0100(2). OWRD asserted that it does not consider third-party agreements that affect the applicant's use of water in making an enlargement determination. Jaramillo Dec. at 2. However, in OWRD's *Technical Operations Manual*, OWRD provides examples of potential enlargement including the movement of a headgate downstream to a location where more water could be diverted to satisfy a water right. In such a situation, the *Technical Operations Manual* states that OWRD will limit the amount of water that may be taken at the new location to that amount taken at the original location. The *Technical Operations Manual* further states that OWRD may impose a requirement for measurement stations at both locations to ensure that more water is not taken. Exhibit H at 8-9. This seeming contradiction between OWRD's assertion and its *Technical Operations Manual* creates a genuine issue of material fact regarding OWRD's interpretation of its administrative rule. Therefore, Applicant is not entitled to a favorable ruling on Issue A.⁹

Because this ruling does not resolve all issues in this contested case proceeding, the remaining issues, including Issue A, will proceed to hearing.

Applicable Law

ORS 540.510(1)(a) provides, in part:

Except as provided in subsections (2) to (8) of this section, all water used in this state for any purpose shall remain appurtenant to the premises upon which it is used and no change in use or place of use of any water for any purpose may be made without compliance with the provisions of ORS 540.520 and 540.530. However, the holder of any water use subject to transfer may, upon compliance with the provisions of ORS 540.520 and 540.530, change the use and place of use, the point of diversion or the use of the water without losing priority of the right * * *.

* * * * *

(6) In the event that government action results in or creates a reasonable expectation of a change in the surface level of a surface water source that impairs or threatens to impair access to a point of diversion authorized by a water right permit, certificate or decree, the owner of the water right may change the point of diversion or add an additional point of diversion in accordance with the provisions of this section in lieu of complying with the requirements of ORS 540.520 and 540.530. Before changing the point of diversion, the water right owner shall provide written notice of the proposed change to the Water Resources Department. Within 15 days after receipt of such notice, the department shall provide notice by publication in the department's public notice of water right applications.

⁹ These provisions of the *Technical Operations Manual* also apply to OWRD's determination of an injury to water rights. However, because of precedential caselaw involving the determination of injuries to water rights, OWRD's seeming conflicting interpretations is irrelevant to Issue B.

Within 60 days after the department receives notice from the owner, the Water Resources Director, by order, shall approve the change unless the director finds the changes will result in injury to other existing water rights. All other terms and conditions of the water right shall remain in effect[.]

ORS 540.530(1)(a) provides:

If, after hearing or examination, the Water Resources Commission finds that a proposed change can be effected without injury to existing water rights, the commission shall make an order approving the transfer and fixing a time limit within which the approved changes may be completed.

ORS 540.520 provides, in part:

(1)(a) Except when the application is made under ORS 541.327 or when an application for a temporary transfer is made under ORS 540.523, if the holder of a water use subject to transfer for irrigation, domestic use, manufacturing purposes, or other use, for any reason desires to change the place of use, the point of diversion, or the use made of the water, an application to make such change, as the case may be, shall be filed with the Water Resources Department.

* * * * *

(2) The application required under subsection (1) of this section shall include:

- (a) The name of the owner;
- (b) The previous use of the water;
- (c) A description of the premises upon which the water is used;
- (d) A description of the premises upon which it is proposed to use the water;
- (e) The use that is proposed to be made of the water;
- (f) The reasons for making the proposed change; and
- (g) Evidence that the water has been used over the past five years according to the terms and conditions of the owner's water right certificate or that the water right is not subject to forfeiture under ORS 540.610[.]

OWRD promulgated rules pertaining to water right transfers in OAR chapter 690, division 380. OAR 690-380-4010 sets out the requirements for OWRD’s review of a transfer application. As pertinent here, OAR 690-380-4010(2) provides:

The Department’s preliminary determination shall include an assessment of whether:

* * * * *

(c) The proposed transfer would result in enlargement;

(d) The proposed transfer would result in injury[.]

Similarly, OAR 690-380-5000, addressing approval of transfers, states:

(1) A transfer application shall be approved if the Department determines that:

(a) The water right affected by the proposed transfer is a water use subject to transfer as defined in ORS 540.505(4) and OAR 690-380-0100(14) * * *;

* * * * *

(c) The proposed transfer would not result in enlargement as defined in OAR 690-380-0100(2);

(d) Except as provided in OAR 690-380-5030,¹⁰ the proposed transfer would not result in injury as defined in 690-380-0100(3)[.]

OAR 690-380-0100 provides some definitions for terms used by OWRD and includes, in part:

(3) “Injury” or “Injury to an existing water right” means a proposed transfer would result in another, existing water right not receiving previously available water to which it is legally entitled[.]

Issue B: Injury to Existing Water Rights

OWRD shall approve a transfer application if the change “can be effected without injury to existing water rights.” ORS 540.530(1)(a). Oregon waters are subject to a prior appropriation system. The Oregon Court of Appeals explained the system, as follows:

¹⁰ OAR 690-380-5030 allows for the approval of an injurious transfer when the holder of the injured right consents to the change.

In the Matter of Transfer Applications T-14158 and T-14170 - OAH Case Nos. 2024-OWRD-00163 and 2024-OWRD-00165

Under Oregon's prior appropriation system, regulating water rights depends on the priority date of respective water rights. When there is a shortage of water, the senior water right holder is entitled to receive their entire share of water before the next most senior water right holder can receive their share, and so on. * * *. This system of water regulation is enforced through OWRD's watermasters, who, among other duties, must "[r]egulate the distribution of water among the various users of water from any natural surface or ground water supply *in accordance with the users' existing water rights of record in the Water Resources Department.*" ORS 540.045(1)(a).

TPC, LLC v. Oregon Water Resources Department, 308 Or App 177, 194 (2020) (Emphasis in original.).

In the Motion, Applicant sought a favorable ruling on the issue of whether the proposed change in POD will injure the instream water rights established in Certificate 59780. Motion at 15. Applicant argues that the quantity of water used by Applicant remains restricted by the terms of Applicant's existing water rights and that Certificate 59780, as a junior water right in a prior appropriation system, is not entitled to water until senior water rights are satisfied, relying on *Fort Klamath Critical Habitat Landowners, Inc. v. Woodcock*, 334 Or App 509 (2024). Motion at 16-17. Protestant asserts that, because Applicant's proposed new POD will not be subject to the BLM restrictions, Applicant will be able to divert more water (both volume and season), reducing water currently available for Certificate 59780 because of the BLM restrictions. WW Response at 14-15. Protestant distinguishes *Woodcock*, asserting that the injury in *Woodcock* was based on indirect effects and diverted water did not involve a "legal restriction." WW Response at 16-17.

Woodcock involved OWRD's approval of the intervenors' request to transfer water rights to a new POD further downstream.¹¹ Petitioners had in-stream irrigation water rights upstream of applicant's water rights with a priority date that was the same or junior to intervenors' water rights. Intervenors' and petitioners' water rights were subject to a call for water¹² in favor of the local tribes' senior instream water rights. Petitioners presented evidence that intervenors did not use the entire water right because (1) some of the diverted water returned to the streams as return flow; and (2) the limitations caused by the tribes' calls required a reduction or cessation in intervenors' diversion of water. Petitioners argued that, by moving the POD downstream, intervenors would use more of their water rights because the new location would be less constrained by the tribes' calls for water and there would be less flow in the streams because of a reduction in return flow from the current POD's location. *Id.* at 511 – 518.

¹¹ Intervenors sought a temporary transfer under ORS 540.523(2), which includes the same requirement as ORS 540.530(1)(a), that OWRD shall grant the request if "the temporary transfer will not injure any existing water right."

¹² At the beginning of the irrigation season, the tribes' call triggers OWRD to send regulation notices to holders of water rights to curtail their rights when the local water levels fall below the level needed to satisfy the call. *Woodcock*, 334 Or App at 512.

Petitioners brought action in circuit court to limit intervenors' water rights to the historic consumptive use. OWRD and intervenors filed motions for summary judgment. For purposes of the motion, the evidence included that intervenors had not historically used the full legal water rights and that a portion of diverted water returned to the streams. In response to petitioners' claim that intervenors' water rights should be limited to historic consumptive use, the circuit court, as stated by the Oregon Court of Appeals, found the following:

The circuit court disagreed, concluding that an increase in intervenor's use to the full "paper value" of the water right did not constitute legally cognizable injury. The court explained:

"An increase in use of water by the holder of water rights, within the limits of a valid water right, does not constitute injury to other water rights regardless of whether that increase in use occurs in conjunction with a transfer."

Based on that reasoning, the court granted intervenor's and the OWRD's motion for summary judgment on petitioners' claim asserting that the transfer would result in "injury."

Woodcock, 334 Or App at 523. Upon review of the record, the Oregon Court of Appeals stated:

We conclude that the circuit court did not err. Petitioners' water rights are either junior or equal to intervenor's water right in priority, and a transfer makes no change in priority. Thus, petitioners' alleged deprivation of water as a result of intervenor's use of its full legal water right is simply a feature of the prior appropriation system; it is not an "injury" that is legally cognizable. We conclude for that reason that the circuit court did not err in granting intervenor's and the OWRD's motion for summary judgment on petitioners' claim of injury.

Id. at 524.

The ALJ does not find any significant distinction between *Woodcock* and the present case. The decision made by the circuit court and upheld by the Oregon Court of Appeals does not depend upon the nature of the water reduction (whether direct by limiting the amount of diverted water with the BLM restriction as in the present matter or indirect by a portion of diverted water returning to the streams as in *Woodcock*) or the nature of the reason for the water reduction (an agreement with BLM or in response to the tribes' call). The legal conclusion reached by the Oregon Court of Appeals is clear – a junior or equal water right is not injured when a senior or equal water right is utilized to the fullest extent within the terms of the water right regardless of any historic lesser use of the water right.

Certificate 59780 has a priority date of November 3, 1983, making it a junior water right to Applicants' water rights that have priority dates from 1868. OWRD's PDs require that the final orders include a condition that the quantity of water diverted at the additional POD,

together with water diverted at the existing POD, “shall not exceed the quantity of water lawfully available at the original [POD].” PD T-14158 and T-14170 at 6. Therefore, even if the additional POD results in Applicant diverting more water than historically diverted, Applicant’s full utilization of the water rights available in Certificates 135393, 96311, and 68553 is not a legally cognizable injury to the waters rights of Certificate 59780.

Protestant’s Protest of OWRD’s PDs T-14158 and T-14170, based on the argument that Applicant’s additional POD will injure Certificate 59780’s water rights, is dismissed.

Issue C: Additional POD as a Change in POD

The three parties agree that the existence of OWRD’s authority to allow a transfer applicant to add a new POD to a water right is dependent upon the interpretation of ORS 540.510(1)(a), specifically the following portion of the statute:

[T]he holder of any water use subject to transfer may, upon compliance with the provisions of ORS 540.520 and 540.530, change the use and place of use, the point of diversion or the use of the water without losing priority of the right.

Applicant asserts that ORS 540.510 has limited prerequisites for a proposed change and that a denial of the transfer application for an additional POD would be an impermissible insertion of language into the statute. Motion at 18-20. OWRD agreed with Applicant’s position, asserting that the statutes do not restrict the ability to add a POD as a change. OWRD Response at 3. Protestant argues that the language of the statute restricts the change to a singular POD. Protestant further argues that the Oregon legislature considered the addition of a POD as distinct from a change to a POD and, thus, the omission of the option of an additional POD from ORS 540.510(1)(a) was deliberate. WW Response at 17-19.

When interpreting a statute, the goal is to ascertain the legislature’s intent. *PGE v. Bureau of Labor Industries*, 317 Or 606, 610 (1993). “We ascertain the legislature’s intentions by examining the text of the statute in its context, along with any relevant legislative history, and, if necessary, canons of construction.” *State v. Cloutier*, 351 Or 68, 75 (2011); *122nd Grp., LLC v. Dep’t of Consumer*, 280 Or App 209 (2016). To determine legislative intent for an accurate interpretation, it is necessary to consider the analytical approach set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993) as modified by *State v. Gaines*, 346 Or 160 (2009); see also *Tye v. McFetridge*, 342 OR 61, 69 (2006) (*PGE* analysis is same method used to analyze administrative rules). In *PGE*, the Oregon Supreme Court explained that to determine legislative intent, a court begins by examining a statute’s text within its statutory context, giving words of common usage their plain, natural, and ordinary meaning. If the legislative intent is unambiguous, the court stops at that first level of analysis but may review any legislative history offered by a party. *PGE*, 317 Or at 610-11; *Gaines*, 346 Or at 171-172, 175 (ambiguity not necessary to review legislative history and the use of dictionary definitions to discern the plain, natural, and ordinary meaning of terms).

Here, the plain and ordinary meaning of “change” does not improve the clarity of the meaning of the phrase “may * * * change * * * the point of diversion” in OAR 540.510(1)(a). Change has a wide variety of definitions, including the following:

- To make different in some particular but short of conversion into something else
- To make over to a radically different form, composition, state or disposition
- To dispose of or give up toward the substituting of something roughly equivalent
- To replace with another or others of the same kind or class
- To undergo transformation or conversion

Webster’s Third New International Dictionary 373-374 (unabridged ed 2002). Although some definitions would require the replacement an existing POD, other definitions would not require replacement but merely a difference or some form of alteration or modification, such as an increase (or addition).

To obtain clarity for the phrase at issue, the ALJ turns to the statutory context of ORS 540.510(1)(a), in particular, caselaw that explains the purpose of this statute. Prior to the institution of the current statutory framework for oversight of water uses, Oregon law explicitly acknowledged that “[a] change in the point of diversion and place of use may be made when it can be done without prejudice to the rights of others.” *Russell-Smith v. Water Resources Dept.*, 152 Or App 88, 98 (1998) (internal citations omitted). This concern for the protection of the public remains the legislative purpose of ORS 540.510(1)(a) as confirmed by the Oregon Supreme Court in *Huff v. Bretz*, 285 Or 507 (1979), as follows:

These procedures are “for the protection of the public” (more specifically, for the protection of the interests of those who own affected or potentially affected water rights) against the evil of unrestrained changes in the point of diversion of water. This legislative purpose would be frustrated if a party could be required under the terms of an agreement to pump from an unauthorized point of diversion thereby changing the point of diversion without complying with the procedures mandated by ORS 540.510 et seq. and be held in breach of that agreement if he did not do so.

Huff, 285 Or at 518.

As noted by Applicant, ORS 540.510(1)(a) requires compliance with ORS 540.520 and ORS 540.530 for changes made to the use or place of use of the applicable water rights. ORS 540.530(1)(a) requires OWRD to examine whether a proposed transfer would injure other water rights and approve the transfer if no such injury occurs.¹³ ORS 540.520 details procedures

¹³ Other provisions of ORS 540.530 allow for the approval of a transfer that causes injury if certain conditions are met.

associated with a transfer application, including requirements to fully identify the water right, location, use, the proposed changes, and evidence of prior use. These requirements require OWRD to collect information to prevent the “evil of unrestrained changes” and protect the public from injury. *Id.* There is nothing in the statutory scheme that would require the limitation of the degree or the number of PODs utilized by a holder of a water right other than to prevent injury or confine the holder to the quantity of water delineated by the water right. Therefore, the ALJ finds that ORS 540.510(1)(a) does not prohibit OWRD from allowing a holder of a water right to change the mechanism of the diversion of water to include the addition of a new POD without requiring the elimination of an existing POD.

Protestant argued that the legislature’s phrase in ORS 540.510(6) of “may change the point of diversion or add an additional point of diversion” demonstrates that the legislature distinguishes a change of POD from an additional POD and deliberately chose not to include the option of an additional point of diversion in ORS 540.510(1)(a). The ALJ disagrees with Protestant’s contention. The legislature only used the phrase “an additional point of diversion” once in ORS chapter 540 and provided no explanation of any distinction. ORS 540.510(6) proceeds to provide the mechanism for a holder of water right to change a POD, including providing written notice to OWRD, OWRD’s publishing notice of the application, and OWRD’s approval of the change. Accepting Protestant’s argument, the holder who intends to add a POD would not have to follow the mechanism for approval of the additional POD that a holder intending a non-additional POD change would have to follow. Such a conclusion would not be a reasonable interpretation. In sum, the legislature’s use of the phrase “additional point of diversion” in ORS 540.510(6) did not indicate that the legislature viewed an additional POD as separate from a change in POD.

Protestant’s Protest of OWRD’s PDs T-14158,¹⁴ based on the argument that OWRD does not have the statutory authority under ORS 540.510(1)(a) to grant an additional POD for Certificates 13593 and 96311, is dismissed.

Issue G: Storage Right as a Water Use Subject to Transfer

Applicant’s Certificate 68553 that is the subject of PD T-14170 is a right to store water. ORS 540.510(1)(a) allows holders of any water right use “subject to transfer” to change the use, place and POD of the water rights. Protestant claims that a right to store water is not a water use subject to transfer, and, therefore, OWRD did not have the authority to grant Applicant’s transfer application. WW Response at 21-22.

In *Bridge Creek Ranch, LLC v. Oregon Water Resources Dept.*, 329 Or App 568 (2023) (*Bridge Creek Ranch II*), the Oregon Court of Appeals addressed this precise issue regarding the same certificate. OWRD originally denied Applicant’s transfer application for a new POD for Certificate 68553, arguing that “the water storage certificate was not a water use subject to transfer” and, thus, OWRD did not have the statutory authority to grant or deny Applicant’s transfer application (*i.e.*, OWRD made the same argument then that Protestant now makes.). *Id.*

¹⁴ The Stipulations Regarding the Statement of Issues provided that Issue C was applicable to PDs T-14158 and T-14170. However, in Applicant’s Motion, Applicant only sought a ruling on Issue C for the Protest of PD T-14158. Motion at 18, 20.

at 580. Applicant brought a mandamus action against OWRD, seeking an order to direct OWRD to process the application. *Id.* at 570. After a review of water law history and the application of statutory interpretation principles, the Oregon Court of Appeals concluded, as follows:

We conclude that, although, as the court held in *Cookinham*, with certain exceptions not applicable here, the storage of water in and of itself is not a “use” of water, when considered in the context of the secondary permit, it can represent a water use subject to transfer. When the storage of water under Certificate 68553 is considered, as it must be, in the context of the use of water under Certificate 68552, we agree with the trial court that relator’s Certificate 68553 establishes a “water use subject to transfer” in the sense contemplated by ORS 540.510. We therefore conclude that the trial court correctly determined that relator’s application for a change in POD should be considered by the OWRD.

Id. at 587.

Applicant and Protestant agree that the ALJ does not have the authority to overturn the Oregon Court of Appeals’ decision in *Bridge Creek Ranch II*. Motion at 21; WW Response at 22 (“WaterWatch also acknowledges that the case is controlling precedent applicable to this proceeding.”).¹⁵ Because the Oregon Court of Appeals recently concluded that the water storage right contained in Certificate 68553 is a water use subject to transfer, the ALJ, as an officer of lower rank, is bound by that decision. *See Stranahan v. Fred Meyer, Inc.*, 331 Or 38 (2000);¹⁶ *Farmers Ins. Co. v. Mowry*, 350 Or 686, 693-694 (2011) (precedents should be stable and reliable); *Horton v. Oregon Health and Science University*, 359 Or 168, 186 (2016) (identifies three category of errors that would justify reconsideration of a prior decision – no analysis, clearly incorrect analysis, or cannot be reconciled with other decisions). Therefore, the *Bridge Creek Ranch II* decision, as the controlling decision, is attached and incorporated into this ruling in its entirety.

Based upon the *Bridge Creek Ranch II* decision, Applicant, as a matter of law, is entitled to a favorable ruling on Issue G. Protestant’s Protest of OWRD’s PD T-14170, based on the argument that the applicable water right is not subject to transfer, is dismissed.

¹⁵ Although Protestant filed an *amicus brief* in *Bridge Creek Ranch II*, it was not a party to that case and could not appeal the decision. *Bridge Creek Ranch II*, 329 Or App at 569. In the WW Response, Protestant notes that it may seek to modify or reverse that ruling upon a potential appeal of this matter. WW Response at 22.

¹⁶ In *Stranahan*, the Oregon Supreme Court stated, as follows:

A deliberate or solemn decision of a court or judge, made after argument of a question of law fairly arising in a case, and necessary to its determination, is an authority, or binding precedent, in the same court or in other courts of equal or lower rank, in subsequent cases, where ‘the very point’ is again in controversy.

Id. at 54 (internal citation omitted.).

In the Matter of Transfer Applications T-14158 and T-14170 - OAH Case Nos. 2024-OWRD-00163 and 2024-OWRD-00165

RULING

Applicant's Motion for Summary Determination is **GRANTED**, in part, and **DENIED**, in part. Applicant's Motion for Summary Determination is granted as to the following issues:

Issue B is **DISMISSED** regarding any claim of injury to Certificate 59780. Because the Stipulations Regarding the Statement of Issues did not confine the issue of injury just to Certificate 59780, Issue B will proceed to hearing regarding injury claims to other water rights, as provided by the Stipulations Regarding the Statement of Issues.

Issue C is **DISMISSED** regarding the Protest filed against PD T-14158. Because the Motion only sought a favorable ruling regarding the claim involving PD T-14158, Issue C will proceed to hearing regarding the Protest filed against PD T-14170, as provided by the Stipulations Regarding the Statement of Issues.

Issue G is **DISMISSED** from this transfer application proceeding.

Applicant's Motion for Summary Determination is denied as to Issue A.

/s/Samantha A. Fair
Senior Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF MAILING

On January 15, 2025 I mailed the foregoing RULING ON MOTION FOR SUMMARY DETERMINATION AND in OAH Case No.2024-OWRD-00163 and 2024-OWRD-00165.

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**329 Or.App. 568
541 P.3d 920**

**BRIDGE CREEK RANCH, LLC, Relator-
Respondent,
v.
OREGON WATER RESOURCES
DEPARTMENT and Doug Woodcock,
Director of Oregon Water Resources
Department, Defendants-Appellants.**

A180610

Court of Appeals of Oregon.

**Argued and Submitted September 13, 2023
December 20, 2023**

Denise Fjordbeck, Assistant Attorney General, Salem, argued the cause and filed the brief for appellants. Also on the briefs were Ellen Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Sara Kobak, Portland, argued the cause and filed the brief for respondent. Also on the brief were Elizabeth E. Howard, and Schwabe Williamson & Wyatt PC.

Steven L. Shropshire and Jordan Ramis PC, Lake Oswego, filed brief amicus curiae for Oregon Farm Bureau Federation and Oregon Association of Nurseries.

Olivier Jamin and Davis Wright Tremaine LLP, Portland, filed the brief amicus curiae for Oregon Water Utility Counsel, League of Oregon Cities, and Special Districts Association of Oregon.

Andrew R. Missel and Brian Posewitz filed the brief amicus curiae for WaterWatch of Oregon.

Before Tookey, Presiding Judge, and Egan, Judge, and Kistler, Senior Judge.

TOOKEY, P. J.

[541 P.3d 922]

The Oregon Water Resources Department (the OWRD) and its director (defendants) appeal from a judgment in this mandamus action under ORS 34.105 to 34.250 directing the OWRD to consider an application by relator Bridge Creek Ranch, LLC (relator) for a change in the "point of diversion" (POD) of water from a creek that serves as a source of water for relator's reservoir.¹ We have jurisdiction of the appeal pursuant to ORS 34.240.² We affirm the trial court's judgment directing the OWRD to consider relator's application for a change in the POD, although based on slightly different reasoning from that of the trial court.

The parties have stipulated to the relevant factual background: Relator owns the Painted Hills Reservoir, an "off-channel" reservoir,³ and agricultural lands in Wheeler County, Oregon, irrigated with water stored in the reservoir. The water is diverted to fill the reservoir from Bear Creek and Bridge Creek on Bureau of Land Management (BLM) land.

Relator's right to store water is pursuant to two water storage right certificates granting relator the right "to store and use" the authorized volumes of water as irrigation storage water, Certificate 68551 and Certificate 68553. The certificates state that they are restricted to that "beneficial use" at the reservoir location.⁴ Relator also holds Certificate 68552, a secondary water certificate granting it the right to divert and apply water both from the reservoir

and from Bear Creek to irrigate specific lands described as authorized places of use in the secondary certificate.

In 2016, relator began working with the OWRD and the BLM to improve the reservoir and to store an additional 500 acre-feet of water for the purpose of supporting fish life. Relator received grants and obtained new reservoir permits and also obtained a separate secondary permit to release that amount of stored water for that purpose.

Through negotiations, relator and the BLM agreed that relator could have a temporary nonrenewable right-of-way over federal land, which expires in December 2024, to move the existing Bridge Creek POD from its current placement on federal land to a new downstream location on relator's own property.

In December 2021, relator submitted a permanent water transfer application to the OWRD under ORS 540.510 to change the Bridge Creek POD for its storage water right under Certificate 68553 and its permitted storage water right. The OWRD accepted and processed the POD transfer application for the *permitted* storage right under ORS 537.211(4) (addressing change of the point of diversion by holder of a water right permit) but declined to process the POD transfer application for the certificated storage water right under Certificate 68553 without a loss of the priority of the water right, stating that, under ORS 540.510(1), the OWRD does not have the "authority to make POD changes to R-rights for storage" established by water certificates.

Relator filed the instant petition for a peremptory or alternative writ, seeking to compel

[541 P.3d 923]

the OWRD to consider its application for a change in the POD. Relator also sought a declaration clarifying the OWRD's authority under ORS 540.510(1)(a) to allow changes in a POD and place of use in a certificated water storage right under Certificate 68553 without loss of the existing priority of the right. On the parties' cross-motions for summary judgment, the trial court granted relator's motion, denied defendants' motion, and issued the peremptory writ. In granting relator's motion for summary judgment and denying defendants' motion, the trial court agreed with relator's construction of the statutes:

"The court finds that storage of water for different purposes qualifies as 'water use.' As such, the right to store water under a water

certificate is a right to 'water use established by *** a water certificate' under ORS 540.505(4)(b). The court also finds that OWRD has the authority to allow transfers of point of diversion and point of use for certificated storage water rights under ORS 540.530."

The peremptory writ of mandamus ordered the OWRD to begin processing relator's application for a transfer of the POD on Certificate 68553 within seven days of receiving a new and complete application. The OWRD has tendered a certificate showing compliance with the writ, in that it has begun to process relator's application.

Defendants appeal.⁵ On appeal, defendants do not ask us to stay the peremptory writ; they state that the OWRD will process relator's application in the ordinary course of business. The parties agree, however, that this matter is not moot, because, although the trial court's judgment determined that the OWRD had authority to process relator's application, it did not direct that the application be granted. Should the OWRD issue an order denying the application, it is anticipated that relator will request a contested case hearing. Should the OWRD issue an order granting the application, it is anticipated that parties not currently involved in this litigation will file protests and request a contested case hearing, placing the OWRD's authority to allow a transfer of the POD for a certificated storage right directly at issue. We agree with the parties that, for the reasons cited, the matter is not moot, and we therefore undertake a review of the petition.

In reviewing the trial court's judgment, we consider first the standard for issuance of a writ of mandamus under ORS 34.110. A writ of mandamus may issue to an agency "to compel the performance of an act which the law specially enjoins." ORS 34.110. The legal right to compel the performance of the legal duty "must be plain and complete."

State ex rel. Engweiler v. Felton , 350 Or. 592, 628, 260 P.3d 448 (2011) (quoting *Florey v. Coleman* , 114 Or. 1, 2, 234 P. 286 (1925)). See also *United States of America v. Cohn* , 201 Or. 680, 684, 272 P.2d 982 (1954) ("[N]o petitioner is entitled to the remedy of mandamus unless he has a clear legal right to the performance of the particular duty sought to be enforced and unless there is a plain legal duty on the part of the defendant to perform the act."). Where, as here, the trial court's judgment as to the OWRD's authority depends on the construction of statutes, we review the judgment for errors of law. See *State ex rel. Schrodt v. Jackson County* , 262 Or App 437, 443, 324 P.3d 615 (2014) (reviewing for legal error trial court determination that mandamus procedure was applicable).

The parties agree that the mandamus petition presented only a question of the statutory construction of the water appropriation and water right transfer statutes, ORS chapter 537; ORS 540.505 to 540.530, and whether those statutes authorized the OWRD to consider an application to allow the holder of a certificated water storage right to make POD changes. The position of the OWRD is that, under ORS 540.510 and other relevant statutes, the OWRD is empowered to entertain an application to transfer the POD for a water right only from an applicant who holds a "water use subject to transfer," and that relator does not hold such a water use. In the

[541 P.3d 924]

view of the OWRD, as defined in ORS 540.505,⁶ and based on statutory context, a certificated water storage right is not a "water use subject to transfer." The OWRD postulates that a certificate for the storage of water allows only appropriation and impoundment of water for a *subsequent* use and is not in and of itself a "beneficial use" or a water right that is established by a "water use."

In relator's view, the trial court correctly concluded that the storage of water pursuant to Certificate 68553 is, in and of itself, a water use that is subject to transfer, because the issuance of the certificate depends on a showing of beneficial

use. Further, relator notes that the particular certificate that it holds states that the water storage is a beneficial use.

We address the statutory construction issue raised on appeal pursuant to the methodology set forth in *State v. Gaines* , 346 Or. 160, 171, 206 P.3d 1042 (2009), and *PGE v. Bureau of Labor and Industries* , 317 Or. 606, 610, 859 P.2d 1143 (1993), beginning with the texts of the relevant statutes.

"All water within the state from all sources of water supply belongs to the public." ORS 537.110. ORS 537.120 provides:

"Subject to existing rights, and except as otherwise provided in ORS chapter 538, all waters within the state may be appropriated for beneficial use, as provided in the Water Rights Act and not otherwise; but nothing contained in the Water Rights Act shall be so construed as to take away or impair the vested right of any person to any water or to the use of any water."

"Beneficial use" is "the basis, the measure and the limit of all rights to use of water in this state." ORS 540.610(1) ; *Alexander v. Central Ore. Irrig. Dist.* , 19 Or App 452, 457, 528 P.2d 582 (1974) ("[A]ctual application of water to a beneficial use is the basis for recognized rights" under Oregon's water law.); see ORS 537.120 (water may be appropriated for a beneficial use and not otherwise); ORS 537.250(3) ("Rights to the use of water acquired under the provisions of the Water Rights Act, as set forth in a certificate issued under this section, shall continue in the owner thereof so long as the water shall be applied to a beneficial use under and in accordance with the terms of the certificate."). See also OAR 690-300-0010(5) (defining "beneficial use" as "the reasonably efficient use of water without waste for a purpose consistent with the laws, rules and the best interests of the people of the state").

The acquisition of a water right in Oregon occurs in two phases. In the first phase, a person must seek a permit for a water right. By application for a permit, the person applies for authorization to develop the source and begin making beneficial use of water. ORS 537.130 provides:

"[A]ny person intending to acquire the right to the beneficial use of any of the surface waters of this state shall, before beginning construction, enlargement or extension of any ditch, canal or other distributing or controlling works,

or performing any work in connection with the construction, or proposed appropriation, make an application to the Water Resources Department for a permit to make the appropriation."

An application for a permit to appropriate water for a beneficial use is made pursuant to ORS 537.140 :

"(1)(a) Each application for a permit to appropriate water shall be made to the Water Resources Department on a form prescribed by the department and shall set forth:

"* * * * *

"(C) The nature and amount of the proposed use;

"* * * * *

"(d) If for construction of a reservoir, the application shall give the height of dam, the capacity of the reservoir, and the uses to be made of the impounded waters."

If the OWRD determines that the water is available for the requested beneficial use, the

[541 P.3d 925]

OWRD may issue a permit. The permit begins the time during which the applicant must "perfect" the water right, *i.e.* , must develop the beneficial use authorized by the permit so as to acquire a certificate. A permit may be amended to change the conditions of the permit or the point of diversion. ORS 537.211(4), (5). A water right that is *permitted* is treated under the statutes as personal property and is subject to cancellation if not properly developed or used. ORS 537.260.

In the second phase, the permittee applies for a water right certificate to appropriate water, which is issued only after the beneficial use identified in the permit is fully developed. A certificate to appropriate water may be acquired and maintained only by "perfecting" and continuing an appropriation of water for beneficial use. ORS 537.250 provides:

"(1) After the Water Resources Department has received a request for issuance of a water right certificate accompanied by the survey required under ORS 537.230 that shows, to the satisfaction of the department, that an appropriation has been perfected in accordance with the provisions of the Water Rights Act, except as provided in subsection (4) of this section, the department shall issue

to the applicant a certificate of the same character as that described in ORS 539.140. The certificate shall be recorded and transmitted to the applicant as provided in that section.

"* * * * *

"(3) Rights to the use of water acquired under the provisions of the Water Rights Act, as set forth in a certificate issued under this section, shall continue in the owner thereof so long as the water shall be applied to a beneficial use under and in

accordance with the terms of the certificate, subject only to loss:

"(a) By nonuse as specified and provided in ORS 540.610 ; or

"(b) As provided in ORS 537.297."

A *certificated* water right is "vested," meaning that it is treated as an interest in real property. *Green v. Wheeler* , 254 Or. 424, 430, 458 P.2d 938 (1969), *cert. den.* , 397 U.S. 990, 90 S.Ct. 1123, 25 L.Ed.2d 397 (1970) (explaining that the appropriative right vests with the issuance of certificate). A certificated water right can only be lost upon a showing of one of the circumstances described in ORS 537.250(3)(a) or (b).

The acquisition of the right to *store* water is subject to the same provisions as any other water right. *See* 46 Op Atty Gen 290, 292-93 (1989) ("Since 1909, rights to appropriate water for storage have been acquired under the same scheme as any other water right."). ORS 537.400⁷ separately

addresses applications for reservoir permits, which are also subject to the same provisions that govern

[541 P.3d 926]

other water right permit applications. An applicant for a permit to store water obtains a "primary water right," which is defined as "the water right designated by the Water Resources Commission as the principal water supply for the authorized use, or if no designation has been made, the water right designated by the applicant as the principal water supply for the authorized use." ORS 540.505(2). A secondary permit must then be sought for use of the water from the reservoir. ORS 537.400.⁸ The final certificate of appropriation issues only after the beneficial use has been completed and perfected under the secondary permit.

Thus, as OWRD states in its briefing to us,

"[t]he primary water right to store water is *** inextricably linked to the secondary permit to put the water to beneficial use, with the reservoir right supplying the supply of water to be put to beneficial use under the secondary permit. This is different from most permits to appropriate water, which do not require a secondary permit to allow beneficial use.

"The permit allows the person intending to store water to construct the necessary works but is not itself a perfected water right. A water right is perfected when the water is put to beneficial use, such as irrigation, as evidenced by a 'final proof survey.' OWRD then issues a water right certificate. ORS 537.250."

Here, the water is to be diverted from storage in the reservoir for irrigation use. Thus, ORS 537.400(1) requires a secondary permit for use of the water. The secondary permit is also a prerequisite to the issuance of a certificate for the reservoir:

"All applications for reservoir permits shall be subject to the provisions of ORS 537.130, 537.140, 537.142 and 537.145 to 537.240, except that an enumeration of any lands proposed to be irrigated under the Water Rights Act shall not be required in the primary permit. *But the party proposing to apply to a beneficial use the water stored in any such reservoir shall file an application for permit, to be known as the secondary permit, in compliance with the provisions of ORS 537.130, 537.140, 537.142 and 537.145 to 537.240. The application shall refer to the reservoir for a supply of water and shall show by documentary evidence that an*

agreement has been entered into with the owners of the reservoir for a sufficient interest in the reservoir to impound enough water for the purposes set forth in the application, that the applicant has provided notice of the application to the operator of the reservoir and, if applicable, that an agreement has been entered into with the entity delivering the stored water. When beneficial use has been completed and perfected under the secondary permit, the Water Resources Department shall take the proof of the water user under the permit. The final certificate of appropriation shall refer to both the ditch described in the secondary permit and the reservoir described in the primary permit."

(Emphases added.) Relator's predecessor happens to have been the applicant for the secondary permit. The OWRD issued to relator's predecessor reservoir permit R-9896, authorizing "the construction of Mitchell Ranch Reservoir Enlargement and storage of water from Bear Creek and Bridge Creek," to be appropriated under a permit with a priority date of October 17, 1983, which is not at issue in this case. The OWRD subsequently issued two certificates

to relator's predecessor for the storage of the water, confirming "the right to store the waters" of Bridge Creek and Bear Creek, recorded as Certificates numbered 68551 and 68553. The OWRD also issued a separate certificate to relator's predecessor confirming the right to

[541 P.3d 927]

use the water for irrigation, recorded as Certificate number 68552.

Thus, three certificates were issued to relator's predecessor for the reservoir—two for water storage under the primary permit and one for use of the stored water under the secondary permit.

To change any element of a certificate, such as a POD or type of use, the certificate holder must apply to the OWRD under ORS 540.510(1). That statute provides that "the holder of a water use *subject to transfer* may, upon compliance with the provisions of ORS 540.520 and 540.530, change the use and place of use, the point of diversion or the use of the water without losing priority of the right." ORS 540.510(1)(a) (emphasis added); *see* ORS 540.520 ; OAR 690-380-3000 (Oct 6, 2006) (describing application requirements).⁹ An application submitted under ORS 540.510 "shall be approved if [the OWRD] determines," among other things, that "[t]he water right affected by the proposed transfer is a water use subject to transfer as defined in ORS 540.505(4) and OAR 690-380-0100(14)." OAR 690-380-5000(1) (Oct 6, 2006);¹⁰ *see id.* (describing conditions for approval); ORS 540.530 (same).

Here, as noted, relator submitted an application to transfer the POD for Certificate 68553, which the OWRD had issued to relator's predecessor for storage at the reservoir. And as noted, here, in response to relator's application to change a POD under ORS 540.510, the OWRD returned the application without processing it, stating, "The Department does not have the authority to make POD changes to R-rights for storage." The rationale provided by the OWRD was that the water storage certificate was not a water use subject to transfer.

The peremptory writ issued by the trial court directs the OWRD to process relator's application. The nub of the dispute on appeal turns on whether relator has the right to request (and OWRD has authority to process) a change in the POD for Certificate 68553 under ORS 540.510(1), which defines the process for seeking to change a water right certificate without losing priority of the right.¹¹ ORS 540.510(1) (a) provides in relevant part:

"(a) Except as provided in subsections (2) to (8) of this section, all water used in this state for any purpose shall remain appurtenant

to the premises upon which it is used and no change in use or place of use of any water for any purpose may be made without compliance with the provisions of ORS 540.520 and 540.530. However, *the holder of any water use subject to transfer may, upon compliance with the provisions of ORS 540.520 and 540.530, change the use and place of use, the point of diversion or the use of the water without losing priority of the right.* "

(Emphases added.) The holder of a "water use subject to transfer" may change "the use and place of use, the point of diversion or the use of the water" without a loss of priority. ORS 540.510(1)(a).

Defendants point further to ORS 540.505(4), which defines "water use subject to transfer," as used in ORS 540.510(1) :

" 'Water use subject to transfer' means a *water use established by* :

"(a) An adjudication under ORS chapter 539 as evidenced by a court decree;

[541 P.3d 928]

"(b) A water right certificate;

"(c) A water use permit for which a request for issuance of a water right certificate under ORS 537.250 has been received and approved by the Water Resources Commission under ORS 537.250 ; or

"(d) A transfer application for which an order approving the change has been issued under ORS 540.530 and for which proper proof of completion of the change has been filed with the Water Resources Commission."

(Emphasis added.) Defendants argue that storage is not a *use* of water and that, therefore, taken together, the above provisions demonstrate that holders of water storage certificates do not, without a loss of priority, have the ability to seek to transfer the place of use of storage or POD of water and, further, that the OWRD does not have authority to consider requests for such changes.

Relator responds that, as set forth in ORS 540.505(4) (b), it holds a water use subject to transfer, because Certificate 68553 is a water right certificate. Defendants reply that although Certificate 68553 is a water right certificate, it does not constitute a water use subject to transfer, because, under ORS 540.505(4), a "water use" is a reference to an actual beneficial use of the water, and storage, with limited exceptions, does not constitute a beneficial use. *See* ORS 540.610(1) (all water rights in Oregon are based on beneficial use of water); *Teel Irrigation Dist. v. Water Resources Dept.* , 323 Or. 663, 667, 919 P.2d 1172 (1996) ("The water right is perfected when the water actually is put fully to a beneficial use.").¹²

The question whether water storage is, in and of itself, a "use" of water was addressed many years ago by the Supreme Court in *Cookinham v. Lewis* , 58 Or. 484, 491-92, 114 P. 88, *reh'g denied* , 58 Or. 484, 495, 115 P. 342 (1911). There, the court had before it a decision by the Oregon "Board of Control" rejecting an application for a reservoir permit for the purpose of reclamation of public desert land. In considering the statutory predecessor of ORS 537.400 in Oregon's Water Code, the court stated that the type of use that supports the issuance of a permit for water storage is not a "use of water." The court explained the distinction between a permit for storage and one for the use of the stored water:

"The primary reservoir permit, provided for by [the Oregon Water Code, Or Laws 1909 Section 58)], contemplates a storage of the water in some locality where it can be utilized for irrigation. The secondary permit contemplates that users of the water shall acquire a

permanent ownership by agreement with the owner for a specified quantity of the stored water for the needs of and use upon his land, and when reclamation is contemplated the water becomes appurtenant to his land. The Water Code makes a distinction between a permit for diversion of water and one to construct a reservoir and store surplus water. *The latter does not include the right to divert*

[541 P.3d 929]

and use such stored water, which must be the subject of the secondary permit. "

58 Or. at 491-92, 114 P. 88 (emphasis added). A permit for storage, *in and of itself*, the court held, does not constitute or include the right to use stored water; it is the secondary permit that applies the water to beneficial use. *Id.* at 492, 114 P. 88 ; *see also*

Nevada Ditch Co. v. Bennett , 30 Or. 59, 89, 45 P. 472 (1896) ("An appropriation proper is not made until there has been an actual application of the water claimed, to some beneficial purpose, or some useful industry. All rights acquired prior to this time, at whatsoever step in the process, amount simply to a claim of an appropriation[.]"); 25 Op Atty Gen 206 (1951) ("Storage in and of itself is not a use. Storage must be for a future purpose.").

Relying on *Cookinham* , defendants contend that, although there may be reservoir permits and certificates that establish both a right to store and to use water, *see* ORS 537.400(2) (describing storage that does not "contemplate future diversion of the stored water"), as a general rule, a certificate for water storage does not itself constitute "water use," as that term is used in ORS 540.510. Because, in defendants' view, storage is not a "use," nor is it, in defendants' view, a "beneficial use;" thus, in defendant's view, it cannot be subject to a right to transfer.

We agree with defendants that a use subject to transfer must be a beneficial use and that, with limited exceptions, a beneficial use of stored water is established not through the primary permit for storage but through the secondary permit.

We nonetheless conclude that relator's Certificate 68553 represents a water use subject to transfer under ORS 540.510. That is because whether Certificate 68553 represents a water use subject to transfer must be viewed in the context of Certificate 68552, which, as required by ORS 540.400(1), was a prerequisite to the issuance of Certificate 68553 and which authorizes the use of water. As provided in ORS 537.400, a certificate for storage is issued only when beneficial use has been completed and perfected under the secondary permit. And, as OWRD acknowledges, the two are "inextricably linked." "The final certificate of appropriation shall refer to both the ditch described in the secondary permit and the reservoir described in the primary permit." ORS 537.400. The holder of the storage certificate and the holder of the certificate for use of the water together create the appropriation and the beneficial use. *See also Nevada Ditch Co.* , 30 Or. at 98, 45 P. 472 (addressing the relationship between

the appropriator of water and the persons who put the water to beneficial use and observing, "in whatever capacity the parties to the appropriation may be considered," both were necessary to appropriate the water). In *Fort Vannoy Irrigation v. Water Resources Comm.* , 345 Or. 56, 78, 188 P.3d 277 (2008), the court said that the "terms and conditions" of the certificate will dictate the use of the water. The use permitted by Certificate 68553 can only be determined with reference to Certificate 68552, which, conversely, depends on Certificate 68553. Together, the two certificates refer to a beneficial use of the water and, hence, to a water use subject to transfer.

Defendants note that ORS 540.510(1)(b) provides that the holder of a water right certificate authorizing storage may change "the type of use" identified in the certificate without losing priority:

"A holder of a water right certificate that authorizes the storage of water may change the type of use identified in the water right certificate, as described in subsection (1)(a) of this section, without losing priority of the right."

(Emphases added.) Defendants contend that ORS 540.510(1)(b) demonstrates a legislative intention to limit the change that can be made by the holder of a water right certificate for storage to "type of use," excluding the other types of changes listed in ORS 540.510(1)(a), including the POD. In defendants' view, understanding a "water use subject to transfer" to be capable of including a water right for storage would render ORS 540.510(1)(b) superfluous, because the change in "type of use" that it explicitly allows would already be encompassed within ORS 540.510(1)(a).

Although the OWRD's construction is a plausible one, we reject it for several reasons.

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First, ORS 540.510(1)(b) does not state that the holder of a water storage certificate may change *only* the type of use. Additionally, a change to the "type of use" permitted by ORS 540.510(1)(b), is not explicitly among the changes listed in ORS 540.510(1)(a). Thus, textually, it is possible to understand ORS 540.510(1)(b) to supplement the changes permitted in ORS 540.510(1)(a) rather than to limit the rights of a holder of a water storage certificate, as defendants contend. Under that construction,

ORS 540.510(1)(b) is not duplicative of ORS 540.510(1)(a) or superfluous.

But beyond the text, the legislative history of ORS 540.510(1)(b) leads us to conclude that ORS 540.510(1)(b) does not have strong bearing on the legislature's intention with respect to ORS 540.510(1)(a). The Supreme Court discussed the history of ORS 540.510 in *Fort Vannoy Irrigation*, 345 Or. at 74-78, 188 P.3d 277. The court

explained that a provision for the change of the use, place of use, and point of diversion has been a part of the Water Code since 1927. *Id.* at 75, 188 P.3d 277. The court explained that, in 1991, the statute was amended to make the right of transfer available only to the "owner of any *certificated* water right." *Id.* (citing Or. Laws 1991, ch. 957, § 7(1)) (emphasis added). Then, in 1995, the legislature amended ORS 540.510(1)(a) by deleting the phrase "owner of any certificated water right" and substituting the phrase "holder of any water use subject to transfer." *Fort Vannoy Irrigation*, 345 Or. at 75, 188 P.3d 277; Or. Laws 1995, ch. 274, § 2. The legislature also enacted a four-part definition of the phrase "water use subject to transfer," codified at ORS 540.505. *Fort Vannoy Irrigation*, 345 Or. at 76, 188 P.3d 277; Or. Laws 1995, ch. 274, § 1. The parties agree that the amendments were intended to *expand* the availability of changes beyond only the owner of a certificated water right, and that water storage certificates were not expressly addressed. *See Fort Vannoy Irrigation*, 345 Or. at 75-77, 188 P.3d 277 ("[T]he legislature abandoned the exclusive focus on certificated water rights in the 1991 version of ORS 540.510(1) by deleting the phrase 'owner of any certificated water right,' substituting the phrase 'holder of any water use subject to transfer,' and enacting a four-part definition of the phrase 'water use subject to transfer' that extended beyond certificated water rights." The effect of the amendments was to extend the transfer provision to "inchoate water rights"—water rights that are not yet "vested," because a certificate has not yet been issued.).

The 1995 amendments made no specific mention of water storage rights or certificates. But the amendments led the OWRD to reevaluate the extent to which water storage certificates could be changed without a loss in priority. In 2018, the Oregon Department of Justice (DOJ) advised

the OWRD that the storage of water is not a "use subject to transfer," as defined in ORS 540.505(4)(b), because it is not a "use" of water. Thus, the DOJ advised the OWRD that water storage is not a use that is eligible to be changed without a loss of priority under ORS 540.510(1),

and that the holder of a water storage certificate could not make changes without a loss of priority.

Then, in 2021, the Legislative Assembly enacted ORS 540.510(1)(b), directly in response to DOJ's opinion and OWRD's change in policy, to make explicit the right of a water storage certificate holder to change the "type of use," the most commonly requested change. Or. Laws 2021, ch. 633, § 1. Defendants contend that that amendment supports their conclusion that a water storage certificate holder can change *only* the type of use without a loss of priority.

Of course, we recognize that various subsections of a statute should be construed together. See *Wetherell v. Douglas County*, 342 Or. 666, 678, 160 P.3d 614 (2007) (explaining that the court should not look at one subsection of a statute in a vacuum but should construe "each part together with the other parts in an attempt to produce a harmonious whole"). But, as the Supreme Court has said, with the exception of statutory amendments that materially change the text of an earlier statute, either explicitly or by implication, *State v. Ofodrinwa*, 353 Or. 507, 529-30, 300 P.3d 154 (2013), a later legislature's understanding of the meaning of a previously enacted statute does not have bearing on what that earlier statute means.

[541 P.3d 931]

See *DeFazio v. WPPSS*, 296 Or. 550, 561, 679 P.2d 1316 (1984) (explaining that "[t]he views legislators have of existing law may shed light on a new enactment, but it is of no weight in interpreting a law enacted by their predecessors"). The legislature did not amend subsection (1)(a) when it enacted subsection (1)(b) in 2021, and there is no necessary implication or indication in the legislative history that the intention in the adoption of subsection (1)(b) was to alter the meaning of subsection (1)(a). We conclude that the enactment of subsection (1)(b) cannot be viewed as expressing an intention to modify subsection (1)(a). Thus, the legislature's view that, in light of the DOJ's 2018

construction of ORS 540.510(1)(a), it was necessary to

enact ORS 540.510(1)(b) to explicitly authorize changes in the type of use of a water reservoir certificate does not weigh in our construction of ORS 540.510(1)(a).

We conclude that, although, as the court held in *Cookinham*, with certain exceptions not applicable here, the storage of water in and of itself is not a "use" of water, when considered in the context of the secondary permit, it can represent a water use subject to transfer. When the storage of water under Certificate 68553 is considered, as it must be, in the context of the use of water under Certificate 68552, we agree with the trial court that relator's Certificate 68553 establishes a "water use subject to transfer" in the sense contemplated by ORS 540.510. We therefore conclude that the trial court correctly determined that relator's application for a change in POD should be considered by the OWRD.

Affirmed.

Notes:

¹ See OAR 690-385-0100(11) (Jan 2007) (defining "point of diversion" as "the place at which surface water is diverted from a surface water source as specified in the water right").

² ORS 34.240 provides:

"From the judgment of the circuit court or Oregon Tax Court, or judge thereof, refusing to allow a mandamus, or directing a peremptory mandamus, an appeal may be taken in like manner and with like effect as in an action."

³ An "off-channel" reservoir is one that exists "outside a natural waterway," unlike an "on-channel" reservoir created by a dam or other impoundment within the waterway. OAR 690-300-0010(31) (Feb 2012).

⁴ The certificates state that "[t]he right to store and use the water for the above purpose is restricted to beneficial use at the place of use described" as the reservoir location.

⁵ WaterWatch of Oregon has filed an *amicus* brief in support of defendants' appeal. The Oregon Water Utility Council, the League of Oregon Cities, the Special Districts Association, the Oregon Farm Bureau Federation, and the Oregon Association of Nurseries have filed *amicus* briefs in support of relator's response.

⁶ ORS 540.505(4)(b) defines "water use subject to transfer" as a "water use established by *** [a] water right certificate."

⁷ ORS 537.400 provides, in relevant part:

"(1) All applications for reservoir permits shall be subject to the provisions of ORS 537.130, 537.140, 537.142 and 537.145 to 537.240, except that an enumeration of any lands proposed to be irrigated under the Water Rights Act shall not be required in the primary permit. But the party proposing to apply to a beneficial use the water stored in any such reservoir shall file an application for permit, to be known as the secondary permit, in compliance with the provisions of ORS 537.130, 537.140, 537.142 and 537.145 to 537.240. The application [for the secondary permit] shall refer to the reservoir for a supply of water and shall show by documentary evidence that an agreement has been entered into with the owners of the reservoir for a sufficient interest in the reservoir to impound enough water for the purposes set forth in the application, that the applicant has provided notice of the application to the operator of the reservoir and, if applicable, that an agreement has been entered into with the entity delivering the stored water. When

beneficial use has been completed and perfected under the secondary permit, the Water Resources Department shall take the proof of the water user under the permit. The final certificate of appropriation shall refer to both the ditch described in the secondary permit and the reservoir described in the primary permit.

"(2) Whenever application is made for permit to store water in a reservoir or pond for any beneficial use which does not contemplate future diversion of the stored water except by livestock drinking from stock water ponds, the extent of utilization thereof may be included in the reservoir permit and no secondary permit shall be required. However, in cases where water from a stream is required to maintain a reservoir or pond by replacing evaporation and seepage losses, or is required to maintain suitable fresh water conditions for the proposed use and to prevent stagnation, the applicant for permit to store water in such reservoir or pond shall also file an application for permit to appropriate the waters of the stream."

⁸ There are two circumstances in which a secondary permit is not required: If the permit is sought "to store water in a reservoir or pond for any beneficial use which does not contemplate future diversion of the stored water," such as for use as a scenic attraction, only a storage water permit is necessary. ORS 537.400(2). Additionally, small reservoirs established before January 1, 1995, are presumed to constitute a "beneficial use." ORS 537.405(1) ("Reservoirs in existence on or before January 1, 1995, that store less than 9.2 acre feet of water or with a dam or impoundment structure less than 10 feet in height, are found to be a beneficial use of the water resources of this state."). But apart from

those exceptions, the diversion of water from storage must be pursuant to a separate application and permit known as a "secondary permit."

⁹ We refer to the rules that were in effect when the application was filed.

¹⁰ OAR 690-380-5000 (Oct 6, 2006) provides:

"(1) A transfer application shall be approved if the Department determines that:

"(a) The water right affected by the proposed transfer is a water use subject to transfer as defined in ORS 540.505(4) and OAR 690-380-0100(14) and, for a right described under 690-380-0100(14)(d), the proof of completion has been approved under 690-380-6040;

"(b) The portion of the water right to be transferred is not cancelled pursuant to ORS 540.610 ;

"(c) The proposed transfer would not result in enlargement as defined in OAR 690-380-0100(2) ;

"(d) Except as provided in OAR 690-380-5030, the proposed transfer would not result in injury as defined in 690-380-0100(3); and

"(e) Any other requirements for water right transfers are met."

Pursuant to OAR 690-300-0010(5), "beneficial use" means "the reasonably efficient use of water without waste for a purpose consistent with the laws, rules and the best interests of the people of the state." For example, for the purposes of statewide water policy, the OWRD defines "beneficial use" as "an instream public use or a use of water for the benefit of an appropriator for a purpose consistent with the laws and the economic and general welfare of the people of the state" that "includes, but is not limited to, domestic, fish life, industrial, irrigation, mining, municipal, pollution abatement, power development, recreation, stockwater and wildlife uses." OAR 690-400-0010 ; *see also, e.g.* , ORS 537.142(2) ("The use of water for a salmon and trout enhancement project *** is a beneficial use[.]"); ORS 537.334(1) ("Public uses are beneficial uses."); *see also* ORS 536.300(1) ("The Water Resources Commission shall proceed as rapidly as possible to study: Existing water resources of this state; means and methods of conserving and augmenting such water resources; existing and contemplated needs and uses of water for domestic, municipal, irrigation, power development, industrial, mining, recreation, wildlife, and fish life uses and for pollution abatement, all of which are declared to be beneficial uses, and all other related subjects, including drainage, reclamation, floodplains and reservoir sites."). *See also Fort Vannoy Irrigation Dist. v. Water Resources Commission* , 345 Or. 56, 78, 188 P.3d 277 (2008) (commenting that both ORS 540.520(8) and ORS 540.523(3) treat "beneficial use" and "water use [established by a water right certificate]" as distinct).

¹¹ The parties do not address, and we therefore do not consider, the issue of OWRD's "authority" to consider the application, as distinct from OWRD's rejection of the application on its merits based on OWRD's understanding that the relevant statutes do not permit that type of change.

¹² The legislature has declared "certain important uses, including irrigation," to be beneficial. *Hennings v. Water Res. Dept.* , 50 Or App 121, 125, 622 P.2d 333 (1981) (citing ORS 536.300).

**BEFORE THE
OREGON WATER RESOURCES DEPARTMENT**

In the Matter of Transfer Application T-14170	)	FINAL ORDER IN CONTESTED CASE
	)	
	)	
BRIDGE CREEK RANCH LLC,	)	OAH Reference No. 2024-OWRD-00165
<i>Applicant</i>	)	
	)	Agency Case No. T-14170
and	)	
	)	
WATERWATCH OF OREGON,	)	
<i>Protestant</i>	)	

HISTORY OF CONTESTED CASE PROCEEDINGS

On September 25, 2023, the Oregon Water Resources Department (OWRD) issued a Preliminary Determination Proposing Approval of an Additional Point of Diversion in the matter of Transfer Application T-14170 (PD T-14170) filed by Bridge Creek Ranch LLC (Applicant).¹ On October 23, 2023, OWRD received the Protest filed by WaterWatch of Oregon (Protestant).

On January 19, 2024, OWRD issued a Preliminary Determination Proposing Approval of Additional Points of Diversion and Partial Cancellation of Water Right in the matter of Transfer Application T-14158 (PD T-14158) filed by Applicant.² On February 15, 2024, OWRD received Protestant's Protest of PD T-14158.

On August 14, 2024, OWRD referred the matters to the Office of Administrative Hearings (OAH).³ The OAH assigned Administrative Law Judge (ALJ) Samantha Fair to preside over the matters. On September 16, 2024, ALJ Fair convened a prehearing conference. Attorney Brian Posewitz represented Protestant. Attorney Elizabeth Howard represented Applicant. Senior Assistant Attorney General Sarah Rowe represented OWRD. Will Davidson also appeared on behalf of OWRD. ALJ Fair scheduled the matters for a prehearing conference on February 6, 2025, for the review of exhibits and for a video hearing on February 11 through 14, 2025. The ALJ also set deadlines for the submission of issue statements, motions, witness lists, and exhibits.

On September 18, 2024, Applicant requested new hearing dates. ALJ Fair rescheduled

¹ PD T-14170 involves Certificate of Water Right (Certificate) 68553.

² PD T-14158 involves Certificates 13593 and 96311.

³ Prior to the referral, the parties agreed to consolidate the two matters for hearing. The OAH assigned reference number 2024-OWRD-00163 to the matter involving PD T-14158 and reference number 2024-OWRD-00165 to the matter involving PD T-14170.

the hearing for February 18 through 21, 2025.

On October 7, 2024, the parties filed Stipulations Regarding the Statement of Issues. Later that day, Protestant filed a Statement Regarding Stipulated Issues. On October 10, 2024, OWRD filed a Response to [Protestant's] Statement Regarding Stipulated Issues. On October 22, 2024, the OAH issued a Ruling on Motion Regarding Statement of Issues, in which the ALJ adopted the issues for hearing as stated in the October 7, 2024 Stipulations Regarding the Statement of Issues.

On November 15, 2024, Applicant filed a Motion for Summary Determination, seeking a dispositive ruling on four of the seven issues for hearing. On November 27, 2024, OWRD filed a Response to [Applicant's] Motion for Summary Determination.

On December 2, 2024, Protestant requested an extension of the deadline for its response to the Motion. On December 3, 2024, the ALJ granted the request and extended the deadline to December 13, 2024. On December 13, 2024, Protestant filed a Response to [Applicant's] Motion for Summary Determination.

On December 31, 2024, Protestant filed a Motion to Deny Applications or Return Cases to Agency. On January 7, 2025, OWRD filed a Response to [Protestant's] Motion to Deny Applications or Return Cases to Agency.

On January 13, 2025, Applicant requested an extension on a submission deadline for the hearing and a rescheduling of the prehearing conference. The ALJ granted the extension and rescheduled the prehearing conference to February 12, 2025.

On January 15, 2025, the OAH issued a Ruling on Motion for Summary Determination, in which the ALJ granted the motion, in part, and denied it, in part.

On January 27, 2025, the OAH issued a Ruling Denying Motion to Deny Applications or Require Withdrawal of Referrals.

On February 4, 2025, the parties filed a Further Stipulations Regarding Issues for Hearing that included final stipulations on the contested case issues that identified the remaining issues for the evidentiary hearing.

On February 4, 2025, Applicant filed a Motion to Quash Subpoenas (Motion) to Randall Jordan Papé and Jake Tolton. On February 10, 2025, Protestant filed a Response to Motion to Quash Subpoenas (Response).

On February 11, 2025, Applicant filed a Motion in Limine, objecting to some of Protestant's exhibits and a witness.⁴

On February 12, 2025, ALJ Fair convened a telephone prehearing conference to review

⁴ The ALJ did not issue a written ruling in response to this motion. Applicant's objections were addressed individually during the February 12, 2025 prehearing conference and during the evidentiary hearing.

exhibits and other hearing matters. Ms. Howard, Conor Butkus,⁵ Mr. Posewitz, Senior Assistant Attorney General Jesse Ratcliffe,⁶ and Mr. Davidson appeared.⁷

On February 13, 2025, the OAH issued a Ruling on Motion to Quash Subpoenas, in which ALJ Fair granted the motion regarding prospective witness Randall Jordan Papé and denied the motion regarding prospective witness Jake Tolton.⁸

On February 18 and 19, 2025, ALJ Fair convened a video hearing. Ms. Howard and Mr. Butkus represented Applicant with Mike Pati, president of Papé Properties, Inc.,⁹ as the client representative. Mr. Posewitz represented Protestant. Mr. Ratcliffe represented OWRD with Mr. Davidson as the agency representative. Lisa Jaramillo, the manager of OWRD's transfer and conservation section, and Kenneth Thiemann, OWRD's watermaster for District 21, testified on behalf of OWRD and Protestant. Mr. Pati, Gordon Tolton, Applicant's ranch manager, and Gabriel Williams, owner and principal engineer for Resource Specialist, Inc.,¹⁰ testified on behalf of Applicant and Protestant. Amanda Roberts, United States Department of the Interior Bureau of Land Management's district manager for the Prineville District,¹¹ and Jake Tolton, Applicant's assistant ranch manager, testified on behalf of Protestant. The evidentiary record closed at the conclusion of the hearing. The record was left open through April 11, 2025, for the receipt of closing briefs.

On March 21, 2025, the parties filed their initial written closing briefs and arguments. On April 11, 2025, the parties filed their written rebuttal closing briefs and arguments.

On May 28, 2025, ALJ Fair issued a Proposed Order in 2025-OWRD-00165/T-14170 proposing that OWRD approve Transfer Application T-14170 as conditioned in the September 25, 2023 Preliminary Determination Proposing Approval of Additional Point of Diversion with the following changes:

- Condition 4 on Page 4 should be changed to read: "The quantity of water diverted for storage at the new point of diversion (POD 3) together with that diverted at the original point of diversion (Bridge Creek POD 2) shall not exceed the quantity of water lawfully available at the original point of diversion (Bridge Creek POD 2)."

⁵ Mr. Butkus is co-counsel with Ms. Howard for Applicant.

⁶ On November 12, 2024, OWRD changed counsel from Ms. Rowe to Mr. Ratcliffe.

⁷ Andrew Archer, a law student working for OWRD, also appeared for training purposes.

⁸ The ALJ informed the parties of her ruling during the February 12, 2025 prehearing conference.

⁹ Papé Properties, Inc., is the sole member of Applicant.

¹⁰ Mr. Williams performs services for Applicant as a natural resource consultant and engineer.

¹¹ Brad Grenham, an attorney with the U.S. Department of the Interior, appeared during Ms. Roberts' testimony.

- Condition 10 on page should impose a completion date of October 1, 2028.

The Proposed Order stated that any party to the proceeding or OWRD could file exceptions to the Proposed Order no later than 30 days after service of the order.

Applicant and Protestant timely filed exceptions to the Proposed Order, and Applicant timely filed responses to Protestant's exceptions. OWRD did not file exceptions to the Proposed Order or responses to the parties' exceptions.

Now, OWRD's Director (Director) considers the exceptions and responses to exceptions, allows the exceptions in part and denies them in part, and issues this final order approving Transfer Application T-14170 as conditioned in the Preliminary Determination, with the ALJ's proposed changes. The "History of the Case," "Issue," "Evidentiary Ruling," "Findings of Fact," "Conclusion of Law," "Opinion," and "Order" sections of this final order set forth the ALJ's Proposed Order as modified by the Director in response to the exceptions and on the Director's own motion. The "Consideration of Exceptions" and "Director's Amendments to the Proposed Order" sections identify and explain the Director's modifications of the ALJ's Proposed Order.

ISSUES¹²

Issue A. Whether approval of the transfer would enlarge the subject water right. OAR 690-380-4010.

Issue B. Whether approval of the transfer would injure other existing water rights. ORS 540.530(1)(a).

Issue C. Whether OWRD exceeded its statutory authority by approving an additional point of diversion (as opposed to approval of a change from one point of diversion to another point of diversion) in PD T-14170. ORS 540.510(1)(a).

Issue G. Whether the subject water right for PD T-14170, which is a water storage right, is a water use subject to transfer. ORS 540.510(1)(a).

EVIDENTIARY RULINGS

OWRD submitted Exhibits A1 through A6. OWRD withdrew Exhibits A3 through A5. Exhibits A1, A2, and A6 were admitted into the record without objection.

Applicant submitted Exhibits R1 through R11. Applicant never offered Exhibits R5 through R10. Exhibits R1 through R4 were admitted into the record without objection.¹³

¹² Protestant withdrew its claims that formed the bases of Issues D through F. Therefore, those issues were no longer subjects of these contested case proceedings.

¹³ Protestant initially raised foundation objections to Exhibits R1 and R2 but withdrew the objections after

Protestant raised a relevancy objection to Exhibit R11. The ALJ overruled the objection and admitted Exhibit R11 into the record.

Protestant submitted Exhibits P1 through P52. Protestant withdrew Exhibit P11. Protestant did not offer Exhibits P19, P32, P36, P41, P45, P46, and P52. Protestant offered page 8 of Exhibit P47 that was admitted without objection. Exhibits P6, P29, P31, P33, P34, P35, P40, P42, and P43 were admitted into the record without objection.

Applicant raised relevancy objections to Exhibits P1, P2, P4, P5, and P25. The ALJ overruled the objections and admitted the exhibits into the record.

OWRD raised a duplicative objection to Exhibit P3. The ALJ overruled the objection and admitted Exhibit P3 into the record.

Applicant and OWRD raised relevancy objections to Exhibits P7, P9, P10, P12, P13, P14, P15, P17, P18, P21, P22, P23, P24, P26, P27, P28, P37, P38, P49, P50, and P51. The ALJ overruled the objections and admitted the exhibits into the record.

FINDINGS OF FACT

1. On December 10, 2008, Applicant filed Articles of Organization with the Oregon Secretary of State. (Ex. R4 at 22.)

2. On December 22, 2008, a Special Warranty Deed was recorded in Wheeler County, Oregon, for the conveyance of real property located in Sections (Sec./Sects.) 24, 25, and 36 in Township (T) 10 South (S), Range (R) 20 East (E) of the Willamette Meridian (WM) and in Sects. 30 and 31 in T10S, R21E, WM (collectively, the Property) to Applicant. (Ex. A2 at 126-128.) The Property is located in Wheeler County, Oregon. Bridge Creek, a tributary of the John Day River,¹⁴ runs through and adjacent to the Property. Applicant engages in ranch operations and other agriculture uses on the Property. (Exs. A2 at 137, 101-102, 126-128; R2 at 1; R4 at 3-4.) The Painted Hills Reservoir is located on the Property. (Ex. R2 at 1.)

3. Applicant holds Certificate of Water Right (Certificate) 68553 for water diverted from Bridge and Bear Creeks¹⁵ for storage at the Painted Hills Reservoir for subsequent irrigation use. (Ex. A2 at 37; test. of Pati and Williams.) The priority date of Certificate 68553 is October 17, 1983. As described in Certificate 68553, Applicant is entitled to store 490 acre-feet of water per year with 330 acre-feet sourced from Bridge Creek. (Ex. A2 at 37.) In the past three years, Applicant has been able to fill the Painted Hills Reservoir. (Test. of G. Tolton.)

Applicant presented foundational evidence.

¹⁴ Pursuant to the John Day River Decree, OWRD does not regulate the tributaries for any calls on the John Day River. (Test. of Thiemann.)

¹⁵ Bear Creek runs west of the Property. (Exs. A2 at 102; R2 at 1.)

4. Certificate 68553 has two points of diversion (PODs), one on Bear Creek and one on Bridge Creek, for the water delivery system. The POD that diverts water from Bridge Creek (BLM POD) is located in Sec. 6, T11S, R21E, WM on land owned by the Department of Interior, Bureau of Land Management (BLM).¹⁶ (Exs. A2 at 44; R2 at 1; test. of Thiemann.) In addition to serving as Applicant's historical POD for Bridge Creek diversions for Certificate 68553,¹⁷ the BLM POD also serves eight acres of BLM land. (Test. of Pati.)

5. The irrigation season for Applicant's Property is approximately April 15 to October 1. (Test. of G. Tolton.) The amount of water diverted by Applicant at the BLM POD varies depending upon seasonal conditions with the wetness of the spring as the biggest factor. (Test. of G. Tolton.)

6. In April 2015, the BLM, in accordance with the Federal Land Policy and Management Act and the National Environmental Policy Act, published a Record of Decision that approved a Resource Management Plan for the John Day Basin (JDBRMP).¹⁸ (Ex. P12 at 3, 8.) BLM's Management Actions included the requirement of rights-of-way (ROWs) to convey surface water across BLM land. For Bridge Creek, the JDBRMP required the cessation of water withdrawals from stream channels when stream flows drop below 10 cubic feet per second (cfs) for the purposes of fish protection, recreation, and pollution abatement. (*Id.* at 10.) The JDBRMP further required any ROWs issued by BLM to include the 10 cfs limitation for water diversions from Bridge Creek. (Test. of Roberts.)

7. Prior to 2020, BLM's field manager sent annual letters to Applicant, reminding Applicant to cease diverting water from Bridge Creek for BLM-leased agricultural fields when Bridge Creek stream flows dropped below 10 cfs. The annual letters did not request that Applicant cease diverting water from Bridge Creek for use on the Property. (Ex. R11 at 1-7.) Prior to 2020 and in compliance with the annual letters, Applicant ceased diverting water for the BLM fields when Bridge Creek stream flows dropped below 10 cfs. Applicant continued to divert water at the BLM POD as needed for the Property even when Bridge Creek stream flows dropped below 10 cfs. (Test. of Pati and G. Tolton.)

8. In 2019, discussions occurred between Applicant and BLM about Applicant's use of the PODs on BLM lands. The discussions included the need for a ROW from BLM for Applicant to access the BLM PODs and BLM's intent to prohibit all water diversions when Bridge Creek stream flows are less than 10 cfs. (Ex. R4 at 1.) BLM endorsed the idea that Applicant use a POD on the Property and cease using the BLM POD. If Applicant secured another POD, BLM intended to decommission the BLM POD and convert BLM's water right to

¹⁶ Applicant's transfer application proposes no changes to the separate Bear Creek POD. (Ex. A2 at 46.)

¹⁷ The BLM POD is also the historical POD for Applicant's Certificates 13593 and 96311 that are the subject of the related transfer application in 2024-OWRD-00163. (Test. of Pati.)

¹⁸ The JDBRMP addressed the management of approximately 456,600 acres of public land in eight counties in central Oregon. (Ex. P12 at 3.)

instream use. (Test. of Pati.)

9. By letter dated January 27, 2020, Applicant filed a ROW application with BLM to obtain access to the BLM POD. In the letter, Applicant objected to the application of BLM's 10 cfs limitation to the Applicant's Property, asserting that such limitation only applied to the BLM lands that received water from the BLM POD.¹⁹ (Ex. R4 at 1.)

10. On July 18, 2020, BLM contacted Applicant about ceasing water diversion from the BLM POD because Bridge Creek stream flows had dropped below 10 cfs. (Ex. P17 at 1.)

11. In May 2021, BLM issued a Trespass Notice to Applicant for Applicant's use of the BLM POD, instructing Applicant to cease all activities associated with the BLM POD unless BLM issues a ROW.²⁰ (Ex. P23 at 1-2.) BLM was aware that restrictions on Applicant's use of the BLM POD would negatively impact their agricultural operations. BLM continued to insist that any use of the BLM POD would include the requirement to cease all water withdrawals when Bridge Creek stream flows dropped below 10 cfs for the benefit of steelhead²¹ and other sensitive species. (Ex. P22 at 1-2.)

12. In September 2021, Applicant and BLM signed a Right-of-Way Grant/Temporary Use Permit (BLM ROW). The BLM ROW, issued pursuant to 43 USC 1761, granted Applicant the right to operate the BLM POD. The BLM ROW was effective September 29, 2021, and would terminate on December 31, 2024. Paragraph 2(d) of the BLM ROW provided that the BLM ROW was not subject to renewal.²² (Ex. R3 at 1-4.) Paragraph 4.25 of Exhibit A of the BLM ROW provided "No water may be diverted when the stream flow drops below 10 cfs in Bridge Creek, as measured at the Bridge Creek gauge station near the mouth of Bridge Creek."²³ (*Id.* at 10.) BLM would not issue the BLM ROW without this limitation and would not provide any exceptions to the limitation. (Exs. P26 at 1; P27 at 1; test. of Roberts.)

13. In compliance with the BLM ROW, Applicant ceased diverting water from the BLM POD for various periods when Bridge Creek stream flows had dropped below 10 cfs

¹⁹ The application was also to obtain access to one of the additional PODs for Certificate 96311. (Ex. R4 at 3.)

²⁰ BLM had not yet processed Applicant's application for a ROW because of Applicant's nonpayment of the processing fee. (Ex. P23 at 1.)

²¹ Mid-Columbia River steelhead are a threatened species listed in the Endangered Species Act. (Ex. P22 at 1.)

²² There is a longer and more costly process that can result in the BLM issuing a long-term ROW. As the goal was for Applicant to add a POD located on the Property and cease using the BLM POD, BLM determined the temporary ROW best suited Applicant's needs. (Test. of Roberts.)

²³ On October 6, 2021, BLM closed the Trespass Notice matter with no further action because Applicant had obtained the BLM ROW. (Ex. P23 at 2-3.)

during the years following the entry of the BLM ROW.²⁴ (Exs. P37 at 1; P47 at 8; test. of Pati, J. Tolton, and G. Tolton.) Applicant supplemented the loss of water diversion from the BLM ROW with water stored at the Painted Hills Reservoir. (Test. of Pati, Williams, J. Tolton, and G. Tolton.)

14. On February 9, 2023, Applicant filed a transfer application for Certificate 68553 with OWRD, seeking to add a POD (New POD) located on Applicant's Property to its water delivery system.²⁵ (Exs. A2 at 47-88; R2 at 1.) After approval of the transfer, a portion of the infrastructure for the BLM POD will be removed, leaving a diversion structure with a fish screen; water diversions will continue for irrigation until revegetation is established; after revegetation, BLM intends to lease the water right for its eight acres for instream use. (Ex. A1 at 135-136.) Applicant intends to divert water, as needed, from Bridge Creek at the New POD per the terms of the certificated water right even when stream flows drop below 10 cfs. (Test. of Pati.)

15. The New POD is located in Sec. 31, T10S, R21E, WM, approximately 1,110 feet downstream of the BLM POD. (Exs. A2 at 110; R2 at 1; test. of Williams and Thiemann.) There are no natural water bodies or drainages that join Bridge Creek between the New POD and the BLM POD. There are no PODs between the New POD and the BLM POD. (Ex. R2 at 1; test. of G. Tolton, Thiemann, and Williams.) The New POD's water diversion capacity is equivalent to the water diversion capacity of the BLM POD that has the capacity for Applicant to maximize the certificated water rights. There are no discernable differences between the Bridge Creek stream flows at the BLM POD and the New POD. (Test. of Williams and G. Tolton.)

16. On March 9, 2023, OWRD's regional watermaster concluded that the transfer application would not cause injury to other water rights because the change in PODs would not cause additional regulation of the downstream water rights junior to Applicant's water rights. The watermaster further recommended the installation of totalizing flow meters at the associated PODs and measuring devices for the reservoir. The totalizing flow meters and measuring devices would verify that Applicant diverted water at the rate provided by the original certificated water right and prevent enlargement. (Ex. A2 at 139-143; test. of Thiemann.) Because OWRD lacks authority to and does not regulate water use based on third-party agreements like the BLM ROW, the watermaster considered the BLM ROW irrelevant to the issues of injury and enlargement and did not consider the 10 cfs limitation in his injury and enlargement analysis. (Test. of Thiemann.)

17. On September 25, 2023, OWRD issued PD T-14170, proposing to approve the addition of the New POD with the 330 acre-feet water right as originally provided by Certificate

²⁴ BLM notified Applicant when to cease Bridge Creek water diversions as OWRD does not regulate for the BLM ROW. (Test. of G. Tolton and Thiemann.)

²⁵ Applicant originally filed this application on December 8, 2021, and re-filed it on February 9, 2023, with new signatures in compliance with Marion County Circuit Court Judge Broyles' ruling in a mandamus action filed by Applicants against OWRD. (Ex. A2 at 67-75, 108-109.)

68553. (Ex. A2 at 106-115.) PD T-14170 provides that the “right to store the water * * * is subject to all other conditions and limitations contained in Certificate 68553 and any related decree.” (*Id.* at 111.) PD T-14170 requires the installation of a totalizing flow meter at all PODs, measuring devices regarding the Painted Hills Reservoir, and the installation of a fish screen at the New POD. PD T-14170 further requires the full beneficial use of water to occur by October 1, 2027.²⁶ (*Id.* at 111-112.)

18. Condition 4 of PD T-14170 further provides that “the quantity of water diverted for storage at the [New POD] shall not exceed the quantity of water lawfully available at the [BLM POD.]” (Ex. A2 at 111.) After issuance of PD T-14170, OWRD discovered a scrivener’s error in this provision of PD T-14170. The provision should read, as follows: the quantity of water diverted for storage at the [New POD]²⁷ together with that diverted at the [BLM POD]²⁸ shall not exceed the quantity of water lawfully available at the [BLM POD]. (Exs. A1 at 140; A2 at 111; test. of Jaramillo.) (Emphasis added.) Such a condition is a standard provision of OWRD’s approval of transfer applications to prevent enlargement of the water right at issue and prevent injury to other existing water rights. The condition prevents any future collective water diversions from exceeding the water diversions available under the original water right. (Test. of Jaramillo.)

19. On October 23, 2023, Protestant filed a protest, seeking the denial of the transfer application. (Ex. A2 at 38-43.)

20. There is only one person who holds a certificated water right to Bridge Creek waters that is senior to Applicant’s Certificates 13593 and 96311.²⁹ The senior water right holder, who holds lands near the mouth of Bridge Creek, has made calls for the water right that required Applicant to cease water diversions at the BLM POD in response to the calls.³⁰ These calls are made when Bridge Creek stream flows drop to 2 cfs. Applicant has never made a call for Certificate 68553. (Test. of G. Tolton and Thiemann.)

21. A Certificate of Water Right (Certificate 13575) was recorded on July 1, 1941, granting John Manning the right to divert Bridge Creek waters for irrigation with a priority date of 1882. (Ex. P1 at 1.) A Certificate of Water Right (Certificate 13592) was recorded on July 1,

²⁶ On December 12, 2023, regarding the transfer application for Certificates 13593 and 96311, Applicant suggested an October 1, 2028 date rather than OWRD’s originally proposed October 1, 2025 date in anticipation of delays in the issuance of the Final Order. (Ex. A1 at 93.) OWRD adopted that proposed change in PD T-14158. (*Id.* at 141.)

²⁷ The New POD is labelled POD 3 in PD T-14170. (Ex. A2 at 44.)

²⁸ The BLM POD is labelled Bridge Creek POD 2 in PD T-14170. (Ex. A2 at 44.)

²⁹ Because Certificates 13593 and 96311 are senior to Certificate 68553, the senior water right holder’s right is also senior to Certificate 68553. (See Ex. A1 at 67-68; A2 at 37).

³⁰ These calls rarely affect Applicant as regulation begins with the most junior waters being shut off by priority dates until the senior water right holder is satisfied. (Test. of Thiemann.)

1941, granting Ben Taylor the right to divert Bridge Creek waters for irrigation and domestic use with a priority date of 1868.³¹ (Ex. P2 at 1.) A Certificate of Water Right (Certificate 66609) was recorded on August 12, 1991, granting instream water rights for the John Day River to support aquatic life and minimize pollution with a priority date of May 24, 1962. (Ex. P5 at 1.) A Certificate of Water Right (Certificate 68553) was recorded on August 14, 1995, granting William Smith Properties, Inc., the right to divert Bridge Creek and Bear Creek waters for storage with a priority date of October 17, 1983. (Ex. P6 at 1.) A Certificate of Water Right (Certificate 75800) was recorded on September 21, 1998, granting S. J. Connolly the right to divert Bridge Creek waters for irrigation with a priority date of 1882. (Ex. P7 at 1.)

22. On April 15, 2008, OWRD published a Technical Operations Manual (Manual) that includes OWRD's policies and practices, such as Section 11.01 titled "Water Right Transfer Reviews." (Ex. A6 at 1; test. of Jaramillo.) Regarding injury to water rights caused by a transfer, the Manual provides, in part:

Water rights that are junior to a transferred right generally are the rights that are most susceptible to being injured by a transfer. * * *.

The concept of "maximization" of the existing right is fundamental to injury evaluations. Many water rights are not used as efficiently or intensively as possible. * * *. When evaluating a transfer, the Department evaluates the proposed changes to determine whether the impacts of the change are greater than could reasonably occur as a result of more efficient or intensive use of the right. Injury results only if the impacts on other water rights resulting from the transfer are greater than the impacts that would result from efficient and intensive use under the existing right.

(Ex. A6 at 2.)

23. Regarding enlargement of a water right, the Manual provides, in part:

Water law does not allow the enlargement of a water right. A water right may only be exercised at the authorized place of use for the specific use described in the right. In addition, the use of water under a right is limited to the amount needed to satisfy the beneficial purpose for which the right was issued. Prior to adoption of the Division 380 rules, enlargement was considered as an element of injury. To clarify that a water right cannot be enlarged regardless of whether another right would be injured, the Division 380 rules establish injury and enlargement as two separate criteria used in reviewing transfer applications.

For example, the enlargement of a water right calling on the Columbia River likely would not injure other water rights. However, the Department would not

³¹ On July 31, 2006, Certificate 13592 was cancelled as part of the grant of a transfer application. (Ex. P10 at 1-4.)

approve the transfer of the right if doing so would allow enlargement of the right.

(Ex. A6 at 8.) OWRD considers any expansion of water use attributes from the certificated water right, such as the number of acres receiving water or amount of diverted water, to be an enlargement of the water right. (Test. of Jaramillo.)

24. OWRD defines “lawfully available” to refer “solely to water that may be legally diverted pursuant to OWRD’s statutes and rules. It does not refer to private conveyance agreements that may or may not be entered into between owners of the land on which diversion works are located and water right holders.” (Ex. P49 at 7.) In transfer applications, OWRD evaluates the water right at issue as defined by the certificate. The amount of water lawfully available after a POD transfer would be the amount of water an applicant would be legally entitled to divert at the originally authorized POD per the terms of the certificated right. (Test. of Jaramillo.)

Bridge Creek Stream Flows

25. Water temperatures decrease with higher stream flows. Water temperatures regularly exceed 25°C when stream flows are lower than 10 cfs. Juvenile steelhead cannot survive in water temperatures higher than 25°C. (Ex. P21 at 1.)

26. A Bridge Creek survey conducted in June 1992 showed a stream flow of 9.7 cfs. A Bridge Creek survey in August 1996 showed a stream flow of 9.5 cfs. (P9 at 1.)

27. In August 2005, a BLM hydrologist observed Bridge Creek stream flows dropping below 10 cfs “about the first week of July and stay below 8 cfs the rest of the summer, probably dipping below 5 during the first week of August.” (Ex. P9 at 1.)

28. For the period of June through August of the years 2006 through 2019, Bridge Creek gauge readings showed stream flows from just above 1 cfs to 200 cfs with a significant cluster of readings around 10 cfs and a second smaller significant cluster of readings around 3 cfs. (Ex. P13 at 1.)

29. In June 2021, Bridge Creek stream flows were at 4 cfs. (Ex. P26 at 1.)

30. The Bridge Creek stream flow was 3.39 cfs on August 5, 2022. (Ex. P38 at 1-2.)

31. On August 8, 2023, BLM noted that Bridge Creek stayed above 10 cfs during the hottest part of the 2023 summer. The stream flow on August 5, 2023, was 10.7 cfs. (Ex. P38 at 1-2.)

32. In the last 13 years, Bridge Creek stream flows typically dip below 10 cfs every summer. (Test. of Thiemann.)

CONCLUSIONS OF LAW

Issue A. Approval of the transfer would not enlarge the subject water right.

Issue B. Approval of the transfer would not injure other existing water rights.

Issue C. OWRD did not exceed its statutory authority by approving an additional point of diversion (as opposed to approval of a change from one point of diversion to another point of diversion).

Issue G. The subject water right for T-14170, which is a water storage right, is a water use subject to transfer.

OPINION

Burden and Standard of Proof

“[A]ssignment of the burden of proof is a way to declare which party loses if the evidence on an issue appears to be equally balanced or if the factfinder cannot say upon which side the evidence weighs more heavily.” *Marvin Wood Products v. Callow*, 171 Or App 175, 179 (2000). “[F]ailure to produce evidence at all, or the failure of the evidence to persuade the factfinder, will be fatal to the party with the burden of proof.” *Id.* at 180.

Under ORS 183.450(2), the burden of proof in contested cases “falls on ‘the proponent of a fact or position, the party who would be unsuccessful if no evidence were introduced on either side.’” *McDowell v. Employment Department*, 348 Or 605, 610 n.2 (2010) (quoting *Harris v. SAIF*, 292 Or 683, 690 (1982)); ORS 183.450(2) (“The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position.”). In contested cases involving water right transfer applications, OWRD cannot approve the application unless the record includes sufficient evidence for OWRD to make certain findings, including that the transfer will not result in injury or enlargement. *See* ORS 540.530(1); OAR 690-380-5000(1). As such, the applicant will be unsuccessful if no evidence is introduced, and the applicant bears the burden of proof. However, where there is sufficient evidence in the record to make a *prima facie* case that the criteria for approval have been met, a party asserting that the criteria have not been met bears the burden of producing evidence to support its position. *See Benz v. Water Resources Com’n*, 94 Or App 73, 78 (1988).

The standard of proof in contested cases is the preponderance of the evidence. ORS 183.450(5); *Gallant v. Board of Medical Examiners*, 159 Or App 175, 183 (1999) (finding that in enacting ORS 183.450(5) the legislature intended to prescribe a standard of proof that corresponded to the preponderance of the evidence standard); *Dixon v. Board of Nursing*, 291 Or App 207, 213 (2018) (in administrative actions, the standard of proof that generally applies in agency proceedings is the preponderance standard). Proof by a preponderance of the evidence means the fact finder is convinced that the facts asserted are more likely true than false. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

Applicable Law for Water Right Transfers

Via the enactment of the Water Rights Act in 1909 (Or Laws 1909, ch 216), the doctrine of prior appropriation became the prevailing water law of Oregon.³² *Fort Vannoy Irr. Dist. v. Water Resources Com'n*, 345 Or 56, 64 (2008). This means that, in times of low stream flows, the water right holder with the oldest priority date can demand the water specified in their water right without regard for the needs of junior users. If there is a surplus beyond what is necessary to fulfill the senior right, the water right holder with the next senior priority date can take what is available to satisfy their needs under their water right. This continues down the line until there is no surplus or until all rights are satisfied. See *Klamath Irrigation Dist. v. U.S.*, 348 Or 15, 23-24 (2010); see also *In re Sucker Creek*, 83 Or 228, 235 (1917).

Prior to 1909, the priority date was based upon the date of an appropriator's public notice of their intent to appropriate water so long as diversion and beneficial use of the diverted water occurred in a reasonable time. *Klamath Irrigation*, 348 Or at 24. With the passage of the Water Rights Act in 1909, subject to prior rights existing at the time of passage of the Act, waters of the state may be appropriated for beneficial use under a permit issued by OWRD with the date of the application for the permit designated the priority date of the right. See ORS 537.120 and ORS 537.130.

ORS 537.120 provides:

Subject to existing rights, and except as otherwise provided in ORS chapter 538, all waters within the state may be appropriated for beneficial use, as provided in the Water Rights Act and not otherwise; but nothing contained in the Water Rights Act shall be so construed as to take away or impair the vested right of any person to any water or to the use of any water.

ORS 537.130 provides, in part:

- (1) Except for a use exempted under ORS 537.040, 537.141, 537.142, 537.143 or 537.800 or under the registration system set forth in ORS 537.132, any person intending to acquire the right to the beneficial use of any of the surface waters of this state shall, before beginning construction, enlargement or extension of any ditch, canal or other distributing or controlling works, or performing any work in connection with the construction, or proposed appropriation, make an application to the Water Resources Department for a permit to make the appropriation.
- (2) Except for a use exempted under ORS 537.040, 537.141, 537.142, 537.143 or 537.800 or under the registration system set forth in ORS 537.132, a person may not use, store or divert any waters until after the department issues a permit to appropriate the waters[.]

³² The riparian and appropriation doctrines were once both recognized in Oregon. Riparian rights are based on a party's ownership of land adjacent to a water source and feature equality, with the right of each appropriator correlated with the rights of other appropriators. *Fort Vannoy*, 345 Or at 64; *In re Sucker Creek*, 83 Or 228, 235 (1917).

ORS 540.510(1) provides, in part:

(a) Except as provided in subsections (2) to (8) of this section, all water used in this state for any purpose shall remain appurtenant to the premises upon which it is used and no change in use or place of use of any water for any purpose may be made without compliance with the provisions of ORS 540.520 and 540.530. However, the holder of any water use subject to transfer may, upon compliance with the provisions of ORS 540.520 and 540.530, change the use and place of use, the point of diversion or the use of the water without losing priority of the right.[.]

ORS 540.520 provides, in part:

(1)(a) Except when the application is made under ORS 541.327 or when an application for a temporary transfer is made under ORS 540.523, if the holder of a water use subject to transfer for irrigation, domestic use, manufacturing purposes, or other use, for any reason desires to change the place of use, the point of diversion, or the use made of the water, an application to make such change, as the case may be, shall be filed with the Water Resources Department.

* * * * *

(4) If the application is to change the point of diversion, the transfer shall include a condition that the holder of the water right provide a proper fish screen at the new point of diversion, if requested by the State Department of Fish and Wildlife.

* * * * *

(7) If a timely protest is filed, or in the opinion of the Water Resources Director a hearing is necessary to determine whether the proposed changes as described by the application would result in injury to existing water rights, the department shall hold a hearing on the matter[.]

ORS 540.505(4)³³ provides:

“Water use subject to transfer” means a water use established by:

- (a) An adjudication under ORS chapter 539 as evidenced by a court decree;
- (b) A water right certificate;
- (c) A water use permit for which a request for issuance of a water right certificate under ORS 537.250 has been received and approved by the Water

³³ OWRD’s operative rule, OAR 690-380-0100(14), provides the same definition for “water use subject to transfer” as ORS 540.505(4).

Resources Commission under ORS 537.250; or

(d) A transfer application for which an order approving the change has been issued under ORS 540.530 and for which proper proof of completion of the change has been filed with the Water Resources Commission.

ORS 540.530 provides, in part:

(1)(a) If, after hearing or examination, the Water Resources Commission finds that a proposed change can be effected without injury to existing water rights, the commission shall make an order approving the transfer and fixing a time limit within which the approved changes may be completed.

* * * * *

(2)(a) If a certificate covering the water right has been previously issued, the commission shall cancel the previous certificate or, if for an irrigation district, the commission may modify the previous certificate and, when proper proof of completion of the authorized changes has been filed with the commission, issue a new certificate or, if for an irrigation district, modify the previous certificate, preserving the previously established priority of rights and covering the authorized changes. If only a portion of the water right covered by the previous certificate is affected by the changes, a separate new certificate may be issued to cover the unaffected portion of the water right[.]

OAR

690-380-2110 provides, in part:

(1) No change in point of diversion³⁴ or appropriation may be made except as described under OAR 690-380-0010 or as approved or recognized by the Department through a water right transfer, permit amendment under ORS 537.211, or certificate of registration modification under OAR chapter 690, division 382.

(2) Except as provided in ORS 540.531 and OAR 690-380-2130, a change in point of diversion is restricted to the same source of surface water. A change in point of appropriation under a water right or certificate of registration modification is restricted to the same aquifer[.]

OAR 690-380-4010(2) provides:

The Department's preliminary determination shall include an assessment of whether:

³⁴ OAR 690-380-0100(7) provides:

“Point of diversion” means the place at which surface water is diverted from a surface water source as specified in the water right. It may be the head of a ditch, a pump suction line, the center line of a dam, or other point at which control is taken of surface water.

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- (a) The right has been used over the past five years according to the terms and conditions of the right and that the right is not subject to forfeiture under ORS 540.610;
- (b) The water user is ready, willing and able to use the full amount of water allowed under the right;
- (c) The proposed transfer would result in enlargement;
- (d) The proposed transfer would result in injury; and
- (e) Any other requirements for water right transfers are met.

OAR 690-380-0100 defines relevant terms for OAR 690-380-4010(2) and provides, in part:

- (2) “Enlargement” means an expansion of a water right and includes, but is not limited to:
 - (a) Using a greater rate or duty of water per acre than currently allowed under a right;
 - (b) Increasing the acreage irrigated under a right;
 - (c) Failing to keep the original place of use from receiving water from the same source; or
 - (d) Diverting more water at the new point of diversion or appropriation than is legally available to that right at the original point of diversion or appropriation.
- (3) “Injury” or “Injury to an existing water right” means a proposed transfer would result in another, existing water right not receiving previously available water to which it is legally entitled[.]

OAR 690-380-5000 provides:

- (1) A transfer application shall be approved if the Department determines that:
 - (a) The water right affected by the proposed transfer is a water use subject to transfer as defined in ORS 540.505(4) and OAR 690-380- 0100(14) * * *;

* * * * *

- (c) The proposed transfer would not result in enlargement as defined in OAR 690-380-0100(2);

- (d) Except as provided in OAR 690-380-5030, the proposed transfer would not result in injury as defined in 690-380-0100(3); and
- (e) Any other requirements for water right transfers are met.

Issue A – Enlargement of a Water Right

As a condition of approval of Applicant's transfer application, the change in the POD cannot result in the enlargement of the existing water rights. OAR 690-380-5000(1)(c). Protestant asserts that the water rights would be enlarged in two ways: (1) the New POD would not include the 10 cfs limitation contained in the BLM ROW; and (2) the Certificates would include a larger number of PODs than currently authorized.

ORS 540.530(1)(a) requires OWRD to approve the transfer of a water right if the proposed change can be effected without injury to existing water rights. OWRD administrative rules reiterate that requirement and add a requirement that the proposed transfer not result in enlargement of the water right. OAR 690-380-5000(1)(c) and (d). Originally, enlargement was considered an element of injury. In response to circumstances in which a water right could be enlarged and yet not cause injury, OWRD established injury and enlargement as two separate criteria used in evaluating transfer applications. OAR 690-380-4010(2). OWRD defined enlargement in OAR 690-380-0100(2) to include, as pertinent in this matter:

(d) Diverting more water at the new point of diversion or appropriation than is *legally available* to that right at the original point of diversion or appropriation.

Emphasis added. Protestant argues that, because of the 10 cfs limitation in the BLM ROW is required by the JDBRMP (developed pursuant to federal law), no water is legally available to Applicant at the original POD (BLM POD) when Bridge Creek stream flows drop below 10 cfs and, therefore, that same limitation should apply to Applicant's prospective water diversions from the New POD.

In PD T-14170, OWRD restricted Applicant's water diversion at the New POD for Certificate 68553 to water diversions that "shall not exceed the quantity of water lawfully available at the original" POD. Exhibit A1 at 140. However, OWRD's use of the term legally/lawfully available does not include any restrictions created by third-party agreements, such as the BLM ROW. OWRD evaluates the water right certificate to determine the amount of water lawfully available to an applicant under Oregon law. Specifically, OWRD finds the amount of water lawfully available after a POD transfer to be the amount of water an applicant would be legally entitled to appropriate or divert by Oregon law at the originally authorized POD per the terms of the certificated right. As stated in the Manual, to prevent enlargement, the diverted water may only be exercised at the authorized place of use and in the amount needed to satisfy the beneficial use as described in the certificated water right. Exhibit A6 at 8. In this matter, the Certificate 68553 does not include a 10 cfs limitation.

The Oregon Supreme Court has held that where "the agency's plausible interpretation of its own rule cannot be shown either to be inconsistent with the wording of the rule itself, or with the rule's context, or with any other source of law, there is no basis * * * [to] assert that the rule has been interpreted 'erroneously.'" See *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142 (1994). Protestant argued that OWRD's interpretation of OAR 690-380-0100(2)(d) is implausible.

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The ALJ disagrees and further finds compelling Applicant's argument that OWRD properly rejects consideration of third-party agreements when evaluating a water transfer application.

As noted above, the Water Rights Act made the doctrine of prior appropriation the prevailing water law of Oregon. That doctrine encourages the full use of vested water rights based upon the seniority of the existing water rights. ORS 537.120 provides that nothing in the Water Rights Act³⁵ is "to take away or impair the vested right of any person to any water or to the use of any water." This same statute authorizes OWRD to review the appropriation of water for beneficial use as provided in the Water Rights Act, "and not otherwise." ORS 537.120. Additionally, the water right certificate defines the terms (priority and extent) of the appropriation. ORS 537.270 (A water right certificate "shall be conclusive evidence of the priority and extent of the appropriation therein described.") Finally, ORS 540.045(1)(a) provides that OWRD shall "regulate the distribution of water among the various users of water from any natural surface or ground water supply in accordance with the water users' existing water rights of record in the Water Resources Department. Thus, OWRD's interpretation to restrict the review of "legally available" to OWRD's statutes and rules and the terms of the certificated water right at issue, without regard to any third-party agreements or federal law, is plausible within the context of this statutory scheme, which provides that water is to be distributed based on water rights of record and that a water right certificate is conclusive evidence of the extent of the water right the certificate describes.³⁶

As Applicant further notes, the statutes concerning the transfer of a state water right certificate provide for OWRD's review of the transfer application under various state laws, such as ORS 540.505(4), 540.510, 540.520, and ORS 540.530. These statutes do not provide for OWRD's transfer application review to include consideration of federal law, federal resource management plans, or third-party agreements. In sum, a review of the text of the rule within the rule's context supports OWRD's interpretation. Therefore, the addition of the New POD that is not subject to the 10 cfs limitation contained in the BLM ROW to the water delivery system for Certificate 68553 is not an enlargement of the water right. The Applicant will simply renew using the full amount of its certificated water right, as it did prior to the entry of the BLM ROW.

Protestant also asserts that the addition of the New POD is an enlargement of the certificated

³⁵ Under ORS 537.010, "Water Rights Act" as used in ORS chapter 537, "means and embraces ORS 536.050, 537.120, 537.130, 537.140 to 537.252, 537.390 to 537.400, 538.420, 540.010 to 540.120, 540.210 to 540.230, 540.310 to 540.430, 540.443 to 540.491, 540.505 to 540.585 and 540.710 to 540.750." As such, "Water Rights Act," as used in ORS chapter 537, includes the portions of ORS chapter 540 governing water right transfers (ORS 540.505 to 540.585).

³⁶ Protestant argues, based on ORS 537.140(1)(a)(E), 537.139(1), 164.245(1) and 164.205(3) that "legally available," as used in OAR 690-380-0100(2)(d), must include restrictions imposed by third-party agreements granting authorization to use non-owned land. ORS 537.140(1)(a)(E) requires applications for permits to appropriate surface water to include "[a] statement declaring whether the applicant has written authorization or an easement permitting access to non-owned land crossed by the ditch, canal or other work." ORS 537.139(1) provides that, where the acquisition of ownership of or authorization to use non-owned land is required for issuance of a permit to appropriate water, failure to obtain such ownership or authorization is grounds for refusal to issue the permit. ORS 164.245(1) and 164.205(3) concern criminal trespass. None of these statutes provide that the amount of water available under an Oregon water right is defined by third-party agreements concerning land use or contradict the general thrust of the statutory scheme that: (1) water should be distributed based on water rights of record; and (2) the extent of a certificated water right is defined by the water right certificate.

water rights. Essentially, Protestant argues that the numerical increase in the number of the available PODs from one (Bridge Creek) POD to two (Bridge Creek) PODs is an enlargement. Although there is a numerical increase in the PODs from which Applicant is authorized to divert water, the priority, source, place of use, type of use, and extent of the water right remains unchanged by the increase in PODs. These items (priority, source, place of use, type of use, and extent) are attributes that go to the heart of a water right – the beneficial use of water. The POD is merely part of the water delivery system and not part of the beneficial use of the water. *See Russell-Smith v. Water Resources Dept.*, 152 Or App 88, 96-99 (1998). PD T-14170 contains the limitation that the Applicant cannot divert more water from the available PODs than it could divert from the original POD(s). PD T-14170 contains the limitation that the Applicant cannot divert more water from the New POD than it could divert from the BLM POD. As acknowledged at hearing, OWRD erred in the language of this condition and intended that the condition state that Applicant cannot divert more water from the New and BLM PODs than the water it could divert from the BLM POD. With that modification to the condition, the proposed limitation prevents any enlargement from the change in the water delivery system sought in Applicant's transfer application. Items such as the source of the water, the acres receiving the water, the type of use and the rate and duty remain unchanged.

Finally, protestant argues that even if approval of the proposed transfer will not result in Applicant diverting more water at the New POD than is legally available at the BLM POD, approving the transfer without including the 10 cfs limitation will cause "an expansion" of the subject water rights and result in enlargement under OAR 690-380-0100(2). The proposed transfer will not result in any of the other types of "expansion" listed in OAR 690-380-0100(2). It will not allow the use of a greater rate or duty of water per acre than currently allowed, increase the acreage irrigated, or change the place of use. Nor will it allow for any other type of expansion of the *terms of the water right*. It will not change the type of use or priority date, and the right will remain subject to the additional limit that water use may not exceed the amount of water needed to satisfy the beneficial uses described in the certificate. The proposed transfer will not result in enlargement as defined in OAR 690-380-0100(2).

In sum, the preponderance of the evidence shows that the approval of the New POD as noted in PD T-14170, coupled with the indicated modification to the diversion limitation, will not cause enlargement.

Issue B – Injury to Water Rights

Certificate 59780 is an instream water right with a priority date of November 3, 1983, that Protestant specifically identified in its Protest as a water right that would be injured by the proposed change in POD. In its Protest, Protestant suggested that "other existing water rights," without identifying any water right other than Certificate 59780, would be injured by the proposed change in POD. At hearing, Protestant submitted Certificates of junior water rights on the John Day River and Bridge Creek.

On January 15, 2025, the OAH issued a Ruling on Motion for Summary Determination, in which ALJ Fair granted Applicant's motion regarding Issue B and the junior water right contained in Certificate 59780. Because the Ruling resolved that issue, it is attached and incorporated into this Proposed and Final Order. Based upon the findings in that Ruling, OWRD's approval of the transfer application would not injure the water right contained in Certificate 59780. The findings in that Ruling would also be applicable to any other junior water rights and are so adopted herein as attached.

Additionally, the ALJ is not persuaded of the existence of any injury to other water rights by the evidence developed at hearing. First, Protestant presented no evidence that any holder of an existing water right objected to the proposed change or asserted that their water right would be injured. Second, although Protestant presented copies of some Certificates, the statuses of those water rights are unknown. A copy of a Certificate does not establish that the certificated water right still exists. For example, Certificate 13592 was cancelled in 2006 as part of the grant of a transfer application. It also does not establish that the holder of the Certificate continues to use the water right. Essentially, the evidentiary record is silent on any recognizable injury to a junior water right holder.³⁷

The evidence established that there are active water rights junior to Applicant's water right as some of these rights have been shut off in response to the call by the holder of the only water right on Bridge Creek senior to Applicant's Certificates 13593 and 96311. The evidence also established that, prior to the implementation of the 10 cfs limitation on Applicant's lands, Applicant never made a call for its own water rights. This evidence supports a finding that Applicant's resumption of its water rights without the 10 cfs limitation will not result on calls on junior water holders.

Protestant presented uncontroverted evidence that larger stream flows improve the health of Bridge Creek for steelhead and other sensitive species. Similarly, Protestant presented uncontroverted evidence that temperatures exceed safe levels for aquatic life when Bridge Creek stream flows drop below 10 cfs. However, this matter involves a transfer application, specifically the addition of the New POD, filed by Applicant. For purposes of a transfer application, OWRD must grant the transfer application when certain conditions are satisfied, such as no enlargement of the water right, water use is subject to transfer, and no injury to existing water rights. Protestant's environmental concerns are not a factor for OWRD's consideration when evaluating a transfer application.

In this matter, Applicant sought to add the New POD, located on the Property, to its current water delivery system. The New POD is located a short distance downstream from the BLM POD. There are no tributaries or drainage systems connecting to Bridge Creek between the BLM POD and the New POD. There are no other PODs between these PODs. The water diversion capacity at the New POD is equivalent to the BLM POD. Bridge Creek stream flows at the New POD are similar to the stream flows at the BLM POD. Ultimately, the requested change is as uneventful and innocuous a change as the ALJ can imagine.

In conclusion, there is no evidence in the record of any injury to existing water rights caused by the addition of the New POD to Certificate 68553, and the preponderance of the evidence shows that the addition of the NEW POD will not cause injury to existing water rights.

Issue C – Approval of an Additional POD

On January 15, 2025, the OAH issued a Ruling on Motion for Summary Determination, in which ALJ Fair granted Applicant's motion regarding Issue C in PD 14158. In the Motion, Applicant had not requested a favorable ruling on Protestant's Issue C claim filed in PD T- 14170. However, in the parties' February 4, 2025 Further Stipulations Regarding Issues for Hearing, the parties agreed that Protestant's argument on Issue C is the same for PD T-14170 as for PD T-14158. As such, the parties

³⁷ The ALJ rejects the assumption that injury to junior water right holders automatically occurs just because Applicant resumes diverting water, as needed, when Bridge Creek stream flows drop below 10 cfs as it did prior to 2020.

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recognized that further litigation of that issue would result in the same ruling from the ALJ. Protestant's Issue C claims were withdrawn as issues for hearing but were preserved to follow and mimic the result of any further adjudication of Issue C in PD T-14158.

Issue G – Water Use Subject to Transfer

On January 15, 2025, the OAH issued a Ruling on Motion for Summary Determination, in which ALJ Fair granted Applicant's motion regarding Issue G. Because the Ruling resolved that issue, it is attached and incorporated into this Proposed and Final Order. Based upon the findings in that Ruling, the subject water right for T-14170, which is a water storage right, is a water use subject to transfer.

CONSIDERATION OF EXCEPTIONS

The Director has considered Applicant's and Protestant's exceptions to the Proposed Order and Applicant's response to Protestant's exceptions. The Director's disposition of certain of the exceptions is discussed below. All exceptions not discussed below are denied.

The Director finds that to the extent any of the changes to the Proposed Order described in this section constitute changes to a finding of historical fact as "finding of historical fact" is defined in ORS 183.650(3) and OAR 137-003-0665(4), the changes are supported by clear and convincing evidence in the record. Additions to the text of the Proposed Order are shown in underline, and deletions are shown in ~~strikeout~~.

Exception 1: Applicant objects to the statement in the first sentence of Finding of Fact 15 that the New POD is "approximately 0.28 miles downstream from the BLM POD" and argues that Exhibit R2 at 1, Mr. William's testimony, and Exhibit A2 at 110 (the preliminary determination for transfer application T-14170) show that the New POD is actually approximately 1,110 feet downstream from the BLM POD.

Disposition: The exception is allowed. For the reasons stated in Applicant's exceptions, the Director agrees that the evidence shows that the New POD is approximately 1,110 feet downstream from the BLM POD. In addition to the evidence discussed in Applicant's exceptions, the scale on the map at Exhibit A1 at 133 and the testimony of Watermaster Kenneth Thiemann also show that the New POD is approximately 1,110 feet downstream from the BLM POD. The first sentence of Finding of Fact 15 is amended as follows:

The New POD is located in Sec. 31, T10S, R21E, WM, approximately 1,110 feet~~0.28-~~
~~miles~~ downstream of the BLM POD. (Exs. A1 at 133-134; R2 at 1; A2 at 110; test. of
Williams and Thiemann.)

Exception 2: Applicant objects to the final sentence of the Proposed Order's Finding of Fact 16, which reads "Because OWRD does not regulate for the BLM ROW, the lack of the 10 cfs limitation on Applicant's use of the New POD was not part of the watermaster's injury and enlargement analysis. (Test. of Thiemann.)" Applicant argues that the following statement more accurately summarizes Watermaster Kenneth Thiemann's testimony: "Because OWRD does not have the authority to consider third-party agreements like the BLM ROW when evaluating water transfer applications, the watermaster did not consider the 10 cfs limitation in his injury and enlargement analysis."

Disposition: The exception is denied. Finding of Fact 16 discusses Mr. Thiemann’s testimony. While Mr. Thiemann’s testimony is not inconsistent with the statement “OWRD does not have authority to consider third-party agreements like the BLM ROW when evaluating water transfer applications,” Mr. Thiemann did not make such a statement in his testimony. Instead, as Finding of Fact 16 notes, Mr. Thiemann emphasized that OWRD does not regulate for the BLM ROW. As such, Mr. Thiemann’s testimony does not provide a basis for Applicant’s requested change. However, to provide a more complete summary of Mr. Thiemann’s testimony concerning the BLM ROW and his injury and enlargement analysis, the Director has amended the sentence to which Applicant objects as follows:

“Because OWRD lacks authority to and does not regulate for water use based on third-party agreements like the BLM ROW, the lack of the 10 cfs limitation on Applicant’s use of the New POD was not part of the watermaster’s injury and enlargement analysis the watermaster considered the BLM ROW irrelevant to the issues of injury and enlargement and did not consider the 10 cfs limitation in his injury and enlargement analysis. (Test. of Thiemann.)”

Exception 3: Applicant requests that the Director add ORS 540.520(1)(a), ORS 540.505(4), and ORS 537.270 to the Proposed Order’s list of statutes that do not provide authority for OWRD to consider federal law, federal resource management plans, or third party agreements when evaluating the legal availability of water under a water right certificate.

Disposition: The exception is denied. The Proposed Order already references ORS 540.520 and 537.270 to support the proposition that the statutory scheme is consistent with OWRD’s interpretation of “legally available,” as used in OAR 690-380-0100(2)(d), to mean the amount of water available under OWRD’s statutes and rules and the terms of the subject water right certificate, without regard to federal law, federal resource management plans, or third-party agreements. It is not necessary to add additional references to those statutes. However, the first sentence of the fourth-to-last paragraph of the Opinion section’s enlargement analysis is amended as shown below to add a reference to ORS 540.505(4). That statute defines “Water Use Subject to Transfer,” in part, as “[a] water right certificate,” indicating that the water use which may be transferred is defined by the water right certificate, without regard to federal law, federal resource management plans, or third-party agreements.

As Applicant further notes, the statutes concerning the transfer of a state water right certificate provide for OWRD’s review of the transfer application under various state laws, such as ORS 540.505(4), 540.510, 540.520, and ORS 540.530.

Exception 4: Protestant objects to the Proposed Order’s enlargement analysis because the analysis does not address Protestant’s argument that the proposed transfer will enlarge the subject water rights by causing “an expansion” of the rights of a type not covered by the four non-exclusive examples of enlargement/expansion provided in OAR 690-380-0100(2).

Disposition: The Director has added the penultimate paragraph of the Opinion’s enlargement analysis to this final order to address Protestant’s argument.

Exception 5: Protestant objects to the Proposed Order’s enlargement analysis because the analysis

does not address Protestant's arguments based on ORS 537.140(1)(a)(E), 537.139(1), 164.245(1) and 164.205(3).

Disposition: The Director has added footnote 36 to this final order to address Protestant's argument.

DIRECTOR'S AMENDMENTS TO THE PROPOSED ORDER

In addition to the changes discussed in the Consideration of Exceptions section, the Director has amended the Proposed Order as described below. The Director finds that to the extent any of the changes to the Proposed Order described in this section constitute changes to a finding of historical fact as "finding of historical fact" is defined in ORS 183.650(3) and OAR 137-003-0665(4), the changes are supported by clear and convincing evidence in the record. Additions to the text of the Proposed Order are shown in underline, and deletions are shown in ~~strikeout~~.

Amendment 1: The Proposed Order is amended to correct typographical errors.

Amendment 2: The History of the Case section is updated to reflect issuance of the Proposed Order, the filing and consideration of exceptions, and issuance of this final order.

Amendment 3: The second sentence of Finding of Fact 16 ("The watermaster sought Applicant's voluntary cancellation of acres not associated with the transfer of Certificate 13593 to prevent enlargement of the water right.") is deleted. Transfer Application T-14170, involves Certificate 68553, not Certificate 13593, so the sentence is not relevant to T-14170.

Amendment 4: Finding of Fact 17 is amended as shown below to reflect that the Preliminary Determination for Application T-14170 proposed to approve the application, rather than approved the application. (Ex. A2 at 108, 110.) Similar amendments are made throughout the final order.

On September 25, 2023, OWRD issued PD T-14170, proposing to approve ~~approving~~ the addition of the New POD with the 330 acre-feet water right as originally provided by Certificate 68553. (Ex. A2 at 106-115.) PD T-14170 provides that the "right to store the water * * * is subject to all other conditions and limitations contained in Certificate 68553 and any related decree." (Id. at 111.) PD T-14170 requires the installation of a totalizing flow meter at all PODs, measuring devices regarding the Painted Hills Reservoir, and the installation of a fish screen at the New POD. PD T-14170 further requires the full beneficial use of water to occur by October 1, 2027. (Id. at 111-112.)

Amendment 5: The first sentence of Finding of Fact 20 is amended as shown below to clarify that there is only one water right to Bridge Creek waters that is senior to Applicant's Certificates 13593 and 96311, rather than to Certificate 68553. Certificate 68553's priority date is October 17, 1983. (Ex. A2 at 37.) Based on Finding of Fact 21, there are several water rights to Bridge Creek waters with priority dates senior to October 17, 1983. In addition, footnote 29 is added to explain that the senior water right holder's water right is also senior to Certificate 68553.

Change to Finding of Fact 20: There is only one person who holds a certificated water right on Bridge Creek that is senior to Applicant's Certificates 13593 and 96311-~~Certificate 68553~~.

New Footnote 29: Because Certificates 13593 and 96311 are senior to Certificate 68553, the senior water right holder's right is also senior to Certificate 68553. (See Ex. A1 at 67-68; A2 at 37).

Amendment 6: The Opinion section is amended to replace the statements concerning the burden and standard of proof that appear in the Proposed Order with the statements that appear in this final order. The purpose of the change is to provide additional information concerning the purpose and effect of assignment of the burden of proof and to provide a full statement of the burden and standard of proof applied in this final order. Given the nature of the record and the issues in dispute in this matter, the clarification of the burden and standard of proof does not require the modification of any findings of fact.

Amendment 7: The Proposed Order's Footnote 35 is deleted because the information in the footnote is not relevant to the issues to be determined in this case.

Amendment 8: The fifth paragraph in the Opinion section's enlargement analysis is amended as shown below to do the following: (1) clarify that ORS 537.120 provides that nothing *in the Water Rights Act* is to take away or impair the vested right of any person to any water or to the use of any water; (2) clarify that ORS 537.120 provides for the review of appropriation of water for beneficial use under the Water Rights Act, rather than under ORS chapter 538; (3) add footnote 35 providing the definition of "Water Rights Act"; (4) provide clarification concerning OWRD's interpretation of "legally available" based on OWRD's responses to Protestant's interrogatories (Ex. P49 at 7); and (5) provide additional support for the conclusion that OWRD's interpretation of "legally available" is plausible within the context of the statutory scheme.

The changes related to ORS 537.120 are supported by the text of that statute, which provides in full: "Subject to existing rights, and except as otherwise provided in ORS chapter 538, all waters within the state may be appropriated for beneficial use, as provided in the Water Rights Act and not otherwise; but nothing contained in the Water Rights Act shall be so construed as to take away or impair the vested right of any person to any water or to the use of any water." These changes are further supported by the fact that ORS chapter 538 does not provide instructions for reviewing applications to appropriate water or to transfer water rights but instead consists largely of a list of water sources that are withdrawn from appropriation. *See* ORS 538.010 to 538.450.

Changes to Opinion paragraph: As noted above, the Water Rights Act made the doctrine of prior appropriation the prevailing water law of Oregon. That doctrine encourages the full use of vested water rights based upon the seniority of the existing water rights. ORS 537.120 provides that nothing in the Water Rights Act³⁵ is "to take away or impair the vested right of any person to any water or to the use of any water." This same statute authorizes OWRD to review the appropriation of water for beneficial use as provided in the Water Rights Act ~~ORS chapter 538~~, "and not otherwise." ORS 537.120. Additionally, the water right certificate defines the terms (priority and extent) of the appropriation. ORS 537.270 (A water right certificate "shall be conclusive evidence of the priority and extent of the appropriation therein described.") Finally, ORS 540.045(1)(a) provides that OWRD shall "regulate the distribution of water among the various users of water from any natural surface or ground water supply in accordance with the water users' existing water rights of record in the Water Resources

Department. Thus, OWRD’s interpretation to restrict the review of “legally available” to ~~Oregon~~ OWRD’s statutes and rules and the terms of the certificated water right at issue, without regard to any third-party agreements or federal law, is plausible within the context of this statutory scheme.

New footnote 35: ORS 537.010 provides that, as used in ORS chapter 537, “‘Water Rights Act’ means and embraces ORS 536.050, 537.120, 537.130, 537.140 to 537.252, 537.390 to 537.400, 538.420, 540.010 to 540.120, 540.210 to 540.230, 540.310 to 540.430, 540.443 to 540.491, 540.505 to 540.585 and 540.710 to 540.750.” As such, “Water Rights Act,” as used in ORS chapter 537, includes the portions of ORS chapter 540 governing water right transfers (ORS 540.505 to 540.585).

Amendment 9: The third-to-last paragraph of the Opinion section’s enlargement analysis is amended as shown below to reflect that approval of Transfer Application T-14170 will not change the place of use and type of use of the subject water right, and that place of use and type of use are attributes that are closely related to the beneficial use of water.

Protestant also asserts that the addition of the New POD is an enlargement of the certificated water right. Essentially, Protestant argues that the numerical increase in the number of the available PODs from one (Bridge Creek) POD to two (Bridge Creek) PODs is an enlargement. Although there is a numerical increase in the PODs from which Applicant is authorized to divert water, the priority, source, place of use, type of use and extent of the water right remains unchanged by the increase in PODs. These items (priority, source, place of use, type of use and extent) are attributes that go to the heart of a water right – the beneficial use of water. The POD is merely part of the water delivery system and not part of the beneficial use of the water. *See Russell-Smith v. Water Resources Dept.*, 152 Or App 88, 96-99 (1998). PD T-14170 contains the limitation that the Applicant cannot divert more water from the New POD than it could divert from the BLM POD. As acknowledged at hearing, OWRD erred in the language of this condition and intended that the condition state that Applicant cannot divert more water from the New and BLM PODs than the water it could divert from the BLM POD. With that modification to the condition, the proposed limitation prevents any enlargement from the change in the water delivery system sought in Applicant’s transfer application. Items such as the source of the water, the acres receiving the water, the type of use and the rate and duty remain unchanged.

Amendment 10: The conclusion paragraphs of the Opinion section’s enlargement and injury analyses are amended as shown below to reflect the Director’s evaluation of the record. Given the legal conclusions concerning the nature of enlargement and injury stated in this final order, there is no evidence in the record showing that approval of transfer application T-14170 will enlarge the subject water right or injure existing water rights. In addition, the evidence showing that the rate, duty, place of use, and type of use of the subject water right will not change, and that diversions at the New POD will be limited to the amount of water lawfully available at the BLM POD, demonstrates that the proposed transfer will not cause injury or enlargement. As such, the preponderance of the evidence shows that approval of transfer application T-14170 will not cause injury or enlargement.

Changes to enlargement conclusion: In sum, the preponderance of the evidence shows ~~evidence fails to demonstrate~~ that the approval of the New POD as noted in PD

T-14170, coupled with the indicated modification of the diversion limitation, will not cause enlargement.

Changes to injury conclusion: In conclusion, there is no evidence in the record of any injury to existing water rights caused by the addition of the New POD to Certificate 98553, and the preponderance of the evidence shows that the addition of the New POD will not cause injury to existing water rights.

Amendment 11: The Order section is amended to include information and conditions from the Preliminary Determination so that the Order section fully describes the consequences of approving Transfer Application T-14170 as conditioned in the Preliminary Determination, with the changes recommended by the ALJ. The Order section is also amended to reflect that the Preliminary Determination proposed to approve Transfer Application T-14170 rather than approving the application, such that this final order must approve the application, not affirm the Preliminary Determination.

ORDER

Now, therefore, it is ORDERED:

1. The additional point of diversion proposed in Transfer Application T-14170 and described in Attachment 1 to this final order is approved.
2. The right to store the water is restricted to the place of storage described and is subject to all other conditions and limitations contained in Certificate 68553 and any related decree.
3. Water right Certificate 68553 is cancelled. A new certificate will be issued describing that portion of the right not affected by this transfer.
4. The quantity of water diverted for storage at the new point of diversion (POD 3), together with that diverted at the original point of diversion (Bridge Creek POD 2), shall not exceed the quantity of water lawfully available at the original point of diversion (Bridge Creek POD 2).
5. Water shall be acquired from the same source of surface water (Bridge Creek) as the original point of diversion (Bridge Creek POD 2).
6. Prior to diverting water, the water user shall install a headgate to control and regulate the quantity of water diverted. The type and plans of the headgate must be approved by the Department prior to beginning construction and shall be installed under the general supervision of the Department. The water user shall maintain the headgate as required by the Department.
7. Water Use Measurement Conditions:
 - a. Before diversion of water may begin under this order, the water user shall install a totalizing flow meter, or, with prior approval of the Director, another suitable measuring device, at each point of diversion.
 - b. The water user shall maintain the meters or measuring devices in good working order.

- c. The water user shall allow the Watermaster access to the meters or measuring devices; provided however, where the meters or measuring devices are located within a private structure, the Watermaster shall request access upon reasonable notice.
8. Reservoir Water Use Measurement Conditions:
- a. Before diversion of water may begin under this order, the water user shall install staff gages, or, with prior approval of the Director, other suitable measuring devices, that measure the entire range and stage between empty and full in each reservoir.
 - b. Before diversion of water may begin under this order, if the reservoir is located in channel, weirs or other suitable measuring devices must be installed upstream and downstream of the reservoir, and an adjustable outlet valve must be installed. The water user shall maintain such devices in good working order. A written waiver may be obtained, if in the judgment of the Director, the installation of weirs or other suitable measuring devices, or the adjustable outlet valve, will provide no public benefit.
 - c. The water user shall allow the Watermaster access to the devices; provided however, where any device is located within a private structure, the Watermaster shall request access upon reasonable notice.
9. Prior to diverting water, the water user shall install a fish screening and/or by-pass device, as appropriate, at the new point of diversion consistent with the Oregon Department of Fish and Wildlife's (ODFW) design and construction standards. Prior to installation, the water user shall obtain written approval from ODFW that the required screen and/or by-pass device meets ODFW's criteria. Prior to submitting a "Claim of Beneficial Use" report, the water user must obtain written approval from ODFW that the required screening and/or by-pass device was installed to the state's criteria. The water user shall maintain and operate the fish screen and/or by-pass device, as appropriate, at the point of diversion consistent with ODFW's operational and maintenance standards.
10. Completion of the change shall be made, consistent with the terms of this order, on or before **October 1, 2028**. A "Claim of Beneficial Use" report prepared by a Certified Water Right Examiner shall be submitted by the applicant to the Department within one year after the deadline for completion of the change.
11. After satisfactory proof of the change is received, a new certificate confirming the right transferred will be issued.

Dated in Salem, Oregon on October 22, 2025.



Lisa J. Jaramillo, Transfer and Conservation Section Manager, for
IVAN GALL, DIRECTOR
Oregon Water Resources Department

NOTICE

Appeal of this order is to the Oregon Court of Appeals pursuant to ORS 183.482 and ORS 536.075(2). Petitions for judicial review of this order must be filed with the Court of Appeals within 60 days from the day this order was served. If the order was mailed, the date of service is the day it was mailed. Failure to file a petition for judicial review within the 60-day time period will waive your right of appeal. Alternatively, under OAR 137-003-0675, a party may petition OWRD for reconsideration or rehearing of this order within 60 days from the day this order was served. Petitions for reconsideration or rehearing shall be filed by emailing to will.d.davidson@water.oregon.gov

ATTACHMENT 1

The portion of the water right represented by Certificate 68553 to be transferred is as follows:

Certificate: 68553 in the name of WILLIAM SMITH PROPERTIES INC. (perfected under Permit R-9896)
Use: STORAGE for IRRIGATION
Priority Date: OCTOBER 17, 1983
Rate: 330.0 ACRE-FEET (AF)
Source: BRIDGE CREEK, tributary of THE JOHN DAY RIVER

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q
10 S	20 E	WM	25	NE SW
10 S	20 E	WM	25	NW SW
10 S	20 E	WM	25	SW SW
10 S	20 E	WM	25	SE SW
10 S	20 E	WM	26	SE SE
10 S	20 E	WM	36	NW NW

Certificate 68553 does not describe the location of authorized Bridge Creek POD 2; however, information is available describing the location as:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
11 S	21 E	WM	6	NE NE	BRIDGE CREEK POD 2 - 590 FEET SOUTH AND 2160 FEET EAST FROM THE N1/4 CORNER OF SECTION 6

Transfer Application T-14170 proposes an additional point of diversion on Bridge Creek located approximately 1,110 feet downstream from the existing authorized Bridge Creek POD 2, as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
10 S	21 E	WM	31	SE SE	POD 3 - 160 FEET NORTH AND 1850 FEET EAST FROM THE S1/4 CORNER OF SECTION 31

CERTIFICATE OF FILING/SERVICE

I certify that on October 22, 2025, I filed the foregoing Final Order in Contested Case with the Office of Administrative Hearings and served true and correct copies as set forth below:

Jesse D Ratcliffe
Oregon Department of Justice
1162 Court St. NE
Salem, OR 97301
Jesse.d.ratcliffe@doj.oregon.gov

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☐ by hand-delivery
☐ by facsimile # _____
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☒ Other: Email

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☐ by hand-delivery
☐ by facsimile # _____
☐ by certified mail # _____
☒ Other: Email

/s/ Will Davidson

Will Davidson, Agency Representative,
 OREGON WATER RESOURCES DEPARTMENT

**BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF OREGON
for the
OREGON WATER RESOURCES DEPARTMENT**

In the Matter of Transfer Applications	)	RULING ON MOTION FOR SUMMARY
T-14158 and T-14170	)	DETERMINATION
	)	
BRIDGE CREEK RANCH LLC,	)	
Applicant	)	OAH Reference Nos. 2024-OWRD-00163 and
	)	2024-OWRD-00165
and	)	
	)	Agency Case Nos. T-14158 and T-14170
WATERWATCH OF OREGON,	)	
Protestant	)	

PROCEDURAL HISTORY

On September 25, 2023, the Oregon Water Resources Department (OWRD) issued a Preliminary Determination Proposing Approval of an Additional Point of Diversion in the matter of the Transfer Application T-14170 (PD T-14170) filed by Bridge Creek Ranch LLC (Applicant).¹ On October 23, 2023, OWRD received the Protest filed by WaterWatch of Oregon (Protestant).

On January 19, 2024, OWRD issued a Preliminary Determination Proposing Approval of Additional Points of Diversion and Partial Cancellation of Water Right in the matter of the Transfer Application T-14158 (PD T-14158) filed by Applicant.² On February 15, 2024, OWRD received Protestant's Protest of PD T-14158.

On August 14, 2024, OWRD referred the matters to the Office of Administrative Hearings (OAH).³ The OAH assigned Administrative Law Judge (ALJ) Samantha Fair to preside over the matters. On September 16, 2024, ALJ Fair convened a prehearing conference. Attorney Brian Posewitz represented Protestant. Attorney Elizabeth Howard represented Applicant. Senior Assistant Attorney General Sarah Rowe represented OWRD. Will Davidson also appeared on behalf of OWRD. ALJ Fair scheduled the matters for a prehearing conference on February 6, 2025, for the review of exhibits and a video conference hearing on February 11 through 14, 2025. The ALJ also set deadlines for the submission of issue statements, motions, witness lists, and exhibits.

¹ The transfer application involves Certificate 68553.

² The transfer application involves Certificates 13593 and 96311.

³ Prior to the referral, the parties agreed to consolidate the two matters for hearing. The OAH assigned reference number 2024-OWRD-00163 to the matter involving PD T-14158 and reference number 2024-OWRD-00165 to the matter involving PD T-14170.

On September 18, 2024, Applicant requested new hearing dates. ALJ Fair rescheduled the hearing for February 18 through 21, 2025.

On October 7, 2024, OWRD filed Stipulations Regarding the Statement of Issues. Later that day, Protestant filed a Statement Regarding Stipulated Issues. On October 10, 2024, OWRD filed a Response to [Protestant's] Statement Regarding Stipulated Issues. On October 22, 2024, the OAH issued a Ruling on Motion Regarding Statement of Issues, in which the ALJ adopted the issues for hearing as stated in the October 7, 2024 Stipulations Regarding the Statement of Issues.

On November 15, 2024, Applicant filed a Motion for Summary Determination (Motion),⁴ seeking a dispositive ruling on four of the issues for hearing. On November 27, 2024, OWRD filed a Response to [Applicant's] Motion for Summary Determination (OWRD Response).

On December 2, 2024, Protestant requested an extension of the deadline for its response to the Motion. On December 3, 2024, the ALJ granted the request and extended the deadline to December 13, 2024. On December 13, 2024, Protestant filed a Response to Bridge Creek Ranch's Motion for Summary Determination (WW Response).

On December 31, 2024, Protestant filed a Motion to Deny Applications or Return Cases to Agency. On January 7, 2025, OWRD filed a Response to [Protestant's] Motion to Deny Applications or Return Cases to Agency.

On January 13, 2025, Applicant requested an extension on a submission deadline for the hearing and a rescheduling of the prehearing conference. The ALJ granted the extension and rescheduled the prehearing conference for February 12, 2025.

ISSUES

Whether there are any genuine issues as to any material facts and, if not, whether Applicant is entitled to a favorable ruling as a matter of law, on the following issues:

- Issue A. Whether approval of the transfers would enlarge the subject water right. OAR 690-380-4010.
- Issue B. Whether approval of the transfers would injure the water rights for Certificate 59780. ORS 540.530(1)(a).
- Issue C. Whether OWRD exceeded its statutory authority by approving an additional point of diversion (as opposed to approval of a change from one point of diversion to another point of diversion) in PD T-14158. ORS 540.510(1)(a).
- Issue G. Whether the subject water right for T-14170, which is a water storage right,

⁴ The Motion is a partial motion for summary determination, seeking favorable rulings on Issues A, B, C, and G of the seven issues for hearing.

is a water use subject to transfer. ORS 540.510(1)(a).

OAR 137-003-0580.

UNDISPUTED STATEMENTS OF FACT

1. Bridge Creek is a tributary of the John Day River, located in Wheeler County, Oregon. (Ex. 1 at 1.)

2. Applicant holds Certificates 13593 and 96311 for irrigation and domestic use of surface waters from Bridge Creek with priority dates from 1868. (Ex. A at 10, 15, 19, 21, 22, 24, 27-32.) Applicant also holds Certificate 68553 for storage of water diverted from Bridge and Bear Creeks into the Painted Hills Reservoir with a priority date of October 17, 1983. (Ex. B at 8, 10.)

3. On February 1, 1989, Certificate 59780 with a priority date of November 3, 1983, was issued for the right to use Bridge Creek waters to maintain an instream flow from the mouth of Bear Creek to the mouth of Bridge Creek for the purpose of supporting aquatic life and minimizing pollution. Certificate 59780 protects waters rights for a maximum flow volume as follows:

Oct. 1 – Oct 31	6 cubic feet per second (cfs)
Nov 1 – Feb 15	25 cfs
Feb. 16 - May 31	40 cfs
June 1 – June 30	25 cfs
July 1 – July 15	15 cfs
July 16 – Sept. 30	6 cfs

(Ex. 1 at 1.)

4. On September 2, 2021, the Bureau of Land Management granted Applicants a right-of-way permit (BLM ROW) to operate and maintain a point of diversion (POD) on public lands in Section 6 of Bridge Creek, including pipeline, headgate, and screen (BLM POD). (Ex. D at 1.) The grant included the following diversion restriction:

No water may be diverted when the stream flow drops below 10 cfs in Bridge Creek, as measured at the Bridge Creek gauge station near the mouth of Bridge Creek.

Id. at 8. Applicant diverts water at the BLM POD for the irrigation and storage water rights described in Certificates 13593, 96311, and 68553.⁵ (Exs. A at 8, 13; B at 8.)

5. On January 24, 2023, Applicant filed a transfer application for Certificates 13593 and 96311, with OWRD, seeking to add a POD located on Bridge Creek in Section 31 (New POD) to

⁵ Applicant also diverts water at other PODs for Certificates 96311 and 68553. (Exs. A at 13; B at 8.)

its delivery system.⁶ (Ex. A at 1, 4.) On February 9, 2023, Applicant filed a transfer application for Certificate 68553, seeking to add the New POD to its delivery system.⁷ (Ex. B at 1, 8, 18.)

CONCLUSIONS OF LAW

There are no genuine issues as to any material facts, and Applicant is entitled to a favorable ruling as a matter of law, on the following issues:

- Issue B. Approval of the transfers would not injure the water rights for Certificate 59780.
- Issue C. OWRD did not exceed its statutory authority by approving an additional point of diversion (as opposed to approval of a change from one point of diversion to another point of diversion) in PD T-14158.
- Issue G. The subject water right for T-14170, which is a water storage right, is a water use subject to transfer.

There are genuine issues of material fact and Applicant is not entitled to a favorable ruling on Issue A (enlargement).

OPINION

Standard of Review for Motion for Summary Determination

OAR 137-003-0580 addresses motions for summary determination. It provides, in relevant part:

(6) The administrative law judge shall grant the motion for a summary determination if:

(a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and

(b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.

(7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.

⁶ The New POD would be located on Applicant's property. (Ex. A 1, 4.)

⁷ Applicant originally filed this application on December 8, 2021, and re-filed it on February 9, 2023, with new signatures in compliance with Marion County Circuit Court Judge Broyles' ruling in a mandamus action filed by Applicants against OWRD. (Ex. B at 1, 5-6, 22, 26, 36.)

(8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing.

* * * * *

(11) The administrative law judge's ruling may be rendered on a single issue and need not resolve all issues in the contested case[.]

Pursuant to OAR 137-003-0580(6)(a), in issuing this ruling, the ALJ considered the following:

- The Motion, the Declaration of Elizabeth Howard, and Exhibits A through I, submitted by Applicant;
- OWRD Response and the Declaration of Lisa J. Jaramillo, submitted by OWRD;
- WW Response, the Declaration of Brian Posewitz, and Exhibits 1 through 28, submitted by Protestant; and
- The pleadings.

In this matter, Protestant asserts the Department erred in finding the proposed transfer would not enlarge the existing water right (Issue A) and would not cause injury to the existing water rights provided by Certificate 59780 (Issue B). Protestant further asserts that the water right for PD T-14170 was not subject to transfer (Issue G), and OWRD's action in granting Applicant an additional POD exceeded its jurisdiction (Issue C). Pursuant to OAR 137-003-0580(7), I reviewed the evidence in the light most favorable to Protestants and OWRD,⁸ the non-moving parties. I determined there are no genuine issues as to the material facts that are relevant to resolution of Issues B (regarding Certificate 59780), C (regarding PD T-14158), and G. Applicant is entitled to a favorable ruling for those issues.

Issue A involves Protestant's assertion that the Applicant's addition of a POD will result in the enlargement of Applicant's water right. OAR 690-380-5000(1)(c) requires OWRD to determine that the granting of a transfer application would not result in enlargement as defined by OAR 690-380-0100(2). OAR 690-380-0100(2) provides, in part:

"Enlargement" means an expansion of a water right and includes, but is not limited to:

* * * * *

(d) Diverting more water at the new point of diversion or appropriation than is legally available to that right at the original point of diversion or appropriation.

⁸ OWRD agreed with Applicant's Motion; however, because OWRD did not file its own motion for summary determination, the agency is a non-moving party for purposes of this ruling.

In the WW Response, Protestant raises several areas of material dispute, including conflicting information with OWRD's interpretation of OAR 690-380-0100(2). OWRD asserted that it does not consider third-party agreements that affect the applicant's use of water in making an enlargement determination. Jaramillo Dec. at 2. However, in OWRD's *Technical Operations Manual*, OWRD provides examples of potential enlargement including the movement of a headgate downstream to a location where more water could be diverted to satisfy a water right. In such a situation, the *Technical Operations Manual* states that OWRD will limit the amount of water that may be taken at the new location to that amount taken at the original location. The *Technical Operations Manual* further states that OWRD may impose a requirement for measurement stations at both locations to ensure that more water is not taken. Exhibit H at 8-9. This seeming contradiction between OWRD's assertion and its *Technical Operations Manual* creates a genuine issue of material fact regarding OWRD's interpretation of its administrative rule. Therefore, Applicant is not entitled to a favorable ruling on Issue A.⁹

Because this ruling does not resolve all issues in this contested case proceeding, the remaining issues, including Issue A, will proceed to hearing.

Applicable Law

ORS 540.510(1)(a) provides, in part:

Except as provided in subsections (2) to (8) of this section, all water used in this state for any purpose shall remain appurtenant to the premises upon which it is used and no change in use or place of use of any water for any purpose may be made without compliance with the provisions of ORS 540.520 and 540.530. However, the holder of any water use subject to transfer may, upon compliance with the provisions of ORS 540.520 and 540.530, change the use and place of use, the point of diversion or the use of the water without losing priority of the right * * *.

* * * * *

(6) In the event that government action results in or creates a reasonable expectation of a change in the surface level of a surface water source that impairs or threatens to impair access to a point of diversion authorized by a water right permit, certificate or decree, the owner of the water right may change the point of diversion or add an additional point of diversion in accordance with the provisions of this section in lieu of complying with the requirements of ORS 540.520 and 540.530. Before changing the point of diversion, the water right owner shall provide written notice of the proposed change to the Water Resources Department. Within 15 days after receipt of such notice, the department shall provide notice by publication in the department's public notice of water right applications.

⁹ These provisions of the *Technical Operations Manual* also apply to OWRD's determination of an injury to water rights. However, because of precedential caselaw involving the determination of injuries to water rights, OWRD's seeming conflicting interpretations is irrelevant to Issue B.

Within 60 days after the department receives notice from the owner, the Water Resources Director, by order, shall approve the change unless the director finds the changes will result in injury to other existing water rights. All other terms and conditions of the water right shall remain in effect[.]

ORS 540.530(1)(a) provides:

If, after hearing or examination, the Water Resources Commission finds that a proposed change can be effected without injury to existing water rights, the commission shall make an order approving the transfer and fixing a time limit within which the approved changes may be completed.

ORS 540.520 provides, in part:

(1)(a) Except when the application is made under ORS 541.327 or when an application for a temporary transfer is made under ORS 540.523, if the holder of a water use subject to transfer for irrigation, domestic use, manufacturing purposes, or other use, for any reason desires to change the place of use, the point of diversion, or the use made of the water, an application to make such change, as the case may be, shall be filed with the Water Resources Department.

* * * * *

(2) The application required under subsection (1) of this section shall include:

- (a) The name of the owner;
- (b) The previous use of the water;
- (c) A description of the premises upon which the water is used;
- (d) A description of the premises upon which it is proposed to use the water;
- (e) The use that is proposed to be made of the water;
- (f) The reasons for making the proposed change; and
- (g) Evidence that the water has been used over the past five years according to the terms and conditions of the owner's water right certificate or that the water right is not subject to forfeiture under ORS 540.610[.]

OWRD promulgated rules pertaining to water right transfers in OAR chapter 690, division 380. OAR 690-380-4010 sets out the requirements for OWRD's review of a transfer application. As pertinent here, OAR 690-380-4010(2) provides:

The Department's preliminary determination shall include an assessment of whether:

* * * * *

(c) The proposed transfer would result in enlargement;

(d) The proposed transfer would result in injury[.]

Similarly, OAR 690-380-5000, addressing approval of transfers, states:

(1) A transfer application shall be approved if the Department determines that:

(a) The water right affected by the proposed transfer is a water use subject to transfer as defined in ORS 540.505(4) and OAR 690-380-0100(14) * * *;

* * * * *

(c) The proposed transfer would not result in enlargement as defined in OAR 690-380-0100(2);

(d) Except as provided in OAR 690-380-5030,¹⁰ the proposed transfer would not result in injury as defined in 690-380-0100(3)[.]

OAR 690-380-0100 provides some definitions for terms used by OWRD and includes, in part:

(3) "Injury" or "Injury to an existing water right" means a proposed transfer would result in another, existing water right not receiving previously available water to which it is legally entitled[.]

Issue B: Injury to Existing Water Rights

OWRD shall approve a transfer application if the change "can be effected without injury to existing water rights." ORS 540.530(1)(a). Oregon waters are subject to a prior appropriation system. The Oregon Court of Appeals explained the system, as follows:

¹⁰ OAR 690-380-5030 allows for the approval of an injurious transfer when the holder of the injured right consents to the change.

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Under Oregon's prior appropriation system, regulating water rights depends on the priority date of respective water rights. When there is a shortage of water, the senior water right holder is entitled to receive their entire share of water before the next most senior water right holder can receive their share, and so on. * * *. This system of water regulation is enforced through OWRD's watermasters, who, among other duties, must "[r]egulate the distribution of water among the various users of water from any natural surface or ground water supply *in accordance with the users' existing water rights of record in the Water Resources Department.*" ORS 540.045(1)(a).

TPC, LLC v. Oregon Water Resources Department, 308 Or App 177, 194 (2020) (Emphasis in original.).

In the Motion, Applicant sought a favorable ruling on the issue of whether the proposed change in POD will injure the instream water rights established in Certificate 59780. Motion at 15. Applicant argues that the quantity of water used by Applicant remains restricted by the terms of Applicant's existing water rights and that Certificate 59780, as a junior water right in a prior appropriation system, is not entitled to water until senior water rights are satisfied, relying on *Fort Klamath Critical Habitat Landowners, Inc. v. Woodcock*, 334 Or App 509 (2024). Motion at 16-17. Protestant asserts that, because Applicant's proposed new POD will not be subject to the BLM restrictions, Applicant will be able to divert more water (both volume and season), reducing water currently available for Certificate 59780 because of the BLM restrictions. WW Response at 14-15. Protestant distinguishes *Woodcock*, asserting that the injury in *Woodcock* was based on indirect effects and diverted water did not involve a "legal restriction." WW Response at 16-17.

Woodcock involved OWRD's approval of the intervenors' request to transfer water rights to a new POD further downstream.¹¹ Petitioners had in-stream irrigation water rights upstream of applicant's water rights with a priority date that was the same or junior to intervenors' water rights. Intervenors' and petitioners' water rights were subject to a call for water¹² in favor of the local tribes' senior instream water rights. Petitioners presented evidence that intervenors did not use the entire water right because (1) some of the diverted water returned to the streams as return flow; and (2) the limitations caused by the tribes' calls required a reduction or cessation in intervenors' diversion of water. Petitioners argued that, by moving the POD downstream, intervenors would use more of their water rights because the new location would be less constrained by the tribes' calls for water and there would be less flow in the streams because of a reduction in return flow from the current POD's location. *Id.* at 511 – 518.

¹¹ Intervenors sought a temporary transfer under ORS 540.523(2), which includes the same requirement as ORS 540.530(1)(a), that OWRD shall grant the request if "the temporary transfer will not injure any existing water right."

¹² At the beginning of the irrigation season, the tribes' call triggers OWRD to send regulation notices to holders of water rights to curtail their rights when the local water levels fall below the level needed to satisfy the call. *Woodcock*, 334 Or App at 512.

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Petitioners brought action in circuit court to limit intervenors' water rights to the historic consumptive use. OWRD and intervenors filed motions for summary judgment. For purposes of the motion, the evidence included that intervenors had not historically used the full legal water rights and that a portion of diverted water returned to the streams. In response to petitioners' claim that intervenors' water rights should be limited to historic consumptive use, the circuit court, as stated by the Oregon Court of Appeals, found the following:

The circuit court disagreed, concluding that an increase in intervenor's use to the full "paper value" of the water right did not constitute legally cognizable injury. The court explained:

"An increase in use of water by the holder of water rights, within the limits of a valid water right, does not constitute injury to other water rights regardless of whether that increase in use occurs in conjunction with a transfer."

Based on that reasoning, the court granted intervenor's and the OWRD's motion for summary judgment on petitioners' claim asserting that the transfer would result in "injury."

Woodcock, 334 Or App at 523. Upon review of the record, the Oregon Court of Appeals stated:

We conclude that the circuit court did not err. Petitioners' water rights are either junior or equal to intervenor's water right in priority, and a transfer makes no change in priority. Thus, petitioners' alleged deprivation of water as a result of intervenor's use of its full legal water right is simply a feature of the prior appropriation system; it is not an "injury" that is legally cognizable. We conclude for that reason that the circuit court did not err in granting intervenor's and the OWRD's motion for summary judgment on petitioners' claim of injury.

Id. at 524.

The ALJ does not find any significant distinction between *Woodcock* and the present case. The decision made by the circuit court and upheld by the Oregon Court of Appeals does not depend upon the nature of the water reduction (whether direct by limiting the amount of diverted water with the BLM restriction as in the present matter or indirect by a portion of diverted water returning to the streams as in *Woodcock*) or the nature of the reason for the water reduction (an agreement with BLM or in response to the tribes' call). The legal conclusion reached by the Oregon Court of Appeals is clear – a junior or equal water right is not injured when a senior or equal water right is utilized to the fullest extent within the terms of the water right regardless of any historic lesser use of the water right.

Certificate 59780 has a priority date of November 3, 1983, making it a junior water right to Applicants' water rights that have priority dates from 1868. OWRD's PDs require that the final orders include a condition that the quantity of water diverted at the additional POD,

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together with water diverted at the existing POD, “shall not exceed the quantity of water lawfully available at the original [POD].” PD T-14158 and T-14170 at 6. Therefore, even if the additional POD results in Applicant diverting more water than historically diverted, Applicant’s full utilization of the water rights available in Certificates 135393, 96311, and 68553 is not a legally cognizable injury to the waters rights of Certificate 59780.

Protestant’s Protest of OWRD’s PDs T-14158 and T-14170, based on the argument that Applicant’s additional POD will injure Certificate 59780’s water rights, is dismissed.

Issue C: Additional POD as a Change in POD

The three parties agree that the existence of OWRD’s authority to allow a transfer applicant to add a new POD to a water right is dependent upon the interpretation of ORS 540.510(1)(a), specifically the following portion of the statute:

[T]he holder of any water use subject to transfer may, upon compliance with the provisions of ORS 540.520 and 540.530, change the use and place of use, the point of diversion or the use of the water without losing priority of the right.

Applicant asserts that ORS 540.510 has limited prerequisites for a proposed change and that a denial of the transfer application for an additional POD would be an impermissible insertion of language into the statute. Motion at 18-20. OWRD agreed with Applicant’s position, asserting that the statutes do not restrict the ability to add a POD as a change. OWRD Response at 3. Protestant argues that the language of the statute restricts the change to a singular POD. Protestant further argues that the Oregon legislature considered the addition of a POD as distinct from a change to a POD and, thus, the omission of the option of an additional POD from ORS 540.510(1)(a) was deliberate. WW Response at 17-19.

When interpreting a statute, the goal is to ascertain the legislature’s intent. *PGE v. Bureau of Labor Industries*, 317 Or 606, 610 (1993). “We ascertain the legislature’s intentions by examining the text of the statute in its context, along with any relevant legislative history, and, if necessary, canons of construction.” *State v. Cloutier*, 351 Or 68, 75 (2011); *122nd Grp., LLC v. Dep’t of Consumer*, 280 Or App 209 (2016). To determine legislative intent for an accurate interpretation, it is necessary to consider the analytical approach set forth in *PGE v. Bureau of Labor and Industries*, 317 Or 606 (1993) as modified by *State v. Gaines*, 346 Or 160 (2009); see also *Tye v. McFetridge*, 342 OR 61, 69 (2006) (*PGE* analysis is same method used to analyze administrative rules). In *PGE*, the Oregon Supreme Court explained that to determine legislative intent, a court begins by examining a statute’s text within its statutory context, giving words of common usage their plain, natural, and ordinary meaning. If the legislative intent is unambiguous, the court stops at that first level of analysis but may review any legislative history offered by a party. *PGE*, 317 Or at 610-11; *Gaines*, 346 Or at 171-172, 175 (ambiguity not necessary to review legislative history and the use of dictionary definitions to discern the plain, natural, and ordinary meaning of terms).

Here, the plain and ordinary meaning of “change” does not improve the clarity of the meaning of the phrase “may * * * change * * * the point of diversion” in OAR 540.510(1)(a). Change has a wide variety of definitions, including the following:

- To make different in some particular but short of conversion into something else
- To make over to a radically different form, composition, state or disposition
- To dispose of or give up toward the substituting of something roughly equivalent
- To replace with another or others of the same kind or class
- To undergo transformation or conversion

Webster’s Third New International Dictionary 373-374 (unabridged ed 2002). Although some definitions would require the replacement an existing POD, other definitions would not require replacement but merely a difference or some form of alteration or modification, such as an increase (or addition).

To obtain clarity for the phrase at issue, the ALJ turns to the statutory context of ORS 540.510(1)(a), in particular, caselaw that explains the purpose of this statute. Prior to the institution of the current statutory framework for oversight of water uses, Oregon law explicitly acknowledged that “[a] change in the point of diversion and place of use may be made when it can be done without prejudice to the rights of others.” *Russell-Smith v. Water Resources Dept.*, 152 Or App 88, 98 (1998) (internal citations omitted). This concern for the protection of the public remains the legislative purpose of ORS 540.501(1)(a) as confirmed by the Oregon Supreme Court in *Huff v. Bretz*, 285 Or 507 (1979), as follows:

These procedures are “for the protection of the public” (more specifically, for the protection of the interests of those who own affected or potentially affected water rights) against the evil of unrestrained changes in the point of diversion of water. This legislative purpose would be frustrated if a party could be required under the terms of an agreement to pump from an unauthorized point of diversion thereby changing the point of diversion without complying with the procedures mandated by ORS 540.510 et seq. and be held in breach of that agreement if he did not do so.

Huff, 285 Or at 518.

As noted by Applicant, ORS 540.510(1)(a) requires compliance with ORS 540.520 and ORS 540.530 for changes made to the use or place of use of the applicable water rights. ORS 540.530(1)(a) requires OWRD to examine whether a proposed transfer would injure other water rights and approve the transfer if no such injury occurs.¹³ ORS 540.520 details procedures

¹³ Other provisions of ORS 540.530 allow for the approval of a transfer that causes injury if certain conditions are met.

associated with a transfer application, including requirements to fully identify the water right, location, use, the proposed changes, and evidence of prior use. These requirements require OWRD to collect information to prevent the “evil of unrestrained changes” and protect the public from injury. *Id.* There is nothing in the statutory scheme that would require the limitation of the degree or the number of PODs utilized by a holder of a water right other than to prevent injury or confine the holder to the quantity of water delineated by the water right. Therefore, the ALJ finds that ORS 540.510(1)(a) does not prohibit OWRD from allowing a holder of a water right to change the mechanism of the diversion of water to include the addition of a new POD without requiring the elimination of an existing POD.

Protestant argued that the legislature’s phrase in ORS 540.510(6) of “may change the point of diversion or add an additional point of diversion” demonstrates that the legislature distinguishes a change of POD from an additional POD and deliberately chose not to include the option of an additional point of diversion in ORS 540.510(1)(a). The ALJ disagrees with Protestant’s contention. The legislature only used the phrase “an additional point of diversion” once in ORS chapter 540 and provided no explanation of any distinction. ORS 540.510(6) proceeds to provide the mechanism for a holder of water right to change a POD, including providing written notice to OWRD, OWRD’s publishing notice of the application, and OWRD’s approval of the change. Accepting Protestant’s argument, the holder who intends to add a POD would not have to follow the mechanism for approval of the additional POD that a holder intending a non-additional POD change would have to follow. Such a conclusion would not be a reasonable interpretation. In sum, the legislature’s use of the phrase “additional point of diversion” in ORS 540.510(6) did not indicate that the legislature viewed an additional POD as separate from a change in POD.

Protestant’s Protest of OWRD’s PDs T-14158,¹⁴ based on the argument that OWRD does not have the statutory authority under ORS 540.510(1)(a) to grant an additional POD for Certificates 13593 and 96311, is dismissed.

Issue G: Storage Right as a Water Use Subject to Transfer

Applicant’s Certificate 68553 that is the subject of PD T-14170 is a right to store water. ORS 540.510(1)(a) allows holders of any water right use “subject to transfer” to change the use, place and POD of the water rights. Protestant claims that a right to store water is not a water use subject to transfer, and, therefore, OWRD did not have the authority to grant Applicant’s transfer application. WW Response at 21-22.

In *Bridge Creek Ranch, LLC v. Oregon Water Resources Dept.*, 329 Or App 568 (2023) (*Bridge Creek Ranch II*), the Oregon Court of Appeals addressed this precise issue regarding the same certificate. OWRD originally denied Applicant’s transfer application for a new POD for Certificate 68553, arguing that “the water storage certificate was not a water use subject to transfer” and, thus, OWRD did not have the statutory authority to grant or deny Applicant’s transfer application (*i.e.*, OWRD made the same argument then that Protestant now makes.). *Id.*

¹⁴ The Stipulations Regarding the Statement of Issues provided that Issue C was applicable to PDs T-14158 and T-14170. However, in Applicant’s Motion, Applicant only sought a ruling on Issue C for the Protest of PD T-14158. Motion at 18, 20.

at 580. Applicant brought a mandamus action against OWRD, seeking an order to direct OWRD to process the application. *Id.* at 570. After a review of water law history and the application of statutory interpretation principles, the Oregon Court of Appeals concluded, as follows:

We conclude that, although, as the court held in *Cookinham*, with certain exceptions not applicable here, the storage of water in and of itself is not a “use” of water, when considered in the context of the secondary permit, it can represent a water use subject to transfer. When the storage of water under Certificate 68553 is considered, as it must be, in the context of the use of water under Certificate 68552, we agree with the trial court that relator’s Certificate 68553 establishes a “water use subject to transfer” in the sense contemplated by ORS 540.510. We therefore conclude that the trial court correctly determined that relator’s application for a change in POD should be considered by the OWRD.

Id. at 587.

Applicant and Protestant agree that the ALJ does not have the authority to overturn the Oregon Court of Appeals’ decision in *Bridge Creek Ranch II*. Motion at 21; WW Response at 22 (“WaterWatch also acknowledges that the case is controlling precedent applicable to this proceeding.”).¹⁵ Because the Oregon Court of Appeals recently concluded that the water storage right contained in Certificate 68553 is a water use subject to transfer, the ALJ, as an officer of lower rank, is bound by that decision. *See Stranahan v. Fred Meyer, Inc.*, 331 Or 38 (2000);¹⁶ *Farmers Ins. Co. v. Mowry*, 350 Or 686, 693-694 (2011) (precedents should be stable and reliable); *Horton v. Oregon Health and Science University*, 359 Or 168, 186 (2016) (identifies three category of errors that would justify reconsideration of a prior decision – no analysis, clearly incorrect analysis, or cannot be reconciled with other decisions). Therefore, the *Bridge Creek Ranch II* decision, as the controlling decision, is attached and incorporated into this ruling in its entirety.

Based upon the *Bridge Creek Ranch II* decision, Applicant, as a matter of law, is entitled to a favorable ruling on Issue G. Protestant’s Protest of OWRD’s PD T-14170, based on the argument that the applicable water right is not subject to transfer, is dismissed.

¹⁵ Although Protestant filed an *amicus brief* in *Bridge Creek Ranch II*, it was not a party to that case and could not appeal the decision. *Bridge Creek Ranch II*, 329 Or App at 569. In the WW Response, Protestant notes that it may seek to modify or reverse that ruling upon a potential appeal of this matter. WW Response at 22.

¹⁶ In *Stranahan*, the Oregon Supreme Court stated, as follows:

A deliberate or solemn decision of a court or judge, made after argument of a question of law fairly arising in a case, and necessary to its determination, is an authority, or binding precedent, in the same court or in other courts of equal or lower rank, in subsequent cases, where ‘the very point’ is again in controversy.

Id. at 54 (internal citation omitted.).

In the Matter of Transfer Applications T-14158 and T-14170 - OAH Case Nos. 2024-OWRD-00163 and 2024-OWRD-00165

RULING

Applicant's Motion for Summary Determination is **GRANTED**, in part, and **DENIED**, in part. Applicant's Motion for Summary Determination is granted as to the following issues:

Issue B is **DISMISSED** regarding any claim of injury to Certificate 59780. Because the Stipulations Regarding the Statement of Issues did not confine the issue of injury just to Certificate 59780, Issue B will proceed to hearing regarding injury claims to other water rights, as provided by the Stipulations Regarding the Statement of Issues.

Issue C is **DISMISSED** regarding the Protest filed against PD T-14158. Because the Motion only sought a favorable ruling regarding the claim involving PD T-14158, Issue C will proceed to hearing regarding the Protest filed against PD T-14170, as provided by the Stipulations Regarding the Statement of Issues.

Issue G is **DISMISSED** from this transfer application proceeding.

Applicant's Motion for Summary Determination is denied as to Issue A.

/s/Samantha A. Fair
Senior Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF MAILING

On January 15, 2025 I mailed the foregoing RULING ON MOTION FOR SUMMARY DETERMINATION AND in OAH Case No.2024-OWRD-00163 and 2024-OWRD-00165.

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 Hearing Coordinator

**329 Or.App. 568
541 P.3d 920**

**BRIDGE CREEK RANCH, LLC, Relator-
Respondent,
v.
OREGON WATER RESOURCES
DEPARTMENT and Doug Woodcock,
Director of Oregon Water Resources
Department, Defendants-Appellants.**

A180610

Court of Appeals of Oregon.

**Argued and Submitted September 13, 2023
December 20, 2023**

Denise Fjordbeck, Assistant Attorney General, Salem, argued the cause and filed the brief for appellants. Also on the briefs were Ellen Rosenblum, Attorney General, and Benjamin Gutman, Solicitor General.

Sara Kobak, Portland, argued the cause and filed the brief for respondent. Also on the brief were Elizabeth E. Howard, and Schwabe Williamson & Wyatt PC.

Steven L. Shropshire and Jordan Ramis PC, Lake Oswego, filed brief amicus curiae for Oregon Farm Bureau Federation and Oregon Association of Nurseries.

Olivier Jamin and Davis Wright Tremaine LLP, Portland, filed the brief amicus curiae for Oregon Water Utility Counsel, League of Oregon Cities, and Special Districts Association of Oregon.

Andrew R. Missel and Brian Posewitz filed the brief amicus curiae for WaterWatch of Oregon.

Before Tookey, Presiding Judge, and Egan, Judge, and Kistler, Senior Judge.

TOOKEY, P. J.

[541 P.3d 922]

The Oregon Water Resources Department (the OWRD) and its director (defendants) appeal from a judgment in this mandamus action under ORS 34.105 to 34.250 directing the OWRD to consider an application by relator Bridge Creek Ranch, LLC (relator) for a change in the "point of diversion" (POD) of water from a creek that serves as a source of water for relator's reservoir.¹ We have jurisdiction of the appeal pursuant to ORS 34.240.² We affirm the trial court's judgment directing the OWRD to consider relator's application for a change in the POD, although based on slightly different reasoning from that of the trial court.

The parties have stipulated to the relevant factual background: Relator owns the Painted Hills Reservoir, an "off-channel" reservoir,³ and agricultural lands in Wheeler County, Oregon, irrigated with water stored in the reservoir. The water is diverted to fill the reservoir from Bear Creek and Bridge Creek on Bureau of Land Management (BLM) land.

Relator's right to store water is pursuant to two water storage right certificates granting relator the right "to store and use" the authorized volumes of water as irrigation storage water, Certificate 68551 and Certificate 68553. The certificates state that they are restricted to that "beneficial use" at the reservoir location.⁴ Relator also holds Certificate 68552, a secondary water certificate granting it the right to divert and apply water both from the reservoir

and from Bear Creek to irrigate specific lands described as authorized places of use in the secondary certificate.

In 2016, relator began working with the OWRD and the BLM to improve the reservoir and to store an additional 500 acre-feet of water for the purpose of supporting fish life. Relator received grants and obtained new reservoir permits and also obtained a separate secondary permit to release that amount of stored water for that purpose.

Through negotiations, relator and the BLM agreed that relator could have a temporary nonrenewable right-of-way over federal land, which expires in December 2024, to move the existing Bridge Creek POD from its current placement on federal land to a new downstream location on relator's own property.

In December 2021, relator submitted a permanent water transfer application to the OWRD under ORS 540.510 to change the Bridge Creek POD for its storage water right under Certificate 68553 and its permitted storage water right. The OWRD accepted and processed the POD transfer application for the *permitted* storage right under ORS 537.211(4) (addressing change of the point of diversion by holder of a water right permit) but declined to process the POD transfer application for the certificated storage water right under Certificate 68553 without a loss of the priority of the water right, stating that, under ORS 540.510(1), the OWRD does not have the "authority to make POD changes to R-rights for storage" established by water certificates.

Relator filed the instant petition for a peremptory or alternative writ, seeking to compel

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the OWRD to consider its application for a change in the POD. Relator also sought a declaration clarifying the OWRD's authority under ORS 540.510(1)(a) to allow changes in a POD and place of use in a certificated water storage right under Certificate 68553 without loss of the existing priority of the right. On the parties' cross-motions for summary judgment, the trial court granted relator's motion, denied defendants' motion, and issued the peremptory writ. In granting relator's motion for summary judgment and denying defendants' motion, the trial court agreed with relator's construction of the statutes:

"The court finds that storage of water for different purposes qualifies as 'water use.' As such, the right to store water under a water

certificate is a right to 'water use established by *** a water certificate' under ORS 540.505(4)(b). The court also finds that OWRD has the authority to allow transfers of point of diversion and point of use for certificated storage water rights under ORS 540.530."

The peremptory writ of mandamus ordered the OWRD to begin processing relator's application for a transfer of the POD on Certificate 68553 within seven days of receiving a new and complete application. The OWRD has tendered a certificate showing compliance with the writ, in that it has begun to process relator's application.

Defendants appeal.⁵ On appeal, defendants do not ask us to stay the peremptory writ; they state that the OWRD will process relator's application in the ordinary course of business. The parties agree, however, that this matter is not moot, because, although the trial court's judgment determined that the OWRD had authority to process relator's application, it did not direct that the application be granted. Should the OWRD issue an order denying the application, it is anticipated that relator will request a contested case hearing. Should the OWRD issue an order granting the application, it is anticipated that parties not currently involved in this litigation will file protests and request a contested case hearing, placing the OWRD's authority to allow a transfer of the POD for a certificated storage right directly at issue. We agree with the parties that, for the reasons cited, the matter is not moot, and we therefore undertake a review of the petition.

In reviewing the trial court's judgment, we consider first the standard for issuance of a writ of mandamus under ORS 34.110. A writ of mandamus may issue to an agency "to compel the performance of an act which the law specially enjoins." ORS 34.110. The legal right to compel the performance of the legal duty "must be plain and complete."

State ex rel. Engweiler v. Felton , 350 Or. 592, 628, 260 P.3d 448 (2011) (quoting *Florey v. Coleman* , 114 Or. 1, 2, 234 P. 286 (1925)). See also *United States of America v. Cohn* , 201 Or. 680, 684, 272 P.2d 982 (1954) ("[N]o petitioner is entitled to the remedy of mandamus unless he has a clear legal right to the performance of the particular duty sought to be enforced and unless there is a plain legal duty on the part of the defendant to perform the act."). Where, as here, the trial court's judgment as to the OWRD's authority depends on the construction of statutes, we review the judgment for errors of law. See *State ex rel. Schrodt v. Jackson County* , 262 Or App 437, 443, 324 P.3d 615 (2014) (reviewing for legal error trial court determination that mandamus procedure was applicable).

The parties agree that the mandamus petition presented only a question of the statutory construction of the water appropriation and water right transfer statutes, ORS chapter 537; ORS 540.505 to 540.530, and whether those statutes authorized the OWRD to consider an application to allow the holder of a certificated water storage right to make POD changes. The position of the OWRD is that, under ORS 540.510 and other relevant statutes, the OWRD is empowered to entertain an application to transfer the POD for a water right only from an applicant who holds a "water use subject to transfer," and that relator does not hold such a water use. In the

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view of the OWRD, as defined in ORS 540.505,⁶ and based on statutory context, a certificated water storage right is not a "water use subject to transfer." The OWRD postulates that a certificate for the storage of water allows only appropriation and impoundment of water for a *subsequent* use and is not in and of itself a "beneficial use" or a water right that is established by a "water use."

In relator's view, the trial court correctly concluded that the storage of water pursuant to Certificate 68553 is, in and of itself, a water use that is subject to transfer, because the issuance of the certificate depends on a showing of beneficial

use. Further, relator notes that the particular certificate that it holds states that the water storage is a beneficial use.

We address the statutory construction issue raised on appeal pursuant to the methodology set forth in *State v. Gaines* , 346 Or. 160, 171, 206 P.3d 1042 (2009), and *PGE v. Bureau of Labor and Industries* , 317 Or. 606, 610, 859 P.2d 1143 (1993), beginning with the texts of the relevant statutes.

"All water within the state from all sources of water supply belongs to the public." ORS 537.110. ORS 537.120 provides:

"Subject to existing rights, and except as otherwise provided in ORS chapter 538, all waters within the state may be appropriated for beneficial use, as provided in the Water Rights Act and not otherwise; but nothing contained in the Water Rights Act shall be so construed as to take away or impair the vested right of any person to any water or to the use of any water."

"Beneficial use" is "the basis, the measure and the limit of all rights to use of water in this state." ORS 540.610(1) ; *Alexander v. Central Ore. Irrig. Dist.* , 19 Or App 452, 457, 528 P.2d 582 (1974) ("[A]ctual application of water to a beneficial use is the basis for recognized rights" under Oregon's water law.); see ORS 537.120 (water may be appropriated for a beneficial use and not otherwise); ORS 537.250(3) ("Rights to the use of water acquired under the provisions of the Water Rights Act, as set forth in a certificate issued under this section, shall continue in the owner thereof so long as the water shall be applied to a beneficial use under and in accordance with the terms of the certificate."). See also OAR 690-300-0010(5) (defining "beneficial use" as "the reasonably efficient use of water without waste for a purpose consistent with the laws, rules and the best interests of the people of the state").

The acquisition of a water right in Oregon occurs in two phases. In the first phase, a person must seek a permit for a water right. By application for a permit, the person applies for authorization to develop the source and begin making beneficial use of water. ORS 537.130 provides:

"[A]ny person intending to acquire the right to the beneficial use of any of the surface waters of this state shall, before beginning construction, enlargement or extension of any ditch, canal or other distributing or controlling works,

or performing any work in connection with the construction, or proposed appropriation, make an application to the Water Resources Department for a permit to make the appropriation."

An application for a permit to appropriate water for a beneficial use is made pursuant to ORS 537.140 :

"(1)(a) Each application for a permit to appropriate water shall be made to the Water Resources Department on a form prescribed by the department and shall set forth:

"* * * * *

"(C) The nature and amount of the proposed use;

"* * * * *

"(d) If for construction of a reservoir, the application shall give the height of dam, the capacity of the reservoir, and the uses to be made of the impounded waters."

If the OWRD determines that the water is available for the requested beneficial use, the

[541 P.3d 925]

OWRD may issue a permit. The permit begins the time during which the applicant must "perfect" the water right, *i.e.* , must develop the beneficial use authorized by the permit so as to acquire a certificate. A permit may be amended to change the conditions of the permit or the point of diversion. ORS 537.211(4), (5). A water right that is *permitted* is treated under the statutes as personal property and is subject to cancellation if not properly developed or used. ORS 537.260.

In the second phase, the permittee applies for a water right certificate to appropriate water, which is issued only after the beneficial use identified in the permit is fully developed. A certificate to appropriate water may be acquired and maintained only by "perfecting" and continuing an appropriation of water for beneficial use. ORS 537.250 provides:

"(1) After the Water Resources Department has received a request for issuance of a water right certificate accompanied by the survey required under ORS 537.230 that shows, to the satisfaction of the department, that an appropriation has been perfected in accordance with the provisions of the Water Rights Act, except as provided in subsection (4) of this section, the department shall issue

to the applicant a certificate of the same character as that described in ORS 539.140. The certificate shall be recorded and transmitted to the applicant as provided in that section.

"* * * * *

"(3) Rights to the use of water acquired under the provisions of the Water Rights Act, as set forth in a certificate issued under this section, shall continue in the owner thereof so long as the water shall be applied to a beneficial use under and in

accordance with the terms of the certificate, subject only to loss:

"(a) By nonuse as specified and provided in ORS 540.610 ; or

"(b) As provided in ORS 537.297."

A *certificated* water right is "vested," meaning that it is treated as an interest in real property. *Green v. Wheeler* , 254 Or. 424, 430, 458 P.2d 938 (1969), *cert. den.* , 397 U.S. 990, 90 S.Ct. 1123, 25 L.Ed.2d 397 (1970) (explaining that the appropriative right vests with the issuance of certificate). A certificated water right can only be lost upon a showing of one of the circumstances described in ORS 537.250(3)(a) or (b).

The acquisition of the right to *store* water is subject to the same provisions as any other water right. *See* 46 Op Atty Gen 290, 292-93 (1989) ("Since 1909, rights to appropriate water for storage have been acquired under the same scheme as any other water right."). ORS 537.400⁷ separately

addresses applications for reservoir permits, which are also subject to the same provisions that govern

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other water right permit applications. An applicant for a permit to store water obtains a "primary water right," which is defined as "the water right designated by the Water Resources Commission as the principal water supply for the authorized use, or if no designation has been made, the water right designated by the applicant as the principal water supply for the authorized use." ORS 540.505(2). A secondary permit must then be sought for use of the water from the reservoir. ORS 537.400.⁸ The final certificate of appropriation issues only after the beneficial use has been completed and perfected under the secondary permit.

Thus, as OWRD states in its briefing to us,

"[t]he primary water right to store water is *** inextricably linked to the secondary permit to put the water to beneficial use, with the reservoir right supplying the supply of water to be put to beneficial use under the secondary permit. This is different from most permits to appropriate water, which do not require a secondary permit to allow beneficial use.

"The permit allows the person intending to store water to construct the necessary works but is not itself a perfected water right. A water right is perfected when the water is put to beneficial use, such as irrigation, as evidenced by a 'final proof survey.' OWRD then issues a water right certificate. ORS 537.250."

Here, the water is to be diverted from storage in the reservoir for irrigation use. Thus, ORS 537.400(1) requires a secondary permit for use of the water. The secondary permit is also a prerequisite to the issuance of a certificate for the reservoir:

"All applications for reservoir permits shall be subject to the provisions of ORS 537.130, 537.140, 537.142 and 537.145 to 537.240, except that an enumeration of any lands proposed to be irrigated under the Water Rights Act shall not be required in the primary permit. *But the party proposing to apply to a beneficial use the water stored in any such reservoir shall file an application for permit, to be known as the secondary permit, in compliance with the provisions of ORS 537.130, 537.140, 537.142 and 537.145 to 537.240. The application shall refer to the reservoir for a supply of water and shall show by documentary evidence that an*

agreement has been entered into with the owners of the reservoir for a sufficient interest in the reservoir to impound enough water for the purposes set forth in the application, that the applicant has provided notice of the application to the operator of the reservoir and, if applicable, that an agreement has been entered into with the entity delivering the stored water. When beneficial use has been completed and perfected under the secondary permit, the Water Resources Department shall take the proof of the water user under the permit. The final certificate of appropriation shall refer to both the ditch described in the secondary permit and the reservoir described in the primary permit."

(Emphases added.) Relator's predecessor happens to have been the applicant for the secondary permit. The OWRD issued to relator's predecessor reservoir permit R-9896, authorizing "the construction of Mitchell Ranch Reservoir Enlargement and storage of water from Bear Creek and Bridge Creek," to be appropriated under a permit with a priority date of October 17, 1983, which is not at issue in this case. The OWRD subsequently issued two certificates

to relator's predecessor for the storage of the water, confirming "the right to store the waters" of Bridge Creek and Bear Creek, recorded as Certificates numbered 68551 and 68553. The OWRD also issued a separate certificate to relator's predecessor confirming the right to

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use the water for irrigation, recorded as Certificate number 68552.

Thus, three certificates were issued to relator's predecessor for the reservoir—two for water storage under the primary permit and one for use of the stored water under the secondary permit.

To change any element of a certificate, such as a POD or type of use, the certificate holder must apply to the OWRD under ORS 540.510(1). That statute provides that "the holder of a water use *subject to transfer* may, upon compliance with the provisions of ORS 540.520 and 540.530, change the use and place of use, the point of diversion or the use of the water without losing priority of the right." ORS 540.510(1)(a) (emphasis added); *see* ORS 540.520 ; OAR 690-380-3000 (Oct 6, 2006) (describing application requirements).⁹ An application submitted under ORS 540.510 "shall be approved if [the OWRD] determines," among other things, that "[t]he water right affected by the proposed transfer is a water use subject to transfer as defined in ORS 540.505(4) and OAR 690-380-0100(14)." OAR 690-380-5000(1) (Oct 6, 2006);¹⁰ *see id.* (describing conditions for approval); ORS 540.530 (same).

Here, as noted, relator submitted an application to transfer the POD for Certificate 68553, which the OWRD had issued to relator's predecessor for storage at the reservoir. And as noted, here, in response to relator's application to change a POD under ORS 540.510, the OWRD returned the application without processing it, stating, "The Department does not have the authority to make POD changes to R-rights for storage." The rationale provided by the OWRD was that the water storage certificate was not a water use subject to transfer.

The peremptory writ issued by the trial court directs the OWRD to process relator's application. The nub of the dispute on appeal turns on whether relator has the right to request (and OWRD has authority to process) a change in the POD for Certificate 68553 under ORS 540.510(1), which defines the process for seeking to change a water right certificate without losing priority of the right.¹¹ ORS 540.510(1) (a) provides in relevant part:

"(a) Except as provided in subsections (2) to (8) of this section, all water used in this state for any purpose shall remain appurtenant

to the premises upon which it is used and no change in use or place of use of any water for any purpose may be made without compliance with the provisions of ORS 540.520 and 540.530. However, *the holder of any water use subject to transfer may, upon compliance with the provisions of ORS 540.520 and 540.530, change the use and place of use, the point of diversion or the use of the water without losing priority of the right.* "

(Emphases added.) The holder of a "water use subject to transfer" may change "the use and place of use, the point of diversion or the use of the water" without a loss of priority. ORS 540.510(1)(a).

Defendants point further to ORS 540.505(4), which defines "water use subject to transfer," as used in ORS 540.510(1) :

" 'Water use subject to transfer' means a *water use established by* :

"(a) An adjudication under ORS chapter 539 as evidenced by a court decree;

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"(b) A water right certificate;

"(c) A water use permit for which a request for issuance of a water right certificate under ORS 537.250 has been received and approved by the Water Resources Commission under ORS 537.250 ; or

"(d) A transfer application for which an order approving the change has been issued under ORS 540.530 and for which proper proof of completion of the change has been filed with the Water Resources Commission."

(Emphasis added.) Defendants argue that storage is not a *use* of water and that, therefore, taken together, the above provisions demonstrate that holders of water storage certificates do not, without a loss of priority, have the ability to seek to transfer the place of use of storage or POD of water and, further, that the OWRD does not have authority to consider requests for such changes.

Relator responds that, as set forth in ORS 540.505(4) (b), it holds a water use subject to transfer, because Certificate 68553 is a water right certificate. Defendants reply that although Certificate 68553 is a water right certificate, it does not constitute a water use subject to transfer, because, under ORS 540.505(4), a "water use" is a reference to an actual beneficial use of the water, and storage, with limited exceptions, does not constitute a beneficial use. *See* ORS 540.610(1) (all water rights in Oregon are based on beneficial use of water); *Teel Irrigation Dist. v. Water Resources Dept.* , 323 Or. 663, 667, 919 P.2d 1172 (1996) ("The water right is perfected when the water actually is put fully to a beneficial use.").¹²

The question whether water storage is, in and of itself, a "use" of water was addressed many years ago by the Supreme Court in *Cookinham v. Lewis* , 58 Or. 484, 491-92, 114 P. 88, *reh'g denied* , 58 Or. 484, 495, 115 P. 342 (1911). There, the court had before it a decision by the Oregon "Board of Control" rejecting an application for a reservoir permit for the purpose of reclamation of public desert land. In considering the statutory predecessor of ORS 537.400 in Oregon's Water Code, the court stated that the type of use that supports the issuance of a permit for water storage is not a "use of water." The court explained the distinction between a permit for storage and one for the use of the stored water:

"The primary reservoir permit, provided for by [the Oregon Water Code, Or Laws 1909 Section 58)], contemplates a storage of the water in some locality where it can be utilized for irrigation. The secondary permit contemplates that users of the water shall acquire a

permanent ownership by agreement with the owner for a specified quantity of the stored water for the needs of and use upon his land, and when reclamation is contemplated the water becomes appurtenant to his land. The Water Code makes a distinction between a permit for diversion of water and one to construct a reservoir and store surplus water. *The latter does not include the right to divert*

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and use such stored water, which must be the subject of the secondary permit. "

58 Or. at 491-92, 114 P. 88 (emphasis added). A permit for storage, *in and of itself*, the court held, does not constitute or include the right to use stored water; it is the secondary permit that applies the water to beneficial use. *Id.* at 492, 114 P. 88 ; *see also*

Nevada Ditch Co. v. Bennett , 30 Or. 59, 89, 45 P. 472 (1896) ("An appropriation proper is not made until there has been an actual application of the water claimed, to some beneficial purpose, or some useful industry. All rights acquired prior to this time, at whatsoever step in the process, amount simply to a claim of an appropriation[.]"); 25 Op Atty Gen 206 (1951) ("Storage in and of itself is not a use. Storage must be for a future purpose.").

Relying on *Cookinham* , defendants contend that, although there may be reservoir permits and certificates that establish both a right to store and to use water, *see* ORS 537.400(2) (describing storage that does not "contemplate future diversion of the stored water"), as a general rule, a certificate for water storage does not itself constitute "water use," as that term is used in ORS 540.510. Because, in defendants' view, storage is not a "use," nor is it, in defendants' view, a "beneficial use;" thus, in defendant's view, it cannot be subject to a right to transfer.

We agree with defendants that a use subject to transfer must be a beneficial use and that, with limited exceptions, a beneficial use of stored water is established not through the primary permit for storage but through the secondary permit.

We nonetheless conclude that relator's Certificate 68553 represents a water use subject to transfer under ORS 540.510. That is because whether Certificate 68553 represents a water use subject to transfer must be viewed in the context of Certificate 68552, which, as required by ORS 540.400(1), was a prerequisite to the issuance of Certificate 68553 and which authorizes the use of water. As provided in ORS 537.400, a certificate for storage is issued only when beneficial use has been completed and perfected under the secondary permit. And, as OWRD acknowledges, the two are "inextricably linked." "The final certificate of appropriation shall refer to both the ditch described in the secondary permit and the reservoir described in the primary permit." ORS 537.400. The holder of the storage certificate and the holder of the certificate for use of the water together create the appropriation and the beneficial use. *See also Nevada Ditch Co.* , 30 Or. at 98, 45 P. 472 (addressing the relationship between

the appropriator of water and the persons who put the water to beneficial use and observing, "in whatever capacity the parties to the appropriation may be considered," both were necessary to appropriate the water). In *Fort Vannoy Irrigation v. Water Resources Comm.* , 345 Or. 56, 78, 188 P.3d 277 (2008), the court said that the "terms and conditions" of the certificate will dictate the use of the water. The use permitted by Certificate 68553 can only be determined with reference to Certificate 68552, which, conversely, depends on Certificate 68553. Together, the two certificates refer to a beneficial use of the water and, hence, to a water use subject to transfer.

Defendants note that ORS 540.510(1)(b) provides that the holder of a water right certificate authorizing storage may change "the type of use" identified in the certificate without losing priority:

"A holder of a water right certificate that authorizes the storage of water may change the type of use identified in the water right certificate, as described in subsection (1)(a) of this section, without losing priority of the right."

(Emphases added.) Defendants contend that ORS 540.510(1)(b) demonstrates a legislative intention to limit the change that can be made by the holder of a water right certificate for storage to "type of use," excluding the other types of changes listed in ORS 540.510(1)(a), including the POD. In defendants' view, understanding a "water use subject to transfer" to be capable of including a water right for storage would render ORS 540.510(1)(b) superfluous, because the change in "type of use" that it explicitly allows would already be encompassed within ORS 540.510(1)(a).

Although the OWRD's construction is a plausible one, we reject it for several reasons.

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First, ORS 540.510(1)(b) does not state that the holder of a water storage certificate may change *only* the type of use. Additionally, a change to the "type of use" permitted by ORS 540.510(1)(b), is not explicitly among the changes listed in ORS 540.510(1)(a). Thus, textually, it is possible to understand ORS 540.510(1)(b) to supplement the changes permitted in ORS 540.510(1)(a) rather than to limit the rights of a holder of a water storage certificate, as defendants contend. Under that construction,

ORS 540.510(1)(b) is not duplicative of ORS 540.510(1)(a) or superfluous.

But beyond the text, the legislative history of ORS 540.510(1)(b) leads us to conclude that ORS 540.510(1)(b) does not have strong bearing on the legislature's intention with respect to ORS 540.510(1)(a). The Supreme Court discussed the history of ORS 540.510 in *Fort Vannoy Irrigation*, 345 Or. at 74-78, 188 P.3d 277. The court

explained that a provision for the change of the use, place of use, and point of diversion has been a part of the Water Code since 1927. *Id.* at 75, 188 P.3d 277. The court explained that, in 1991, the statute was amended to make the right of transfer available only to the "owner of any *certificated* water right." *Id.* (citing Or. Laws 1991, ch. 957, § 7(1)) (emphasis added). Then, in 1995, the legislature amended ORS 540.510(1)(a) by deleting the phrase "owner of any certificated water right" and substituting the phrase "holder of any water use subject to transfer." *Fort Vannoy Irrigation*, 345 Or. at 75, 188 P.3d 277; Or. Laws 1995, ch. 274, § 2. The legislature also enacted a four-part definition of the phrase "water use subject to transfer," codified at ORS 540.505. *Fort Vannoy Irrigation*, 345 Or. at 76, 188 P.3d 277; Or. Laws 1995, ch. 274, § 1. The parties agree that the amendments were intended to *expand* the availability of changes beyond only the owner of a certificated water right, and that water storage certificates were not expressly addressed. *See Fort Vannoy Irrigation*, 345 Or. at 75-77, 188 P.3d 277 ("[T]he legislature abandoned the exclusive focus on certificated water rights in the 1991 version of ORS 540.510(1) by deleting the phrase 'owner of any certificated water right,' substituting the phrase 'holder of any water use subject to transfer,' and enacting a four-part definition of the phrase 'water use subject to transfer' that extended beyond certificated water rights." The effect of the amendments was to extend the transfer provision to "inchoate water rights"—water rights that are not yet "vested," because a certificate has not yet been issued.).

The 1995 amendments made no specific mention of water storage rights or certificates. But the amendments led the OWRD to reevaluate the extent to which water storage certificates could be changed without a loss in priority. In 2018, the Oregon Department of Justice (DOJ) advised

the OWRD that the storage of water is not a "use subject to transfer," as defined in ORS 540.505(4)(b), because it is not a "use" of water. Thus, the DOJ advised the OWRD that water storage is not a use that is eligible to be changed without a loss of priority under ORS 540.510(1),

and that the holder of a water storage certificate could not make changes without a loss of priority.

Then, in 2021, the Legislative Assembly enacted ORS 540.510(1)(b), directly in response to DOJ's opinion and OWRD's change in policy, to make explicit the right of a water storage certificate holder to change the "type of use," the most commonly requested change. Or. Laws 2021, ch. 633, § 1. Defendants contend that that amendment supports their conclusion that a water storage certificate holder can change *only* the type of use without a loss of priority.

Of course, we recognize that various subsections of a statute should be construed together. See *Wetherell v. Douglas County*, 342 Or. 666, 678, 160 P.3d 614 (2007) (explaining that the court should not look at one subsection of a statute in a vacuum but should construe "each part together with the other parts in an attempt to produce a harmonious whole"). But, as the Supreme Court has said, with the exception of statutory amendments that materially change the text of an earlier statute, either explicitly or by implication, *State v. Ofodrinwa*, 353 Or. 507, 529-30, 300 P.3d 154 (2013), a later legislature's understanding of the meaning of a previously enacted statute does not have bearing on what that earlier statute means.

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See *DeFazio v. WPPSS*, 296 Or. 550, 561, 679 P.2d 1316 (1984) (explaining that "[t]he views legislators have of existing law may shed light on a new enactment, but it is of no weight in interpreting a law enacted by their predecessors"). The legislature did not amend subsection (1)(a) when it enacted subsection (1)(b) in 2021, and there is no necessary implication or indication in the legislative history that the intention in the adoption of subsection (1)(b) was to alter the meaning of subsection (1)(a). We conclude that the enactment of subsection (1)(b) cannot be viewed as expressing an intention to modify subsection (1)(a). Thus, the legislature's view that, in light of the DOJ's 2018

construction of ORS 540.510(1)(a), it was necessary to

enact ORS 540.510(1)(b) to explicitly authorize changes in the type of use of a water reservoir certificate does not weigh in our construction of ORS 540.510(1)(a).

We conclude that, although, as the court held in *Cookinham*, with certain exceptions not applicable here, the storage of water in and of itself is not a "use" of water, when considered in the context of the secondary permit, it can represent a water use subject to transfer. When the storage of water under Certificate 68553 is considered, as it must be, in the context of the use of water under Certificate 68552, we agree with the trial court that relator's Certificate 68553 establishes a "water use subject to transfer" in the sense contemplated by ORS 540.510. We therefore conclude that the trial court correctly determined that relator's application for a change in POD should be considered by the OWRD.

Affirmed.

Notes:

¹ See OAR 690-385-0100(11) (Jan 2007) (defining "point of diversion" as "the place at which surface water is diverted from a surface water source as specified in the water right").

² ORS 34.240 provides:

"From the judgment of the circuit court or Oregon Tax Court, or judge thereof, refusing to allow a mandamus, or directing a peremptory mandamus, an appeal may be taken in like manner and with like effect as in an action."

³ An "off-channel" reservoir is one that exists "outside a natural waterway," unlike an "on-channel" reservoir created by a dam or other impoundment within the waterway. OAR 690-300-0010(31) (Feb 2012).

⁴ The certificates state that "[t]he right to store and use the water for the above purpose is restricted to beneficial use at the place of use described" as the reservoir location.

⁵ WaterWatch of Oregon has filed an *amicus* brief in support of defendants' appeal. The Oregon Water Utility Council, the League of Oregon Cities, the Special Districts Association, the Oregon Farm Bureau Federation, and the Oregon Association of Nurseries have filed *amicus* briefs in support of relator's response.

⁶ ORS 540.505(4)(b) defines "water use subject to transfer" as a "water use established by *** [a] water right certificate."

⁷ ORS 537.400 provides, in relevant part:

"(1) All applications for reservoir permits shall be subject to the provisions of ORS 537.130, 537.140, 537.142 and 537.145 to 537.240, except that an enumeration of any lands proposed to be irrigated under the Water Rights Act shall not be required in the primary permit. But the party proposing to apply to a beneficial use the water stored in any such reservoir shall file an application for permit, to be known as the secondary permit, in compliance with the provisions of ORS 537.130, 537.140, 537.142 and 537.145 to 537.240. The application [for the secondary permit] shall refer to the reservoir for a supply of water and shall show by documentary evidence that an agreement has been entered into with the owners of the reservoir for a sufficient interest in the reservoir to impound enough water for the purposes set forth in the application, that the applicant has provided notice of the application to the operator of the reservoir and, if applicable, that an agreement has been entered into with the entity delivering the stored water. When

beneficial use has been completed and perfected under the secondary permit, the Water Resources Department shall take the proof of the water user under the permit. The final certificate of appropriation shall refer to both the ditch described in the secondary permit and the reservoir described in the primary permit.

"(2) Whenever application is made for permit to store water in a reservoir or pond for any beneficial use which does not contemplate future diversion of the stored water except by livestock drinking from stock water ponds, the extent of utilization thereof may be included in the reservoir permit and no secondary permit shall be required. However, in cases where water from a stream is required to maintain a reservoir or pond by replacing evaporation and seepage losses, or is required to maintain suitable fresh water conditions for the proposed use and to prevent stagnation, the applicant for permit to store water in such reservoir or pond shall also file an application for permit to appropriate the waters of the stream."

⁸ There are two circumstances in which a secondary permit is not required: If the permit is sought "to store water in a reservoir or pond for any beneficial use which does not contemplate future diversion of the stored water," such as for use as a scenic attraction, only a storage water permit is necessary. ORS 537.400(2). Additionally, small reservoirs established before January 1, 1995, are presumed to constitute a "beneficial use." ORS 537.405(1) ("Reservoirs in existence on or before January 1, 1995, that store less than 9.2 acre feet of water or with a dam or impoundment structure less than 10 feet in height, are found to be a beneficial use of the water resources of this state."). But apart from

those exceptions, the diversion of water from storage must be pursuant to a separate application and permit known as a "secondary permit."

⁹ We refer to the rules that were in effect when the application was filed.

¹⁰ OAR 690-380-5000 (Oct 6, 2006) provides:

"(1) A transfer application shall be approved if the Department determines that:

"(a) The water right affected by the proposed transfer is a water use subject to transfer as defined in ORS 540.505(4) and OAR 690-380-0100(14) and, for a right described under 690-380-0100(14)(d), the proof of completion has been approved under 690-380-6040;

"(b) The portion of the water right to be transferred is not cancelled pursuant to ORS 540.610 ;

"(c) The proposed transfer would not result in enlargement as defined in OAR 690-380-0100(2) ;

"(d) Except as provided in OAR 690-380-5030, the proposed transfer would not result in injury as defined in 690-380-0100(3); and

"(e) Any other requirements for water right transfers are met."

Pursuant to OAR 690-300-0010(5), "beneficial use" means "the reasonably efficient use of water without waste for a purpose consistent with the laws, rules and the best interests of the people of the state." For example, for the purposes of statewide water policy, the OWRD defines "beneficial use" as "an instream public use or a use of water for the benefit of an appropriator for a purpose consistent with the laws and the economic and general welfare of the people of the state" that "includes, but is not limited to, domestic, fish life, industrial, irrigation, mining, municipal, pollution abatement, power development, recreation, stockwater and wildlife uses." OAR 690-400-0010 ; *see also, e.g.* , ORS 537.142(2) ("The use of water for a salmon and trout enhancement project *** is a beneficial use[.]"); ORS 537.334(1) ("Public uses are beneficial uses."); *see also* ORS 536.300(1) ("The Water Resources Commission shall proceed as rapidly as possible to study: Existing water resources of this state; means and methods of conserving and augmenting such water resources; existing and contemplated needs and uses of water for domestic, municipal, irrigation, power development, industrial, mining, recreation, wildlife, and fish life uses and for pollution abatement, all of which are declared to be beneficial uses, and all other related subjects, including drainage, reclamation, floodplains and reservoir sites."). *See also Fort Vannoy Irrigation Dist. v. Water Resources Commission* , 345 Or. 56, 78, 188 P.3d 277 (2008) (commenting that both ORS 540.520(8) and ORS 540.523(3) treat "beneficial use" and "water use [established by a water right certificate]" as distinct).

¹¹ The parties do not address, and we therefore do not consider, the issue of OWRD's "authority" to consider the application, as distinct from OWRD's rejection of the application on its merits based on OWRD's understanding that the relevant statutes do not permit that type of change.

¹² The legislature has declared "certain important uses, including irrigation," to be beneficial. *Hennings v. Water Res. Dept.* , 50 Or App 121, 125, 622 P.2d 333 (1981) (citing ORS 536.300).



CERTIFICATES OF FILING AND SERVICE

I certify that on September 8, 2026, I filed Petitioner WaterWatch of Oregon's Opening Brief with the Appellate Court Administrator by using the appellate courts' eFiling system.

I further certify that on September 8, 2026, service of a copy of the brief was accomplished through the eFiling system at the email addresses recorded on the date of service in the eFiling system of counsel for Bridge Creek Ranch and counsel for the Oregon Water Resources Department.

Dated: September 8, 2026

/s/ Andrew R. Missel

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