

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Water Right Transfer Application T-14170 in the Name of

BRIDGE CREEK RANCH LLC,

Applicant – Respondent on Review

WATERWATCH OF OREGON,

Protestant – Petitioner on Review

v.

OREGON WATER RESOURCES DEPARTMENT,

Respondent on Review

**Petition for Judicial Review of an Order of
the Oregon Water Resources Department**

Agency Case No. T-14170
OAH Case No. 2024-OWRD-00165
Court of Appeals No. A_____

1.

Petitioner seeks judicial review of the final order of the Oregon Water Resources Department in case number T-14170, dated October 22, 2025, which approved an additional point of diversion for a water right allowing Bridge Creek Ranch LLC to withdraw and store water from Bridge Creek, a tributary to the John Day River.

2.

The parties to the review are:

WaterWatch of Oregon, petitioner

Oregon Water Resources Department, respondent

Bridge Creek Ranch LLC, respondent-applicant below

4.

The name, bar number, address, telephone number, and email address of the attorneys for each party represented by an attorney are:

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5.

A. Attached to this petition is a copy of the order for which judicial review is sought.

B. Petitioner was a party to the administrative proceeding that resulted in the order for which review is sought.

C. Because this petition for review is brought under ORS 536.075 rather than the general judicial-review provisions of ORS 183.482, there is no basis for shortening the agency record, and ORAP 4.15(1)(e) is inapplicable. *Compare* ORS

183.482(4) (allowing shortening of the record by stipulation), *with* ORS 536.075(9) (“[t]he review by the Court of Appeals ... shall be on the *entire record* forwarded by” the agency) (emphasis added). To the extent that ORAP 4.15(1)(e) is applicable, petitioner is not willing stipulate that the agency record may be shortened.

D. Pursuant to ORS 536.075(4), petitioner states:

1. Petitioner is adversely affected by the order. For more than 40 years, petitioner has invested time, effort, and money in pursuit of the interests of itself, its members, and the public in protecting and restoring in-stream flows in Oregon’s rivers and streams. Among other things, WaterWatch led advocacy efforts resulting in passage of Oregon’s Instream Water Rights Act in 1987 and has continuously advocated for creation of instream water rights under the Act in the John Day Basin and elsewhere. The Act allowed for creation of in-stream water rights through applications by state agencies and through conversion of “minimum perennial streamflows” established by administrative rule. Pursuant to the Act and WaterWatch’s advocacy in support of in-stream water rights, an in-stream water right was created in 1989, through conversion of a minimum perennial streamflow, to protect flows in Bridge Creek “for the purpose of AQUATIC LIFE AND MINIMIZING POLLUTION.”

The order of the Water Resources Department (“Department”) that petitioner challenges in this case will undermine WaterWatch’s interests described above by allowing Bridge Creek Ranch to withdraw more water from Bridge Creek during low-flow periods when keeping water in the stream is critically important to keep the stream from getting too warm for fish, including seagoing steelhead listed as threatened under the federal Endangered Species Act. The in-stream water right in Bridge Creek is supposed to protect flows for those fish, but the Department’s order will result in that in-stream water right being denied water which was previously available. For these reasons, WaterWatch is adversely affected by the Department’s order within the meaning of ORS 536.075. *See WaterWatch of Or., Inc. v. Water Res. Comm’n*, 193 Or App 87, 93–96, 88 P3d 327 (2004), *vac’d on other grounds*, 339 Or 275, 119 P3d 221 (2005) (discussing what it means to be “affected” or “adversely affected” by an order within the meaning of ORS 536.075).

2. There are five independent grounds for reversing the order. The Department’s order approves a transfer application from Bridge Creek Ranch, allowing Bridge Creek Ranch to create an additional point of diversion on Bridge Creek for its water rights. For five independent reasons, the order should be reversed.

First, the order relies on the Department's erroneous conclusion that the transfer will not "injure" existing water rights, including the in-stream water right in Bridge Creek just downstream of the new point of diversion. The Department's conclusion regarding injury is based on an erroneous interpretation of law, is an abuse of the agency's discretion, and/or is unsupported by substantial evidence. *See* ORS 183.482(8).

Second, the order relies on the Department's erroneous conclusion that the transfer will not "enlarge" Bridge Creek Ranch's water rights. The Department's conclusion regarding enlargement is based on an erroneous interpretation of law, is an abuse of the agency's discretion, and/or is unsupported by substantial evidence. *See* ORS 183.482(8).

Third, the order is unlawful because it purports to approve an *additional* point of diversion for Bridge Creek Ranch's water rights. The relevant statutory provisions allow the Department to approve a *change* from one point of diversion to another, but not to add an *additional* point of diversion while retaining the existing one(s). Thus, the Department acted outside the discretion delegated to it by law and in violation of a statutory provision, and it erroneously interpreted the law. *See* ORS 183.482(8).

Fourth, the Department unlawfully expedited the contested case proceeding through an agreement with Bridge Creek Ranch providing that Bridge Creek

Ranch would pay the Department’s legal fees and the fees associated with the administrative law judge from the Office of Administrative Hearings. The Department relied on ORS 536.055 as authority for entering into this agreement and expediting the contested-case proceeding, but ORS 536.055 provides no such authority. Thus, the Department’s order reflects agency action outside the discretion delegated to the agency by law and in violation of a statutory provision, and also reflects an erroneous interpretation of the law. *See* ORS 183.482(8). In addition, the Department’s unlawful agreement with Bridge Creek Ranch and expedition of the contested case proceeding amounts to “a material error in procedure or a failure to follow prescribed procedure” that “may have” impaired “either the fairness of the proceedings or the correctness of the action,” warranting remand. ORS 183.482(7).

Fifth, the water right at issue is a right to store water, not a right to use water. As such, it is not a “water use subject to transfer” within the meaning of the statutes – including ORS 540.510(1) and ORS 540.505(4) – that allow a change in the point of diversion for a “water use subject to transfer.”

DATED: December 12, 2025

/s/ Brian Posewitz

Brian Posewitz, OSB No. 914002
For Petitioner WaterWatch of Oregon, Inc.

CERTIFICATE OF FILING AND SERVICE

I certify that, on December 15, 2025, I filed the foregoing petition electronically using the court's eFiling system.

I further certify that on the same date, I caused a true copy of the petition to be delivered to each of the following, by the United States Postal Service, via certified mail, with return receipt requested, and postage prepaid:

Oregon Water Resources Department 725 Summer St., N.E., Suite A Salem, OR 97301	Attorney General of the State of Oregon Office of the Solicitor General 400 Justice Building 1162 Court St., N.E. Salem, Oregon 97301-4096
Jesse D Ratcliffe Oregon Department of Justice 1162 Court St. NE Salem, OR 97301 <i>Attorney for Oregon Water Resources Department</i>	Elizabeth Howard Lindsay Thane Conor Butkus Schwabe, Williamson & Wyatt PC 1211 SW Fifth Ave., Suite 1900 Portland, OR 97204 <i>Attorneys for Bridge Creek Ranch LLC</i>

/s/ Brian Posewitz

Brian J. Posewitz
Attorney for Petitioner WaterWatch of Oregon

**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>	)	
	)	
and	)	Agency Case No. T-14170
	)	
	)	
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.

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.

In the Matter of Transfer Application T-14170 - OAH Ref. No. 2024-OWRD-00165

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
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☐ 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.

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 540.501(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.

BY FIRST CLASS AND, WHERE AVAILABLE, BY ELECTRONIC MAIL:

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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 537.400² 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

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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.

[541 P.3d 930]

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).