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May 23, 2024

Via Email

Oregon Water Resources Department
Transfer Section
725 Summer St NE
Salem OR 97301
Lisa.J.Jaramillo@water.oregon.gov
Dante.J.Luongo@water.oregon.gov
(503) 986-0900

Re: ORCA comments on applications T-14438, T-14439, T-14440

Dear Ms. Jaramillo,

On behalf of Oregon Coast Alliance (ORCA), please accept these comments for Transfers T-14438, T-14439, and T-14440. These comments are for all three applications, except where otherwise specified. ORCA is concerned about enlargement that will result from the transfers and the reduced water availability in the area.

As it relates to all three applications, water right transfer decisions are actions that must be coordinated with local land use governments to protect important local water resources. OAR 690-005-0025(3); OAR 690-005-0035. The transfer applicant, Bandon Biota LLC, withdrew its application for a golf course with the Coos County Planning Department on February 1, 2023. Attached is Coos County's notice of Bandon Biota's application withdrawal. The approval by the Planning Commission is no longer valid, as a result of the withdrawal. To the extent that a new application for a golf course has been submitted, it has not been noticed for public review or hearings, nor has it been deemed complete. At this point, the applicant has no existing approval from Coos County for the proposed golf course.

OAR 690-005-0035(4)(a) requires that "land use information be submitted with applications or requests, or as otherwise specified prior to taking action on the water use

approval. The information shall be sufficient to assess compatibility as specified on forms contained in the department's Land Use Planning Procedures Guide[.]” The necessary information was not, apparently, provided by the applicant. OAR 690-005-0035(4)(c), in turn, requires that an applicant submit land use information prior to use of water and associated construction:

“If local land use approvals are pending, place conditions on a permit or other approval to preclude use of water and any associated construction until the applicant obtains all required local land use approvals; or, withhold issuance of the water use permit or approval until the applicant obtains all required local land use approvals.”

Because the land use application has neither been noticed nor deemed complete, the agency has no approval that the agency can rely upon. The previous application experienced significant opposition, and it is likely the new application will experience similar opposition, which could create a protracted process. The County should remedy the blatantly false Land Use Compatibility Statement that states that the applicant has received an approval when that application has been withdrawn.

Furthermore, as it relates to all three applications, they fail to include Exhibit 3 water use plan that as of early 2023 included year-round pumping of 600cfs without reclamation for reuse.¹ No specific information about the site wells within the proposed golf course were provided, including their depth and the hydrology of the area, amongst others. This is important because most shallow wells have been going dry during recent summers.

For T-14438, ORCA submits that it would result in enlargement because a golf course is a more consumptive use than irrigation and temperature control for cranberry production. Not only are cranberry operations typically lined and the water is recycled but it also occurs in a small area (17.4 acres), much smaller than the proposed irrigation area (26.4 acres), which will result in enlargement.

For T-14438, ORCA submits that the certificates 86449 (primary) and 86448 (secondary) are not eligible for transfer because they were not used according to the terms of the certificate. The applicant has not established the requisite use for the full

¹ Unlike a golf course, cranberries use reclamation and use less water per acre. The majority of the proposed water rights to be transferred are those assigned to both irrigation and temperature control of cranberries. The irrigation of cranberries is collected and reused before being lost to evaporation. Golf courses, on the other hand, use fertilization and irrigation that is not reclaimed. Moreover, majority winter-applied water to mitigate freeze events (and summer-applied for temperature control) is not equivalent to summer-applied irrigation to turf grass.

time from 2014 through 2019. No water use is posted on WRIS for either certificate for any year. The terms of the certificate appear to have been violated because both certificates require annual reporting for temperature control but none is available.

For T-14438, the application must be denied because the source is from an unlawful reservoir. ORS 537.130(2) restricts anyone from storing “any waters” without a permit. WRD cannot allow an unlawful reservoir to continue and the transfer must be denied because it relies on an unpermitted reservoir.

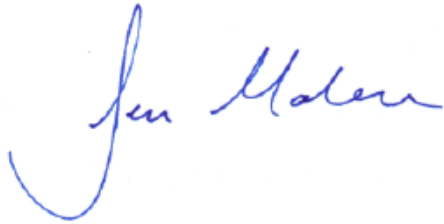
For T-14439, ORCA submits that the transfer will reduce stream flows and Instream Water Right Certificate 76268 on Twomile Creek. T-14439 proposes to change the place of use and add a point of diversion for Certificate 73636. The current place of use is 53 acres of land directly north and adjacent to Twomile Creek. The current points of diversion are four portable pumps located within Twomile Creek and adjacent to the irrigated land. Certificate 73636, however, has been leased instream intermittently since 2001 under IL-107, with the current lease agreement in place from 2021 to 2025. The proposed place of use is the new golf course which is not adjacent to Twomile Creek but spread out over six quadrants south of the creek. The proposed new point of diversion is at a fixed location in Twomile Creek in a different quadrant and further down the river from the portable pumps. This proposed transfer would therefore cause significant changes to the flows within Twomile Creek and any return flows it received when the land under the certificate was being irrigated. This is important because Twomile Creek within this reach is protected by an instream water right. ISWR Certificate 76268 exists to provide required stream flow for anadromous fish migration, spawning, egg incubation, fry emergence, and juvenile rearing, and flows are protected throughout the reach. Additionally, Twomile Creek is listed by the Oregon Department of State Lands as Essential Habitat for Fall chinook, winter steelhead, and coho. It appears likely that the proposed transfer would injure the instream water right’s flows and purpose.

For T-14439, ORCA submits that the transfer will cause injury to other water rights, including certificates 26397, 90113, and 90096. These water rights’ source of water from Twomile Creek will not receive return flows from irrigation of the original land under Certificate 73636 if the place of use is changed to a large golf course. Furthermore, the proposed additional point of diversion would be located further downstream from the diversion points for Certificate 26397, 90113, and 90096, where as the points of diversion are located upstream. New pumping by a senior water right at this location may cause injury to junior water rights.

For T-14440, ORCA submits that the transfer will also result in enlargement. T-14440 proposes changes to certificates 89934 which allows beneficial use for irrigation, temperature control, and flood harvesting of 13.8 acres of cranberry bogs. The proposed transfer changes the place of use for the irrigation portion. The proposed transfer also changes the character of use for the temperature control portion to irrigation and changes

its place of use. These changes will result in enlargement issues because irrigation of golf courses, which typically use thirsty turf grass, is a much more consumptive use than irrigation and temperature control for cranberry operations, especially since cranberry bogs are typically lined and they recycle water. The current cranberry operations also occur on a compact area of land; the irrigation and temperature control occur on the same 13.8 acres. The proposed irrigation will spread out over 20.9 acres across four quadrants. This change from an overlap of use and size of the place of use will result in enlargement of the water right.

Sincerely,

A handwritten signature in blue ink that reads "Sean T. Malone". The signature is written in a cursive style with a large, sweeping initial "S".

Sean T. Malone
Attorney for Oregon Coast Alliance

Cc:
Client