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September 28, 2016

VIA EMAIL ONLY

Land Conservation and Development Commission
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RE: Comments for the Sep. 30, 2016 DLCD Goal 5 Historic Resources RAC Meeting

Dear Rules Advisory Committee:

This firm represents Matt and Suzanne Gadow, residents of unincorporated Deschutes County, Oregon, and fee simple landowners within the Pilot Butte Canal Historic District (Cooley Road-Yeoman Road Segment)(“PCBHD”). We submitted comments to the RAC on August 30, 2016, and provided testimony to the RAC on August 31, 2016, and we incorporate those prior statements into this comment for the September 30, 2016 RAC meeting.

We have reviewed the Staff Report, List of Historic Districts, and List of National Register Properties documents released on September 23, 2016. Despite assurances from DLCD staff that this rulemaking is “not about COID,” the proposals and information provided to the RAC point otherwise. The plain language of the proposed rules and their parroted talking points, the engineered intent of the proposals, and the clear omission of the PBCHD from the RAC materials demonstrate that this rulemaking is to benefit one quasi-municipal entity in Deschutes County: the Central Oregon Irrigation District. We offer the following comments:

1. The “List of Historic Districts” and “List of Historic Properties” in the RAC materials omits the PBCHD.

The September 16, 2016 printouts of the “National Register Historic Districts in Oregon” and “Oregon National Register List” included in the RAC committee materials glaringly omit the PBCHD from the listing. The PBCHD was listed on the National Register of Historic Places on February 8, 2016, over seven months ago. (*See* Attachment 1). The PBCHD should be listed under Deschutes County in both documents. Despite the PBCHD being the only concerned property mentioned in the public comments in the August 2016 RAC meeting, it is very odd that of all of the properties to be omitted, that the PBCHD was somehow overlooked. Moreover, the omission leads to two conclusions:

- Negligently omitting the PBCHD results in the documents’ accuracy being called into question including the procedures used by the Department to accurately procure and



disseminate data used in policy-making decisions. The list may omit recently listed properties, and may have properties not presently listed. Regardless, with the PBCHD omitted, the list is inaccurate and should be treated as incomplete for decision making purposes; or

- Intentionally omitting the PBCHD demonstrates bias against this particular listed property and the residents that supported its nomination to the National Register of Historic Places. Intentionally omitting the PBCHD would also support the inference that this rulemaking, as previously asserted, is biased in favor of COID to engineer means to remove the PBCHD from the National Register of Historic Places. Purposefully omitting the PBCHD removes the consideration of the resource as a historically protected property.

Make no mistake, the PBCHD was listed in the National Register of Historic Places on February 8, 2016 after lengthy consideration and debate. The omission on the RAC materials calls into question the accuracy of the lists provided, and biases the policy-making discussion by failing to consider the PBCHD as a protected property compared to listed properties and reducing the number of protected properties listed in Deschutes County.

2. The RAC should reject the proposed definition of “Owner” that includes interests less than the fee simple owner of the property.

The proposed rules include a definition of “owner” as follows:

“‘Owner’ or ‘owners’ means those individuals, partnerships, corporations or public agencies holding fee simple title to property or a property interest that entitles the possessor of the property interest to exclusive and continuous use and possession of all or part of the property. Examples of property interests constituting ownership are limited fee interests in rights-of-way, such as those for railroads, irrigation canals, public highways and major high-voltage powerlines, but not for common utility easements such as those for local water, gas, electricity, or communications services.”

Regardless of the drafter of the language, this definition is faulty on many levels, and should be rejected for a definition that closely resembles the federal definition.

A. The inclusion of a property interest less than the fee simple owner provides an absolute veto to historic protection from disinterested parties.

As discussed in our August 30, 2016 comments, giving a property interest holder the same standing as a fee simple owner in the historic protection process allows for disinterested and disincentivized parties to prevent historic protection when it is against their business interests. The



interest holders will not receive federal tax benefits from listing their property, as only the fee simple holder pays the property tax on the historically protected property. When the addition of historic protection on the burdened fee simple property will could affect future development plans (such as piping a canal for a hydropower project), the interest holder will never assent to historic protection. Given the obvious disincentive to promote protection, the addition of disinterested parties should be rejected.

B. The definition uses ambiguous terminology and examples in its attempt to allow for COID to enjoy standing as an “owner” to object to listing a historic property.

The definition uses the terminology “a property interest that entitles the possessor of the property interest to exclusive and continuous use and possession of all or part of the property.” Such a description could fall into several categories: an easement holder could fall within this category, as COID holds an easement to use the Pilot Butte Canal according to historical usage. A leaseholder/renter could also argue that they qualify under this definition, as they pay rent in exchange for the continuous use and possession of all or part of the property. Would a landlord be in favor of empowering his tenants with the ability to object to historic protection for the landlord’s fee simple property? The definition is sloppy, and allows for more parties to be considered an “owner” than likely intended. It should be rejected.

Furthermore, the definition includes “examples” of properties that allow for objection:

“Examples of property interests constituting ownership are limited fee interests in rights-of-way, such as those for railroads, irrigation canals, public highways and major high-voltage powerlines, but not for common utility easements such as those for local water, gas, electricity, or communications services.”

For a rulemaking that “is not about COID,” explicitly enumerating rights of way for “irrigation canals” as a qualifying property interest is disingenuous and transparent in motive. Notably, the staff report fails to justify why certain property interests held by local gas, water, electricity, and communications services do not rise to the level of “ownership.” If under this theory of adding parties to the definition of owner is to prevent historic protection to properties, why are common residential utilities unable to protect themselves from prescriptive historical protection? No justification is given, and the reasons are transparent: to give COID its own ownership standing while overcoming wide-scale empowerment of residential utility companies.

The “examples” are similarly ambiguous, as the examples vary in physical scope among many different situations. Is a 2-foot wide irrigation “canal” running in front of a residence sufficient to qualify? Or is the holder of a right of way reserved in front of a historic residence able to object as an “Owner” of the parcel? Such ambiguous examples cause more trouble than they are worth, and invite litigation to determine what the drafters meant. Moreover, these examples are unjustified by



staff, and are likely only included to provide COID its “ownership” standing camouflaged with other influential lobbying groups including the railroads, power corporations, and local governments. The examples are ambiguous surplusage that invite conflict into the decision making process and should be stricken from consideration.

C. The definition uses archaic and out of date terminology parroted by COID in its failed attempts to demonstrate ownership for the PBCHD to the National Park Service.

The genesis of the above definition is easily determined by the telling use of “limited fee.” In the 2015 nomination of the PBCHD to the National Register of Historic Places, COID through its attorneys argued that COID had standing to object under the federal definition of “owner” because they held a “limited fee” in the Pilot Butte Canal. I argued at length (*see* Attachment 2) that this was no more than an easement, and as such COID failed to qualify as an owner with standing to object. The National Park Service agreed.

The concept of the “limited fee” resides primarily in federal jurisprudence. The term was used in early 20th century federal railroad cases, and then by analogy courts applied the term to rights of way granted under the Right of Way Act and the Carey Act. In one of three Oregon cases¹ applying the term, *Wolf v. Central Oregon & Pacific Railroad*, the court explained how federal courts now recognize “limited fees” as easements.² 230 Or. App. 269, 216 P.3d 316 (2009).

Using the “limited fee” terminology reveals the fingerprint of COID’s influence, as “limited fee” is not defined or used on the Oregon Revised Statutes, or the Oregon Administrative Rules. Moreover, the term borrows from federal jurisprudence which has generally discarded the term, and without firm foundation in Oregon law, interpreting the term in litigation will be difficult. If this is the preferred method for empowering special interests with the ability to object to the fee simple owner’s historic preservation efforts, the term “easement” as has been used and understood by courts, the legislature, and administrative agencies, should be employed. However, because it presents a complex and unworkable method for empowering one particular entity to achieve its hydropower venture, this definition should be rejected.

¹ The other cases being *Clyde v. Walker*, 220 Or. 137, 348 P.2d 1104 (1960), and *Roberts v. Ellis*, 229 Or. 609, 368 P.2d 342 (1962) that fail to explain the term.

² “The concept of ‘limited fee’ was no doubt applied in Townsend because under the common law an easement * * * did not give an exclusive right of possession. With the expansion of the meaning of easement to include, as far as railroads are concerned, a right in perpetuity to exclusive use and possession the need for the ‘limited fee’ label disappeared.” *Wolf*, 216 P.3d 316, quoting *State of Wyoming v. Udall*, 379 F.2d 635, 640 (10th Cir.), *cert. den.*, 389 U.S. 985, 88 S.Ct. 470, 19 L.Ed.2d 479 (1967).



D. There is no conflict-resolution process for determining whose objection is paramount between the fee simple owner and the easement holder.

With the definition presented, it creates a conflict between the fee simple owner and the holder of an “interest.” There is no way to reconcile a discrepancy between the owners of the same piece of land with opposing viewpoints. It is unworkable as presented, which is why the National Park Service uses the following definition of “owner:”

“‘Owner’ or ‘owners’ means those individuals, partnerships, corporations or public agencies holding fee simple title to property. Owner or owners does not include individuals, partnerships, corporations or public agencies holding easements or less than fee interests (including leaseholds) of any nature.” 36 CFR 60.3.

It identifies one party able to object with the most to lose or gain from the designation. It is pragmatic, simple to apply, and reduces uncertainty in administering historic preservation programs. Why the DLCD would want to introduce complexities for itself and SHPO in administering a more complex and litigious option voluntarily is without explanation. Moreover, adding more parties able to object to historic listing could be interpreted as frustrating the federal historic preservation program, and could give rise to a preemption challenge. The additional complexities of determining ownership should be rejected to conform with a definition more closely in line with the single-party option as defined in the federal regulations.

3. The alternate delisting path is vague and without explicit standards for consideration.

Proposed section (9)(b) includes four conditions to provide “an alternate path for removing a local historic designation.” Paragraphs A & D are reasonable situations to warrant possible removal, however paragraphs B & C are invitations for abuse by outside interests.

Proposed paragraph B states: “Additional information shows that the property no longer satisfies the criteria for recognition as a historic resource or did not satisfy the criteria for recognition as a historic resource at time of listing.” The use of “additional information” is telling, as this invites outside parties to litigate a past decision to place a property onto a resource list. Providing this inroad to constantly argue the criteria for listing defeats the finality of a decision to provide historic protection, and empowers wealthy, or powerful special interests to argue at length why a resource should be removed. This is not historic preservation, it is an outlet for removal based on third party preferences.

Proposed paragraph C states:

“The value to the community of the proposed use of the property outweighs the value of retaining the designated historic resource on the present site and the property owner has made a reasonable effort to rehabilitate, reuse, sell, and or relocate the property and has found that the available alternatives are either not technically feasible or not economically feasible.”



Again, this is an inroad for third parties to lobby local governments for the removal of historic protection. The “value to the community” is an amorphous statement and subject to wide interpretation based on the fashionable cause of the day. Moreover, it does not protect the property owner from the crushing weight of public opinion on the use of the property owner’s land. This paragraph provides no procedure, no clearly articulated standards, and fails to consider the complexities associated with a historic district, or historic resources inextricably tied to the land. This is an amorphous proposal and should be rejected as a method of delisting a historic property.

4. The proposed exceptions to minimum protection for Historic Districts eviscerates historic protections, and creates classes of historic districts based on local government inaction.

Proposed subsection (8)(c) provides an exception for minimum protection standards when local governments have either failed to, or have chosen not to implement local protection plans for specific historic districts. The proposed subsection states:

“[Local governments must] apply additional local protection measures to resources listed after the effective date of this rule only through a designation process pursuant to sections (4) through (6). A local government may apply additional local protection measures to a district listed in the National Register of Historic Places without a designation process under sections (4) through (6) if the local government’s program to achieve Goal 5 pursuant to OAR 660-023-0050 was acknowledged prior to the effective date of this rule and the program permitted implementation of protection measures to National Register districts without a designation process.”

This proposal creates two classes of historic districts based on historical inaction: one protected class when the local government has affirmatively provided a protection plan for the district, and a second-class status for historic districts that were placed on the National Register of Historic Places through the state and federal process.

By creating these two classes of districts based on the past action of local governments, it disenfranchises districts placed on the National Register of Historic Places outside of the local process. This proposal is aimed to strip minimum protection based on local government inaction in protecting a historic district. This proposal frustrates and nullifies historic protection, and is likely targeted at the PBCHD because this is the exact situation in which it was nominated to the National Register of Historic Places. Historic properties should be protected in a like manner, without separate classes of properties to be administered based on local government inaction. This proposal should be rejected.

CONCLUSION

The above discussed proposals for the September 30, 2016 DLCD Goal 5 RAC are not reasonable. They represent a targeted attack on a single historic district in unincorporated Deschutes



County, and should not serve as a policy position for historic properties around the state. The intent should be recognized and dismissed in favor of policies that aim to protect and facilitate historic preservation, rather than inviting litigation, fostering ambiguity, encouraging third party and special interest lobbying, and stripping historic protections. The RAC should reject the proposals that are against historic preservation. We appreciate your time in considering our comments.

Sincerely,

Brian R. Sheets
BRS Legal, LLC

Cc: Clients



Oregon Parks and Recreation Department

NEWS RELEASE

Date: February 8, 2016

MEDIA CONTACT:

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Pilot Butte Canal Historic District (Cooley Road – Yeoman Road Segment) Listed in the National Register of Historic Places

A segment of the Pilot Butte Canal between Cooley Road and Yeoman Road in Bend and unincorporated Deschutes County is Oregon's latest entry in the National Register of Historic Places.

The construction of the Pilot Butte Canal was a result of the vision of east-coast real-estate investor Alexander McClurg Drake. Drake sought to irrigate the lands surrounding the Deschutes River under the provisions of the federal Carey Desert Lands Act, which encouraged the establishment of irrigated farms in the arid West.

Construction on the canal began in 1903. The critical Cooley Road to Yeoman Road Segment connected the already-constructed flume from the Deschutes River and traversed the basalt bedrock on its way north. However, the section was particularly difficult due to the terrain, and resources were concentrated here. Laborers using horse-drawn Fresno Scrapers and steam-powered drills finished this portion of the canal on February 10, 1905.

The canal's completion spurred rapid growth and development of central Oregon, including the establishment of Bend, Redmond, and other communities. It also provided an economic boost to the entire state with the growth of the agriculture and timber industries. The basalt floor and sides of the Cooley Road – Yeoman Road Segment of the Pilot Butte Canal still show the tooling marks left by the scrapers and the steam drills, and its rough, unfinished nature reflects both the difficulty in digging the canal and the importance of finishing the project quickly.

The National Park Service under the authority of the National Historic Preservation Act of 1966 listed the Pilot Butte Canal segment in the National Register after an extensive public process beginning in December 2014. The review process included comments from the Central Oregon Irrigation Company, residents, advocacy groups, and local, state, and federal agencies. NPS' decision is based only on the National Register criteria, which considers the degree to which the property retains its historic appearance and its historic importance.

More information about the National Register and the Pilot Butte Canal Historic District, including a description of the nomination process and a full copy of the nomination document is available online at www.oregonheritage.org (click on "National Register" at left of page and then Pilot Butte Canal Historic District, Deschutes County).

United States Department of the Interior
National Park Service

DEC 23 2015

1052

National Register of Historic Places Registration Form

Nat. Register of Historic Places
National Park Service

This form is for use in nominating or requesting determinations for individual properties and districts. See instructions in National Register Bulletin, *How to Complete the National Register of Historic Places Registration Form*. If any item does not apply to the property being documented, enter "N/A" for "not applicable." For functions, architectural classification, materials, and areas of significance, enter only categories and subcategories from the instructions. Place additional certification comments, entries, and narrative items on continuation sheets if needed (NPS Form 10-900a).

1. Name of Property

historic name Pilot Butte Canal Historic District (Cooley Road – Yeoman Road Segment)
other names/site number N/A
multiple property document N/A

(Enter "N/A" if property is not part of a multiple property listing)

2. Location

street & number Roughly bounded by Cooley Rd. to the north, Overtree Rd. to the not for publication
east, Yeoman Rd. to the south, and Brightwater Dr. to the west
city or town Bend and unincorporated Deschutes County vicinity
state Oregon code OR county Deschutes code 017 zip code 97701

3. State/Federal Agency Certification

As the designated authority under the National Historic Preservation Act, as amended,
I hereby certify that this X nomination ___ request for determination of eligibility meets the documentation standards for registering properties in the National Register of Historic Places and meets the procedural and professional requirements set forth in 36 CFR Part 60.

In my opinion, the property X meets ___ does not meet the National Register Criteria. I recommend that this property be considered significant at the following level(s) of significance:

___ national ___ statewide X local

Christine Connor 12.18.15
Signature of certifying official/Title: Deputy State Historic Preservation Officer Date

Oregon State Historic Preservation Office
State or Federal agency/bureau or Tribal Government

In my opinion, the property ___ meets ___ does not meet the National Register criteria.

Signature of commenting official Date

Title State or Federal agency/bureau or Tribal Government

4. National Park Service Certification

I hereby certify that this property is:

- entered in the National Register
- determined eligible for the National Register
- determined not eligible for the National Register
- removed from the National Register

other (explain:)

Barry Keenan 2/18/16
Signature of the Keeper Date of Action

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July 29, 2015

VIA U.S. MAIL AND EMAIL

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**RE: Comment by Matt Gadow Regarding Proposed National Register
Nomination: Pilot Butte Canal, 15000397, and response to Ownership
Concerns**

Dear Mr. Johnson:

We represent Matt Gadow, a member of the Pilot Butte Canal Preservation Alliance (“PBCPA”), and fee simple owner of the property at 63435 Overtree Rd. Bend, Oregon. We have received the July 10, 2015 letters from Gabriela Goldfarb and Central Oregon Irrigation District (“COID”). In these two letters, there are unfortunately severe misstatements of law regarding ownership of the Pilot Butte Canal that must be addressed before the State Parks Office and the National Parks Service make a regrettable decision on the merits of COID’s attempted objection. In your July 16 and July 24, 2015 email, you identify that NPS and the State have looked into the assertions claimed by COID on its ability to object to historic designation, and these concerns are well founded.

1. COID is not the “owner of private property” with sufficient standing to object to nomination of the Pilot Butte Canal under 36 CFR § 60.6(r).

36 CFR § 60.6(r) allows an “owner of private property” to object by notarized statement by sending the objection to the Keeper prior to listing, and the National Park Service defines “owner or owners” to mean:

“The term owner or owners means those individuals, partnerships, corporations or public agencies holding fee simple title to property. Owner or owners does not include individuals, partnerships, corporations or public agencies holding easements or less than fee interests (including leaseholds) of any nature.”

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36 CFR § 60.3(k). Both the Goldfarb letter and COID letter dated July 10, 2015 are in error when they state that COID is the owner of the Pilot Butte Canal. Case law on that point and a plain interpretation of the controlling CFRs explain that COID does not hold fee simple title to property subject to nomination to the historic registry.

A. The Supreme Court has rejected the concept of the “limited fee” as applied to Right of Way Act easements.

The concept of the “limited fee” has been rejected by multiple federal courts contrary to COID’s assertion that the 1921 U.S. Supreme Court decision in *Kern River Co. v. United States*, 257 U.S. 147 (1921) recognizes the property interest. The “limited fee” concept for 1891 Right of Way Act (“ROW”) easements arose from *Kern River*, which by analogy used the 1915 Supreme Court Case *Rio Grande Western Ry. Co. v. Stringham* 239 U.S. 44 (1915) to compare railroad easements to ROW easements.

In 1942, the U.S. Supreme Court in *Great Northern Railway Co. v. United States*, challenged the concept of the “limited fee” for railroads stating:

“. . . important differences between the 1875 Act and the earlier land grant acts were not called to this Court's attention in *Rio Grande Ry. v. Stringham*, 239 U.S. 44, a case in which the Government and private owners were not represented. Hence, the statement there made, by way of dictum, that the railroads have a ‘limited fee’ in rights of way acquired under the 1875 Act should be reexamined.

A repudiation of the dictum in the *Stringham* case by a decision holding that the 1875 Act grants the railroads an easement rather than a fee will not disturb land titles; it will merely restore a rule of property which existed between 1875 and 1915, the period during which most of these rights of way were acquired.”

Great N. R. Co. v. United States, 315 U.S. 262, 270 (U.S. 1942).

Several courts have recognized the repudiation of the “limited fee” consideration of a railroad easement.¹ Numerous courts made the connection between the rejection of *Stringham*’s introduction of the “limited fee” as it applies to ROW easements.

¹ *Home on the Range v. AT&T Corp.*, 386 F. Supp. 2d 999, 1018-1019 (S.D. Ind. 2005) (“. . . the Supreme Court’s decision in *Rio Grande Western Ry. Co. v. Stringham*, which described rights of way under the 1875 Act as limited fee interests, as *Townsend* had described rights of way under the 1864 Act. In *Great Northern*, however, the Supreme Court had overruled *Stringham* on this point.” (citations omitted)); *Idaho v. Oregon S. L. R. Co.*, 617 F. Supp. 207, 210–11 (D. Idaho 1985) (“In *Stringham*, *supra*, the court dealt with statutory language in the 1875 Act that was identical to the language of the 1864 Act examined in the *Townsend* case; both the 1864 and 1875 Acts granted a “right-of-way” with no other limiting language. The 1862 Act likewise granted a right-of-way employing identical language. Thus, by the early 1920’s, the Supreme Court interpreted post-1871 rights-of-way to be ‘limited fees.’. . . In 1942, the United States Supreme Court modified its view of the 1875 Act rights-of-way, and acted to

“The *Kern River* interpretation of the 1891 Act has been questioned, however, in view of the Court's subsequent interpretation of very similar language to confer easements, not fee estates, in a statute authorizing the issuance of rights-of-way to railroads. . . . Moreover, citing *Great Northern*, the Colorado Supreme Court has recently construed the 1891 Act as granting only easements to recipients of rights-of-way. *Bijou Irr. District v. Empire Club*, 804 P.2d 175, 182 (Colo. 1991), *cert. denied*, 111 S. Ct. 2017, 114 L. Ed. 2d 104, 59 U.S.L.W. 3687 (1991).”

Aldrich Enterprises, Inc. v. United States, 938 F.2d 1134, 1139 n6 (10th Cir. Colo. 1991). “While the concept of a ‘limited fee’ may have been useful in distinguishing a particular sort of right-of-way from an easement at common law . . . A right-of-way that is not a grant of lands is more like an easement than a fee.” *Denver v. Bergland*, 517 F. Supp. 155, 186 (D. Colo. 1981).

The Montana Supreme Court summarized the rejection of the “limited fee” in federal jurisprudence when it said:

“When the United States Supreme Court in *Kern River*, supra, designated the present interest under the Act in question a ‘limited fee’ it was relying on an earlier decision in *Rio Grande Western Ry. Co. v. Stringham* (1915), 239 U.S. 44, 36 S.Ct. 5, 60 L.Ed. 136. In *Stringham* the Court characterized a railroad right of way obtained under a 1875 Act of Congress as a ‘limited fee.’ 239 U.S. at 47, 36 S.Ct. at 6, 60 L.Ed. at 138. The rationale for this characterization was later severely criticized by the Court in *Great Northern Ry. Co. v. United States* (1942), 315 U.S. 262, 62 S.Ct. 529, 86 L.Ed. 836. In that case the Court found that the railroad rights of way obtained under the 1875 Act should properly have been designated easements. It follows therefore that the designation in *Kern River*, that the reservoir right of way under the 1891 Act is a limited fee, rests on a shakey [sic] legal foundation. An analysis of the limited fee/easement distinction as it pertains to a reservoir right of way under the 1891 Act is contained in *United States v. Big Horn Land and Cattle Co.* (8th Cir. 1927), 17 F.2d 357. In that case it was emphasized that a fee interest may be had in an easement. ‘We think, it therefore, not important whether interest or estate passed be considered an easement or a limited fee. In any event it is a limited fee in the nature of an easement.’ *Big Horn Land and Cattle Co.*, 17 F.2d at 365. We agree. *Kern River* introduced unnecessary terminological confusion. Therefore, we hold that, despite

remove the above-mentioned definitional difficulties by holding that such rights-of-way were only easements and not fee interests. To that extent, the *Stringham* case was thereby overruled. *Great Northern, supra.*”); *Wyoming v. Udall*, 379 F.2d 635, 638 (10th Cir. 1967) (“The Court rejected the application of the ‘limited fee’ principle to post-1871 grants, and held that the 1875 right-of-way act granted only an easement with no rights in the underlying oil and minerals.”)

Kern River, there is no useful distinction to be made between a limited fee and an easement when describing the nature of a reservoir right of way granted under the 1891 Act.

E.E. Eggebrecht, Inc. v. Waters, 217 Mont. 291, 294–95 (1985). The Arizona Court of Appeals opinion in *Wiltbank v. Lyman Water Co.* 477 P.2d 771 (1970), uses *Kern River*, *Stringham*, and *Northern P. R. Co. v. Townsend*, 190 U.S. 267, 271 (U.S. 1903)², as authority for continuing the “limited fee” distinction of a ROW easement while ignoring the case law essentially overruling all of the authority.

The rejection of the limited fee, and recognition of ROW’s grants as easements by the courts demonstrates that COID’s interest in the Pilot Butte Canal is an “easement[] or less than fee interests (including leaseholds) of any nature,” and therefore COID lacks standing to object as an “owner” of the Pilot Butte Canal.

B. COID’s ROW easement is public property, thereby not meeting the “private property” prong of standing to object in 36 CFR § 60.6(r).

COID is a public municipal corporation holding public property, and therefore any objection to its easement’s listing fails to meet the “private property” prong of the definition of “owner.” Early Oregon irrigation district case law has held that “[a]n irrigation district organized under the Irrigation District Law of this state is a municipal corporation, its property public property, and its officers public officers, elected by the legal voters of the irrigation district, with duties and powers fixed and limited by the law of their creation.” *Twohy Bros. Co. v. Ochoco Irr. Dist.*, 108 Or. 1, 11 (1922). COID’s easement is therefore a public asset, and therefore the COID is not an “owner of private property” able to make an objection under 36 CFR § 60.6(r). Oregon Administrative rules are consistent with this rationale noting “a statement of objection will not automatically preclude listing in the National Register of a property that is in public ownership.” OAR 736-050-0250(3).

COID’s “Notarized Owner Objection Statement to the National Register Nomination of a Segment of Pilot Butte Canal, Deschutes County, Oregon” fails to meet the threshold qualifications of the ownership requirement for objection under the CFRs. “Upon notification, any owner or owners of a private property who wish to object shall submit to the State Historic Preservation Officer a notarized statement *certifying that the party is the sole or partial owner of the private property*, as appropriate, and objects to the listing.” 36 CFR 60.6(g). COID states, in

² *Overruled as stated in Calhan Chamber of Commerce v. Town of Calhan*, 166 P.3d 200, 203 (Colo. Ct. App. 2007) (“The Chamber of Commerce relies on *Northern Pacific Railway v. Townsend*, 190 U.S. 267, 23 S. Ct. 671, 47 L. Ed. 1044 (1903), for the proposition that the railroad’s interest constituted a limited fee. However, the Supreme Court disavowed that holding in *Great Northern Railway v. United States*, 315 U.S. 262, 277, 62 S. Ct. 529, 535, 86 L. Ed. 836 (1942), where it held that the General Railroad Right of Way Act of 1875 only granted railroads an easement.”).

sum, “Central Oregon Irrigation District owns property within the nomination area and hereby objects to the National Register listing of a segment of Pilot Butte Canal.” The certification does not assert that the COID is “the sole or partial owner of the private property” under 36 CFR 60.6(g) because it cannot: their interest is in public property, and they are not the sole or partial “owner” because COID holds “easements or less than fee interests (including leaseholds) of any nature.” COID cannot assert that they hold property within the proposed National Register listing as fee simple owners because they simply do not.

COID is not an “owner of private property” because COID holds public “easements or less than fee interests of any nature” in the Pilot Butte Canal, therefore making objection to the listing of the canal as improper and without standing.

2. Deschutes County passed on the Goal 5 designation of the County Historic prior to accepting the resource application because COID claimed it was “an owner” of the canal under Oregon law.

The County-based decision on listing the Pilot Butte Canal in its historic inventory is not complete. The County’s improper conclusion of law that COID was entitled to object on a state-based historic registration is pending appeal at the Oregon Land Use Board of Appeals, therefore making the County’s decision of PBCPA’s historic resource listing subject to affirmation, reversal, or remand. Regarding the National Historic listing, the PBCPA nomination was heard at the State Advisory Committee on February 19, 2015, more than one month before Deschutes County made a decision in PBCPA’s historic resource application on March 25, 2015. The claim that “PBCPA simply does not like the result and is now attempting to make an end-run around the county’s decision” is disingenuous at best. PBCPA’s National Historic nomination application preceded the County’s decision, and inaccurate statements of this ilk must be corrected.

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Ian Johnson, Oregon State Historic Preservation Office
July 29, 2015
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In conclusion, COID maintains an easement of public property, that fails to satisfy the objection standing requirements of 36 CFR 60.6(r). The objection is without merit, and should be excluded from consideration in this application, or further nomination applications.

Very truly yours,
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