

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

In the Matter of Transfer Application      )  
T-8366, Josephine County                    )  
  )  
  )  
  )  
  )  
  )  
  )  
  )  
  )

RECONSIDERATION ON REMAND  
FROM SUPREME COURT OF ORDER  
RECORDED IN SPECIAL ORDER  
VOLUME 65 PAGES 480 – 487 (*Fort  
Vannoy Irrigation District v. Water  
Resources Commission*), SUPERSEDING  
FINAL ORDER APPROVING  
ADDITIONAL POINTS OF DIVERSION  
AND DIMINUTION

**Authority**

ORS 540.505 to 540.580 establishes the process by which a water right holder may submit a request to transfer the point of diversion, place of use, or character of use authorized under an existing water right. OAR Chapter 690, Division 380 implements the statutes and provides the Department's procedures and criteria for evaluating transfer applications.

**Applicant**

KEN-WAL FARMS, INC.  
5630 UPPER RIVER ROAD  
GRANTS PASS, OR 97526

**Findings of Fact**

**Background**

1. On November 30, 1999, Robert J. Crouse, Agent, on behalf of Ken-Wal Farms, Inc., submitted a transfer application to change the points of diversion under Certificates 2803, 3247, 8942, 8943, and 15340. The Department assigned the transfer application number T-8366.
2. On February 2, 2000, the Department received amendments to the transfer application identifying the amended, proposed point of diversion.
3. Notice of Transfer Application T-8366 was published in the Department's weekly notice on December 14, 1999, and in the Grants Pass Daily Courier newspaper on September 16, 23, and 30, 2000.

This final order is subject to judicial review by the Court of Appeals under ORS 183.482. Any petition for judicial review must be filed within the 60-day time period specified by ORS 183.482(1). Pursuant to ORS 536.075 and OAR 137-003-0675, you may petition for judicial review or petition the Director for reconsideration of this order. A petition for reconsideration may be granted or denied by the Director, and if no action is taken within 60 days following the date the petition was filed, the petition shall be deemed denied.

4. On October 16, 2000, a timely protest was filed by Fort Vannoy Irrigation District (FVID) and Herman E. Baertschiger, Jr.
5. The Protestants asserted among other things, FVID is the holder of the water rights (Certificates 8942 and 8943) proposed for transfer and the transfer cannot be approved without the water right holder's consent.
6. A contested case hearing was held to resolve the protest issues.
7. Regarding the issue of whether Certificates 8942 and 8943 held in the name of FVID could be transferred without the consent of FVID, the Proposed Order in contested case, found that FVID's consent was not necessary to process Transfer Application T-8366.
8. The Protestants filed Exceptions to the Proposed Order and on July 29, 2005, the Water Resources Commission (Commission) considered the Exceptions and directed the Department to issue a final order approving Transfer Application T-8366 consistent with the Proposed Order.
9. The Department, consistent with the directive of the Commission, issued a final order approving Transfer Application T-8366. The final order approving Transfer Application T-8366 was issued on July 29, 2005, and was recorded in Special Order Volume 65, Pages 480 - 487.
10. Fort Vannoy Irrigation District and Herman E. Baertschiger, Jr., sought judicial review of the final order approving Transfer Application T-8366.
11. On July 11, 2007, the Oregon Court of Appeals found that FVID is the holder of the water use subject to transfer, being Certificates 8942 and 8943. The Court reversed and remanded for reconsideration the final order approving Transfer Application T-8366.
12. On July 10, 2008, on review from the Oregon Court of Appeals, the Supreme Court of the State of Oregon affirmed the decision of the Court of Appeals. Transfer Application T-8366 was remanded to the Department to continue processing consistent with Supreme Court's opinion that FVID is the holder of the water right Certificates 8942 and 8943 and Ken-Wal could not transfer the point of diversion for these certificates without the consent of FVID.
13. Consistent with the opinion of the Supreme Court and as ordered in Special Order Volume 93, Pages 896-897, entered in the records of the Department on December 5, 2014, Certificates 8942 and 8943 are no longer included in Transfer Application T-8366.
14. The portion of the first right to be transferred is as follows:
  - Certificate:** 2803 (as modified by Special Orders Volume 93, Pages 896 – 897, Volume 93, Pages 898 – 899 and Volume 93, Pages 1165-1170) in the name of Ft. Vannoy Orchards (perfected under Permit S-4015)
  - Use:** Supplemental Irrigation of 60.0 acres
  - Priority Date:** March 10, 1919
  - Quantity:** 0.75 cubic foot per second (cfs) or its equivalent in case of rotation
  - Source:** Rogue River, a tributary of the Pacific Ocean

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
36 S	6 W	WM	16	NE SW	1.0
36 S	6 W	WM	16	NW SW	7.0
36 S	6 W	WM	16	SW SW	27.0
36 S	6 W	WM	16	SE SW	5.0
36 S	6 W	WM	20	NE NE	10.0
36 S	6 W	WM	21	NW NW	10.0
<b>Total:</b>					<b>60.0</b>

15. Certificate 2803 does not describe the authorized point of diversion. However, information is available from the applicant and previous department documents that describes the point as diversion as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
36 S	6 W	WM	14	NE SW	SOUTH 61° EAST 1580 FEET FROM THE EAST ¼ CORNER OF SECTION 15 (referred to as pod #1 in Transfer Application T7086)

16. Transfer Application T-8366 proposes to add an additional point of diversion at:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
36 S	6 W	WM	21	NW NW	515 FEET SOUTH AND 890 FEET EAST FROM THE NW CORNER OF SECTION 21 (referred to as pod #4 in Transfer Application T7086)

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

**Certificate:** 3247, (as modified by Special Orders Volume 93, Pages 896 – 897, and Volume 93, Pages ~~1165-1170~~) in the names of H. Wood, A. H. Fetters and H. B. Wyman (perfected under permit S-4034)

**Use:** Supplemental Irrigation of 39.5 acres

**Priority Date:** March 27, 1919

**Quantity:** 0.49 cfs or its equivalent in case of rotation

**Source:** Rogue River, a tributary of the Pacific Ocean

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
36 S	6 W	WM	16	NE SW	4.5
36 S	6 W	WM	16	NW SW	10.0
36 S	6 W	WM	16	SW SW	12.0
36 S	6 W	WM	16	SE SW	5.0
36 S	6 W	WM	21	NE NW	2.0
36 S	6 W	WM	21	NW NW	6.0
<b>Total:</b>					<b>39.5</b>

18. Certificate 3247 does not describe the authorized point of diversion. However, information is available from the applicant that describes the point as diversion as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
36 S	6 W	WM	21	NE NW	15 RODS SOUTH AND 100 RODS EAST FROM THE SW CORNER OF SECTION 16

19. Transfer Application T-8366 proposes to move the point of diversion approximately 1/8<sup>th</sup> mile downstream in the source to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
36 S	6 W	WM	21	NW NW	515 FEET SOUTH AND 890 FEET EAST FROM THE NW CORNER OF SECTION 21

20. The portion of the third right to be transferred is as follows:

**Certificate:** 15340 (as modified by Special Order Volume 93, Pages 896 – 897) in the name of Ada Weston (perfected under Permit S-16358)

**Use:** Irrigation of 11.7 acres

**Priority Date:** May 31, 1945

**Quantity:** 0.15 cfs, or its equivalent in case of rotation, measured at the point of diversion from the stream.

**Rate/Duty:** The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands shall be limited to one-eightieth of one cfs per acre, or its equivalent for each acre irrigated and shall be further limited to a diversion of not to exceed 4.5 acre-feet per acre for each acre irrigated during the irrigation season from April 2 to October 31 of each year.

**Source:** Drain Creek, a tributary of Vannoy Creek, tributary to the Rogue River

**Authorized Point of Diversion:**

Twp	Rng	Mer	Sec	Q-Q
36 S	6 W	WM	16	NW NE

**Authorized Place of Use:**

Twp	Rng	Mer	Sec	Q-Q	Acres
36 S	6 W	WM	16	NW NE	1.7*
36 S	6 W	WM	16	NE NW	10.0

\*See below for diminishment to supplemental irrigation.

21. Transfer Application T-8366 proposes to add a point of diversion approximately 1/8<sup>th</sup> mile downstream to:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
36 S	6 W	WM	17	SE SE	895 FEET NORTH AND 160 FEET WEST FROM THE SE CORNER OF SECTION 17

22. An affidavit of partial diminution of a water right was received on August 31, 2000, from the Crouse Family Trust and Ken-Wal Farms, Inc. The portion of the water right to be diminished is:

**Certificate:** 15340 (as modified by Special Order Volume 93, Pages 896 – 897) in the name of Ada Weston (perfected under Permit S-16358)

**Use:** Irrigation of 1.7 acres

**Priority Date:** May 31, 1945

**Quantity:** 0.02 cfs, or its equivalent in case of rotation, measured at the point of diversion from the stream.

**Rate/Duty:** The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands shall be limited to one-eightieth of one cfs per acre, or its equivalent for each acre irrigated and shall be further limited to a diversion of not to exceed 4.5 acre-feet per acre for each acre irrigated during the irrigation season from April 2 to October 31 of each year.

**Source:** Drain Creek, a tributary of Vannoy Creek, tributary to the Rogue River

**Authorized Place of Use to be Diminished:**

Twp	Rng	Mer	Sec	Q-Q	Acres
36 S	6 W	WM	16	NW NE	1.7

23. Water has been used within the last five years prior to the submittal of Transfer Application T-8366 according to the terms and conditions of the rights. There is no information in the record that would demonstrate the rights are subject to forfeiture under ORS 540.610.
24. An existing system including a pump, combination of concrete lined ditches and buried pressurized sprinkler system sufficient to use the full amount of water allowed under the existing rights were present within the five year period prior to submittal of Transfer Application T-8366.
25. The Oregon Department of Fish and Wildlife has requested inclusion of a condition requiring installation of proper fish screen or by-pass device at the new, additional points of diversion to prevent fish from leaving the source and entering the diversion.
26. The Watermaster has requested that prior to diverting water, the water user shall install and maintain a headgate, an in-line flow meter, weir or other suitable device for measuring and recording the quantity of water diverted. The type and plans of the headgate and measuring device must be approved by the Department prior to beginning construction and shall be installed under the general supervision of the Department.
27. The proposed changes would not result in enlargement of the rights.
28. The proposed changes would not result in injury to other water rights.

**Conclusions of Law**


The proposed changes in points of diversion in Transfer Application T-8366 are consistent with the opinion of the Supreme Court of the State of Oregon and the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000 and the water right (as identified above) should be diminished pursuant to OAR 690-380-5120.

**Now, therefore, it is ORDERED:**

1. The changes proposed in Transfer Application T-8366 for Certificates 2803, 3247 and 15340 (as modified by subsequent orders) are approved.

2. Water shall be acquired from the same source as the original points of diversion.
3. The right to the use of the water is restricted to beneficial use at the places of use described and is subject to all other conditions and limitations contained in Certificates 2803, 3247, and 15340 and any related decree.
4. The quantity of water diverted at the additional points of diversion, together with that diverted at the original points of diversion shall not exceed the quantity of water lawfully available at the original points of diversion.
5. Certificates 2803, 3247 and 15340 (as modified by subsequent orders) are cancelled.
6. Prior to diverting water, the water user shall install and maintain a headgate, an in-line flow meter, weir or other suitable device for measuring and recording the quantity of water diverted. The type and plans of the headgate and measuring device must be approved by the Department prior to beginning construction and shall be installed under the general supervision of the Department.
7. New certificates evidencing the portions of the water rights NOT modified by this superseding order shall be issued.
8. Full beneficial use of the water shall be made, consistent with the terms of this order, on or before **October 1, 2016**. A Claim of Beneficial Use (CBU) prepared by a Certified Water Right Examiner shall be submitted by the applicant to the Department within one year after the deadline for completion of the changes and full beneficial use of the water.
9. When satisfactory proof of the completed changes is received, new certificates confirming the rights transferred will be issued.

Dated at Salem, Oregon this 27 day of January, 2015.

  
\_\_\_\_\_  
Dwight French, Water Right Services Administrator, for  
THOMAS M. BYLER, DIRECTOR

Mailing date: JAN 30 2015