

BEFORE THE OREGON WATER RESOURCES DEPARTMENT

In the Matter of Transfer Application T8545 in the name of Mallard Creek Golf Course, <div style="text-align: center;"><i>Applicant,</i></div> and  Friends of Linn County, <div style="text-align: center;"><i>Protestants.</i></div>	) ) ) ) ) ) ) ) ) ) )	FINAL ORDER DISMISSING CONTESTED CASE HEARING, CORRECTING CERTIFICATE 19899, AND APPROVING TRANSFER APPLICATION T-8545 FOR A CHANGE IN PLACE OF USE AND POINT OF DIVERSION
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**FINDINGS OF FACT:**

Application T-8545, submitted by Mallard Creek Golf Course, requests approval of a change in place of use and point of diversion for water from Hamilton Creek, tributary of the South Santiam River, for irrigation use on an existing golf course operating under a conditional use permit issued by Linn County in 1996. The conditional use permit authorized operation of a golf course, RV campground and related facilities on a parcel zoned for Exclusive Farm Use.

Former Protestants Paul and Phyllis O’Driscoll challenged the transfer application, asserting that approval of the application would cause injury to their senior water rights. On August 16, 2001, Protestants O’Driscoll withdrew their protest in this matter and withdrew from this proceeding.

Protestants Friends of Linn County (FOLC) challenge the above-referenced transfer application. Protestants assert that the proposed change of water supply from ground water to surface water for the golf course is a land use action requiring a determination of compatibility with the local comprehensive land use plan, and that decision requires notice and opportunity for hearing, and further that the proposed transfer is not compatible with the local land use plan.

The Department referred the matter to the Hearing Officer Panel and the case was assigned to Hearing Officer Weisha Mize. A prehearing conference was held on July 17, 2001. The parties were directed to submit legal briefs on two issues: 1) whether, as a matter of law, the transfer can injure senior rights; and 2) whether the Water Resources Department lawfully determined that the proposed transfer is compatible with acknowledged comprehensive plans, in compliance with ORS 197.180. The parties briefed these two questions.

As Protestants O’Driscoll withdrew their protest and the issue of injury to senior water rights, the Water Resources Department and the Applicant assert that there is no factual issue remaining and no genuine issue of material fact relevant to the determination of the legal issue, and requested that a proposed order be issued dismissing the matter on the basis that the agency is entitled to a favorable ruling as a matter of law, as allowed by OAR 137-003-0580.

On September 17, 2001, Hearing Officer Mize issued a proposed order proposing to dismiss the contested case hearing. No exceptions to the proposed order were filed.

### **CONCLUSIONS AND REASONS:**

The Water Resources Department must make decisions on water use applications, including transfer applications, in compliance with statewide planning goals and in a manner compatible with acknowledged local comprehensive plans and land use regulations. ORS 197.180(1). State agencies may comply with the compliance and compatibility requirements by adopting and following a State Agency Coordination Program (SAC) which complies with ORS 197.180(3) and is certified by the Department of Land Conservation and Development. The Water Resources Department has done so. The Water Resources Department's SAC, contained in OAR Chapter 690 Division 5 and a document entitled *Land Use Planning Procedures Guide (Guide)* was adopted by the Water Resources Commission in June 1990 and certified by the DLCDC December 20, 1990. The SAC establishes procedures for the Water Resources Department and applicants to follow in determining whether a transfer application is compatible with the comprehensive land use plan of the local government in which the proposed use is located.

FOLC's argument is that when the proposed use, an existing golf course, originally obtained a conditional use permit from Linn County in 1996, the stated source of water for that golf course was ground water. As the source is now proposed to be changed, FOLC appear to argue that the proposed change invalidates the conditional use permit. FOLC's argument fails. FOLC has failed to demonstrate that the basis for the prior conditional approval was the proposed use of ground water or that the current proposed use of surface water changes the character or nature of the use of the land from use as a golf course to some other use not considered by the Linn County Planning Commission. Nor has the FOLC demonstrated that the proposed transfer of surface water is an action over which the Linn County Planning Commission has jurisdiction, or that the proposed transfer is incompatible with the comprehensive land use plan.

The land use to be served by the proposed transfer has already received conditional land use approval. That approval was not for the source of water for the proposed use, a question over which the local government lacks jurisdiction, but for the type of land use proposed. Because the applicant originally proposed to use ground water for irrigation of the golf course, which was to be located within an area zoned for Exclusive Farm Use, the local planning jurisdiction issued a conditional use permit and required a showing that the applicant could carry out its proposal without negatively impacting nearby preexisting domestic wells.

The county Planning Commission further required that the applicant secure the necessary water use permits from the Oregon Water Resources Department. The conditional use permit neither required the exclusive use of ground water for the land use approved by Linn County nor prohibited a change in the source of water used. Moreover, since the filing of this application, Linn County has thrice indicated that the proposed use of surface water does not violate the conditional use permit.

Approval of a particular type of land use, whether conditional or absolute, is within the jurisdiction of the local government and is not subject to being overridden or second-guessed by the Water Resources Department. As the conditional use permit is compatible with the county's comprehensive plan, a proposed change of water supply which is not in violation of the conditional use permit must also be viewed as compatible with the county's comprehensive plan.

The Water Resources Department's determination of the compatibility of the proposed water use transfer with the local comprehensive plan was properly done in accordance with the restrictions and requirements of the SAC and OAR 197.180.

Inasmuch as there is no factual issue remaining and further no genuine issue of material fact relevant to the determination of the sole legal issue to be determined, the agency is entitled to a favorable ruling as a matter of law pursuant to the provisions of OAR 137-003-0580.

### ORDER

It is ORDERED that the contested case proceeding in this matter is DISMISSED.

It is FURTHER ORDERED that Water Right Certificate 19899 is CORRECTED as described below.

It is FURTHER ORDERED that pursuant to ORS 540.510 to 540.530 and finding no injury to existing water rights would result, Transfer Application T-8545, submitted by Mallard Creek Golf Course, requesting a change in place of use and a change in point of diversion is APPROVED as limited and conditioned below.

Certified Water Right Examiner #332, Walter L. Trimmer, and the Watermaster District #2 office, have provided evidence that Certificate 19899 is in error.

The place of use for the right of record is as follows:

SW $\frac{1}{4}$  NE $\frac{1}{4}$  0.2 ACRE  
SE $\frac{1}{4}$  NE $\frac{1}{4}$  9.4 ACRES  
NE $\frac{1}{4}$  SE $\frac{1}{4}$  2.4 ACRES  
NW $\frac{1}{4}$  SE $\frac{1}{4}$  0.7 ACRE  
SECTION 25

TOWNSHIP 12 SOUTH,  
RANGE 1 WEST, W.M.

SW $\frac{1}{4}$  NW $\frac{1}{4}$  23.8 ACRES  
SE $\frac{1}{4}$  NW $\frac{1}{4}$  24.8 ACRES  
NE $\frac{1}{4}$  SW $\frac{1}{4}$  1.2 ACRES  
NW $\frac{1}{4}$  SW $\frac{1}{4}$  9.2 ACRES  
SECTION 30

TOWNSHIP 12 SOUTH,  
RANGE 1 EAST, W.M.

The corrected place of use is as described below.

The first right to be modified, as evidenced by a portion of Certificate 19899, was perfected under Permit 19473 with a date of priority of APRIL 25, 1950. The right allows the use of HAMILTON CREEK, a tributary of SOUTH SANTIAM RIVER, for IRRIGATION OF 27.2

ACRES. The amount of water to which this right is entitled is limited to an amount actually beneficially used and shall not exceed 0.339 cubic foot per second, if available at the authorized points of diversion:

SE¼ NE¼, SECTION 25, T 12 S, R 1 W, W.M.; NE¼ SW¼ AND NW¼ SW¼, SECTION 30, T 12 S, R 1 E, W.M.

or its equivalent in case of rotation, measured at the point of diversion from the source.

The second right to be modified, as evidenced by Certificate 26911, was perfected under Permit 20460 with a date of priority of AUGUST 20, 1951. The right allows the use of HAMILTON CREEK, a tributary of SOUTH SANTIAM RIVER, for IRRIGATION OF 53.0 ACRES. The amount of water to which this right is entitled is limited to an amount actually beneficially used and shall not exceed 0.66 cubic foot per second, if available at the authorized point of diversion:

SW¼ NE¼, SECTION 30, T 12 S, R 1 E, W.M.,

or its equivalent in case of rotation, measured at the point of diversion from the source.

The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, is limited to ONE-EIGHTIETH of one cubic foot per second per acre or its equivalent for each acre irrigated and shall be further limited to a diversion of not to exceed 2½ acre-feet for each acre irrigated during the irrigation season of each year.

The use shall conform to any reasonable rotation system ordered by the proper state officer.

The authorized places of use are located as follows:

PERMIT 19473 (Corrected)

SE¼ NW¼ 21.5 ACRES  
NE¼ SW¼ 6.0 ACRES

PERMIT 20460

SW¼ NE¼ 33.0 ACRES  
N½ NW¼ SE¼ 20.0 ACRES

SECTION 30

TOWNSHIP 12 SOUTH, RANGE 1 EAST, W.M.

The correct remainder of Permit 19473 is located as follows :

SW¼ NE¼ 0.2 ACRE  
SE¼ NE¼ 9.4 ACRES  
NE¼ SE¼ 2.4 ACRES  
NW¼ SE¼ 0.7 ACRE  
SECTION 25

TOWNSHIP 12 SOUTH,

RANGE 1 WEST, W.M.  
SW¼ NW¼ 18.4 ACRES  
NW¼ SW¼ 13.4 ACRES  
SECTION 30

TOWNSHIP 12 SOUTH,  
RANGE 1 EAST, W.M.

The right to use the water for the above purpose is restricted to beneficial use on the lands or place of use described.

The applicant proposes to change the place of use to:

PERMIT 19473

SW<sup>1</sup>/<sub>4</sub> SW<sup>1</sup>/<sub>4</sub> 17.5 ACRES  
SE<sup>1</sup>/<sub>4</sub> SW<sup>1</sup>/<sub>4</sub> 9.7 ACRES  
SECTION 15

PERMIT 20460

NE<sup>1</sup>/<sub>4</sub> NW<sup>1</sup>/<sub>4</sub> 7.4 ACRES  
NW<sup>1</sup>/<sub>4</sub> NW<sup>1</sup>/<sub>4</sub> 28.9 ACRES  
SW<sup>1</sup>/<sub>4</sub> NW<sup>1</sup>/<sub>4</sub> 11.7 ACRES  
SE<sup>1</sup>/<sub>4</sub> NW<sup>1</sup>/<sub>4</sub> 1.5 ACRES  
NE<sup>1</sup>/<sub>4</sub> SW<sup>1</sup>/<sub>4</sub> 1.2 ACRES  
NW<sup>1</sup>/<sub>4</sub> SW<sup>1</sup>/<sub>4</sub> 2.3 ACRES  
SECTION 22

TOWNSHIP 12 SOUTH, RANGE 1 WEST, W.M.

The applicant proposes to change the point of diversion of both permits to :

NE<sup>1</sup>/<sub>4</sub> SW<sup>1</sup>/<sub>4</sub>, SECTION 22, T 12 S, R 1 W, W.M.; 906 FEET NORTH AND 645 FEET WEST OF THE SE CORNER OF DLC 44.

THE CHANGES TO EXISTING WATER RIGHTS MAY BE MADE PROVIDED THE FOLLOWING CONDITIONS ARE MET BY THE WATER USER:

1. The proposed changes shall be completed on or before October 1, 2003.
2. The quantity of water diverted at the new point of diversion, together with that diverted at the old points of diversion, shall not exceed the quantity of water lawfully available at the original points of diversion.
3. 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.
4. Water shall be acquired from the same surface water source as the original point of diversion.
5. The former places of use shall no longer be irrigated as a part of these water rights.
6. The water user shall install and maintain a fish screen or fish by-pass device. The type and plans of the screen or by-pass device must be approved by the Oregon Department of

Fish and Wildlife prior to beginning of construction and shall be installed under the supervision of the Department of Fish and Wildlife.

7. The water user may participate in the Oregon Department of Fish and Wildlife's cost sharing program for installation of screening and by-pass devices in accordance with ORS 540.525.

It is FURTHER ORDERED that Certificates 19899 and 26911 are cancelled. A new certificate will be issued to confirm the corrected portion of Permit 19473 NOT involved in this transfer. When satisfactory proof of the completed changes is received, new certificates confirming these water rights will be issued.

WITNESS the signature of the Water Resources

Director, affixed this 6<sup>th</sup> day of December, 2001

  
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Paul R. Cleary, Director

### **Appeal Rights**

You are entitled to judicial review of this order. Judicial review may be obtained by filing a petition for review with 60 days from the date of service of this Order. If this Order was personally delivered to you, the date of service is the date you received the Order. If this Order was mailed to you, the date of service is the day it was mailed. Judicial review, pursuant to the provisions of ORS 536.075, is to the Oregon Court of Appeals. If you do not file a petition for judicial review within the 60-day time period, you will lose your right to appeal.


CERTIFICATE OF SERVICE

I hereby certify that on the 6<sup>th</sup> day of December 2001, I served the attached FINAL ORDER DISMISSING CONTESTED CASE HEARING, CORRECTING CERTIFICATE 19899, AND APPROVING TRANSFER APPLICATION T-8545 FOR CHANGE IN PLACE OF USE AND POINT OF DIVERSION, by mailing certified in a sealed envelope, and by regular U.S. mail, postage pre-paid, a copy thereof addressed as follows:

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