

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

In the Matter of Transfer Application)
T-7683, Douglas County)
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FINAL ORDER APPROVING A
CHANGE IN POINT OF DIVERSION
AND RE-DESCRIPTION OF PLACES
OF USE UNDER TRANSFER
APPLICATION T-5259 and
CERTIFICATES 56466, 55438, 60003,
81736, 44370, 64851 and 57553

Authority

ORS 540.505 to 540.580 establishes the process in 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

Dave Russel
1800 Del Rio Road
Roseburg, OR 97470

Findings of Fact

Background

1. On January 10, 1997, Dave Russel filed an application to change the point of diversion under Certificate 57553 (perfected under Permit S-28837.) The Department assigned the application number T-7683.
2. On May 13, 1963, W. S. Barnes, a registered professional engineer, performed a survey of the water uses from the North Umpqua for the property owned by G. H. Harrell. The 1963 survey identified the general layout of the lands irrigated and described the place of use in relation to Township, Range, Section and Quarter-Quarter lines for the purpose of water right application S-38746 (Permit S-28837).
3. Following development of beneficial use of water under the permit, the Department performed a plane table survey for Permit S-28837 on July 12, 1967 and prepared a Final

This is an order in other than a contested case. This order is subject to judicial review under ORS 183.484. Any petition for judicial review must be filed within the 60 day time period specified by ORS 183.484(2). Pursuant to ORS 536.075 and OAR 137-004-0080, you may either 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.

Proof map concurrent with issuance of Certificate 35309. The Final Proof map confirmed the general shape of the place of use but described it somewhat differently in relation to Section quarter-quarter and Donation Land Claim (DLC) lines within each quarter-quarter and DLC from the way it was described in Application S-37446 map and Permit S-28837.

4. Subsequent to the Final Proof survey (1967), numerous modifications (transfers and cancellations) to the right were processed as the Del Rio subdivision was developed, resulting in the issuance of Certificate 57553. Transfer Application T-7683 requested further modification to Certificate 57553.
5. In 1993, the Department undertook an investigation of how the 1967 survey and the pending transfer application maps overlaid one another. The analysis showed that the location of the section line between sections 14 and 23 was not consistent between the 1967 survey and other maps due to a rotational error in the 1967 plane table survey; though the footprint of the place of use remains the same.
6. The Department determined that a re-description of the place of use for the entirety of the place of use originally evidenced by Certificate 35309 was needed and prepared a revised map and comparison table of acreage within each section and quarter-quarter.

Twp	Rng	Mer	Sec	Q-Q	Acres based on 1967 survey	Acres based on 1993 investigation
26 S	6 W	WM	14	SW NE	10.0	10.1
26 S	6 W	WM	14	SE NW	1.2	1.1
26 S	6 W	WM	14	NE SW	1.2	1
26 S	6 W	WM	14	SW SW	0.1	0
26 S	6 W	WM	14	SE SW	15.4	15.4
26 S	6 W	WM	14	NE SE	19.4	19.9
26 S	6 W	WM	14	NW SE	17.4	16.8
26 S	6 W	WM	14	SW SE	30.4	25.88
26 S	6 W	WM	14	SE SE	22.3	24.4
26 S	6 W	WM	23	NE NE	1.6	2
26 S	6 W	WM	23	NW NE	15.0	13.3
26 S	6 W	WM	23	NE NW	0.3	1.20
Total acres:					134.3	134.3

7. Since the issuance of Certificate 35309 numerous modifications (transfers and cancellations) to this water right occurred, each affecting a portion of the original place of use of the right. This necessitates the need to re-describe the place of use in some of the resulting documents that are not consistent with the 1993 investigation. Transfer Application T-5259, Certificates

Certificate 64851 (confirming T-5975)

Twp	Rng	Mer	Sec	Q-Q	As issued acres	Proposed re-described acres
26 S	6 W	WM	14	SW SE	0.35	0.25
26 S	6 W	WM	23	NW NE	1.05	1.15

Certificate 57553 (portions of the right not modified)

Twp	Rng	Mer	Sec	Q-Q	GLot	As issued acres	Proposed re-described acres
26 S	6 W	WM	14	SW NE		10.00	10.10
26 S	6 W	WM	14	SE NW		1.20	1.10
26 S	6 W	WM	14	NE SW		1.20	1.00
26 S	6 W	WM	14	SW SW		0.10	0
26 S	6 W	WM	14	SE SW		10.31	10.74
26 S	6 W	WM	14	NE SE	7	0.40	0.70
26 S	6 W	WM	14	NE SE		19.00	19.20*
26 S	6 W	WM	14	NW SE		17.40	16.80
26 S	6 W	WM	14	SW SE		28.14	25.88
26 S	6 W	WM	14	SE SE		20.20	21.10
26 S	6 W	WM	14	SE SE	6	1.30	2.00
26 S	6 W	WM	23	NW NE		3.49	2.79
26 S	6 W	WM	23	NE NW		0	0.62

*This entry includes 0.9 acre that has been cancelled (but erroneously documented) as further described in Finding of Fact #8.

8. On January 25, 1984, an order cancelling 0.9 acre in the NESE, Section 14, T26S 6W, WM, was issued and recorded in Special Order Volume 38, Page 114. However, the resulting document did not reduce the total acres in this quarter-quarter by the above referenced cancellation order. Additionally, all subsequent documents repeated this error which should have been corrected when a superseding certificate was issued.

9. Both the survey and the additional evidence describe the same irrigated land. The differences between the two descriptions result from different bases of bearing and reference points used. The 1993 retracements performed by both the Department and CWRE #80 were based on reference points established or re-established by government land surveyors instead of a retracement of the original survey made by the Department Final Proof survey in 1967 upon which the water right certificate was based. The actual location of the place of use, as found on the ground, remains the same.

10. The portion of the right (as authorized) proposed to be transferred under T-7683 is as follows:

Certificate: 57553 in the name of G. H. HARRELL (perfected under Permit S-28837)

Use: IRRIGATION of 1.70 ACRES

Priority Date: MAY 13, 1963

56466, 55438, 60003, 81736, 44370, 64851 and 57553 need re-description as further outlined in the tables below:

Transfer Application T-5259

Twp	Rng	Mer	Sec	Q-Q	As authorized	Proposed re-described acres
26 S	6 W	WM	23	NE NE	1.60	2.00
26 S	6 W	WM	14	NW NE	2.70	1.70
26 S	6 W	WM	14	SW SE	1.00	1.62
26 S	6 W	WM	14	SE SE	0.80	1.30

Certificate 56466 (confirming T-5054)

Twp	Rng	Mer	Sec	Q-Q	As issued acres	Proposed re-described acres
26 S	6 W	WM	14	SE SW	1.20	1.17
26 S	6 W	WM	23	NE NW		0.06

Certificate 55438 (confirming T-3626)

Twp	Rng	Mer	Sec	Q-Q	As issued acres	Proposed re-described acres
26 S	6 W	WM	14	SE SW	1.38	1.28
26 S	6 W	WM	23	NE NW	0.12	0.14

Certificate 60003 (confirming T-3993)

Twp	Rng	Mer	Sec	Q-Q	As issued acres	Proposed re-described acres
26 S	6 W	WM	14	SE SW	1.17	0.97
26 S	6 W	WM	14	SW SE	0.06	0.11
26 S	6 W	WM	23	NE NW	0.10	0.18

Certificate 81736 (confirming T-4168)

Twp	Rng	Mer	Sec	Q-Q	As issued acres	Proposed re-described acres
26 S	6 W	WM	14	SE SW	0.44	0.34
26 S	6 W	WM	14	SW SE	0.25	0.54
26 S	6 W	WM	23	NE NW	0.08	0.20

Certificate 44370 (confirming T-2953)

Twp	Rng	Mer	Sec	Q-Q	As issued acres	Proposed re-described acres
26 S	6 W	WM	14	SW SE	0.60	0.70
26 S	6 W	WM	23	NW NE	0.80	0.70

Rate: 0.02 CUBIC FOOT PER SECOND (cfs)

Limit/Duty: ONE-EIGHTIETH cfs per acre, not to exceed 2.5 acre-feet per acre during the irrigation season, provided further that right to the use of water is limited to the period when the flow of the North Umpqua River is more than 525 cfs at its mouth.

Source: NORTH UMPQUA RIVER, tributary to UMPQUA RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	DLC	Survey Coordinates
26 S	6 W	WM	14	SW SE	45	2550 FEET SOUTH AND 2620 FEET WEST FROM THE E1/4 CORNER OF SECTION 14

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
26 S	6 W	WM	14	SW SE		0.15
26 S	6 W	WM	23	NW NE	45	1.55

11. Transfer Application T-7683 proposes to move the authorized point of diversion approximately 360 feet upstream to:

Twp	Rng	Mer	Sec	Q-Q	Lot	DLC	Survey Coordinates
26 S	6 W	WM	23	NW NE	14	45	600 FEET SOUTH AND 300 FEET EAST FROM THE N¼ CORNER OF SECTION 23

12. During the processing of Transfer Application T-7683 it became apparent that the portion of the water right proposed to be modified did not “match” the existing water right map nor the 1993 revised map. The original transfer map showed the footprint of this portion of the water extending down to the water’s edge and shows a total of 1.70 acres of water right within the parcel to be affected by this transfer. The 1967 and 1993 Department’s water right maps indicate the water right place of use does not extend down to the water’s edge.

13. The following table provides a comparison of the description of the portion of the authorized place of use for Certificate 57553 to be affected by Transfer Application T-7683 and a re-description based on other evidence collected by the Department (including assessor’s information, Del Rio Ranch Estates Subdivision PLAT, aerial photographs and information from Janet Lundeen, CWRE #80).

Certificate 57553 Place of Use involved in T-7683	
T-7683 Transfer Map	Revised proposed re-description
SW SE 0.15 acre Section 14	SW SE 0.13 acre Section 14
NW NE 1.55 acres Section 23	NW NE 1.26 acres Section 23
Township 26 South, Range 6 West, W.M.	Township 26 South, Range 6 West, W.M.
TOTAL = 1.70 acres	TOTAL = 1.39 acres

14. Notice of the application for transfer was published on January 21, 1997, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.

15. The Oregon Department of Fish and Wildlife (ODFW) has determined that a fish screening and/or by-pass device is necessary at the new point of diversion to prevent fish from entering the diversion and/or safely transport fish back to the body of water from which the fish were diverted and that the diversion is not currently equipped with an appropriate fish screening and/or by-pass device. This diversion may be eligible for screening cost share funds.
16. Water has been used within the last five years according to the terms and conditions of the right, and there is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.
17. The proposed change would not result in enlargement of the right.
18. An instream water right, Certificate 59939, exists for the reach of the river in which the authorized point of diversion would be moved upstream, and streamflows within the reach are frequently below the levels allocated under the instream water right. Thus, the instream water right would be injured as a result of the proposed change in point of diversion.
19. On April 26, 2007, the Department mailed a copy of the *draft* Preliminary Determination proposing to deny Transfer Application T-7683 to the applicant. The cover letter that accompanied the *draft* Preliminary Determination set forth a deadline of May 27, 2007, in which the applicant could respond.
20. On May 18, 2007, the applicant requested that the Department seek a recommendation from ODFW as to whether the Department should consent to injury of the instream water right pursuant to OAR 690-380-4030.
21. On June 20, 2007, the Department issued a Preliminary Determination proposing to deny Transfer Application T-7683 unless ODFW recommended the Department to consent to the injury due to a net benefit that would result from the proposed change. A copy of the Preliminary Determination was mailed to the applicant. Additionally, notice of the Preliminary Determination for the transfer application was published on the Department's weekly notice on June 26, 2007 pursuant to ORS 540.520 and OAR 690-380-4020. No protests were filed in response to the notice.
22. The cover letter that accompanied the Preliminary Determination informed the applicant of the Department's intent to initiate the consent to injury process by seeking a recommendation from ODFW.
23. On June 20, 2007, the Department sent a letter to ODFW requesting a recommendation as to whether the Department should consent to injury of the instream water right (Certificate 59939).
24. On April 9, 2008, ODFW recommended that the Department consent to injury of the instream water right Certificate 59939 because the proposed change would result in a net benefit to the resource. The recommendation concluded that:

- a) The movement of the point of diversion to the North Umpqua River, where habitat is a bedrock shelf, is likely better than maintaining the point of diversion at the mouth of Sutherlin Creek, where a deep backwater hole provides better juvenile rearing and adult holding habitat for resident fish.
 - b) The applicant will limit water use to an average of one-inch-per-week during the irrigation season of each year, adjusted using the Eugene Water and Electric Board's (or other appropriate entity's) evapotranspiration information to compensate for more or less available soil moisture.
 - c) Native riparian habitat must be maintained and enhanced along the property boundary with the North Umpqua River.
25. Subsequent to the receipt of ODFW's recommendation, the Department noted that some of the information provided to ODFW in the initial request for a recommendation was erroneous. This necessitated another analysis by ODFW of the injury to instream water right Certificate 59939.
 26. The initial proposal involved a total of 1.70 acres of irrigation. The amended information reflects a reduction of 0.31 acre leaving 1.39 acres (consistent with the proposed re-description) proposed to be served by the new point of diversion.
 27. On August 4, 2008 the Department received the second recommendation from ODFW. This recommendation re-confirmed the initial recommendation and concluded that with the inclusion of the original conditions (as stated in Finding of Fact #25 above) the proposed change would result in a net benefit to the resource.
 28. Notice of opportunity to comment on the initial recommendation to consent to injury of instream water right Certificate 59939 was provided to the applicant and all persons who filed comments under OAR 690-380-4030. Additionally, notice of the opportunity to comment was published in the Department weekly notice on June 10, 2008 pursuant to OAR 690-380-5050(4).
 29. Furthermore, on September 24, 2008, an email incorporating the second recommendations of ODFW to consent to injury was sent to the applicant. The email asked for either acceptance or disagreement with the conditions suggested by ODFW.
 30. On September 24, 2008, the applicant emailed the Department and agreed to the conditions outlined in Finding of Fact #25.
 31. On December 10, 2008, the Department issued a *revised* Preliminary Determination proposing to approve Transfer Application T-7683 and mailed a copy to the applicants. Additionally, notice of the Preliminary Determination for the transfer application was published on the Department's week notice on December 16, 2008 pursuant to ORS 540.520 and OAR 690-380-4020. No protests were filed in response to the notice.

Conclusions of Law

Based on the recommendation of the Oregon Department of Fish and Wildlife, the Department consents to injury of the instream water right evidenced by Certificate 59939. The proposed change in point of diversion proposed in Transfer Application T-7683, as conditioned, is consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000 and 690-380-5030.

Now, therefore, it is ORDERED:

1. The change in point of diversion proposed in Transfer Application T-7683, as conditioned, is approved.
2. Water right Certificate 57553 is cancelled. A new certificate will be issued describing that portion of the right not affected by this transfer and incorporating the re-description and partial cancellation.
3. The right to use of the water is restricted to beneficial use at the place of use described and is subject to all other conditions and limitations contained in Certificate 57553 and any related decree.
4. The applicant will limit water use to an average of one-inch-per-week during the irrigation season of each year, adjusted using the Eugene Water and Electric Board's (or other appropriate entity's) evapo-transpiration information.
5. Native riparian habitat must be maintained and enhanced along the property boundary with the North Umpqua River.
6. When required by the Department, the water user shall install, maintain and operate 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 measuring device must be approved by the Department prior to beginning construction and shall be installed under the general supervision of the Department.
7. 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, 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.
8. The approved change shall be completed and full beneficial use of the water shall be made on or before October 1, 2012. A Claim of Beneficial Use prepared by a Certified Water

Rights Examiner shall be submitted by the applicant to the Department within one year after the deadline for completion of the change and full beneficial use of the water.

9. Superseding certificates and a final order incorporating the re-description (outlined in the table in Finding of Fact #7) will be issued for the following: Transfer Application T-5259, Certificates 56466, 55438, 60003, 81736, 44370, 64851 and 57553.
10. When satisfactory proof of the completed change is received, a new certificate confirming the portion of the right transferred will be issued.

Dated at Salem, Oregon this 23rd day of January, 2009.

William E. Feber
for Phillip C. Ward, Director

Mailing date: FEB 05 2009