

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

In the Matter of Instream Transfer)	FINAL ORDER APPROVING A
Application T-6646, Yamhill County)	CHANGE IN PLACE OF USE AND
)	CHARACTER OF USE AND PARTIAL
)	ABANDONMENT OF GROUND
)	WATER REGISTRATIONS

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. OAR Chapter 690, Division 077 provides additional criteria for evaluating transfers to instream water rights.

Applicant

A & R SPADA FARMS
7251 ST. PAUL HWY NE
ST. PAUL, OR 97137

Agent

JORDAN SCHRADER, PC
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PO BOX 230669
PORTLAND, OR 97281

Findings of Fact

Background

1. On November 25, 1991, A & R Spada Farms filed an application to change the point of diversion under Certificate 13772. The Department assigned the application number T-6646.
2. Initial notice of the application for transfer was published pursuant to ORS 540.520 and OAR 690, Division 15 (since replaced by Division 380). Consistent with the transfer application process previously described in Division 15, notice of the application was also published in a newspaper for three consecutive weeks on September 6, 13 and 20, 1995. WaterWatch of Oregon filed a comment requesting that fish screening and bypass devices meeting the specifications of the Oregon Department of Fish and Wildlife be required at the proposed diversion point. The Oregon Department of Fish and Wildlife did request inclusion of a condition requiring installation and maintenance of fish screening and bypass devices approved by an ODFW representative prior to diversion of any water from the proposed

<p>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.</p>

diversion. These comments were made consistent with the transfer application's original intent to change the point of diversion.

3. On January 3, 2006, the Department sent the applicant a draft Preliminary Determination proposing to deny the transfer application.
4. On January 3, 2007, A & R Spada Farms filed an application to obtain a new surface water permit to divert water from the Willamette River for Irrigation use. On February 23, 2007, the Water Resources Commission granted A & R Spada Farms a Basin Program exception to allow the use of water from the Willamette River for irrigation purposes under a new surface water permit. The Basin Program exception granted to A & R Spada Farms required that transfer application T-6646, as well as transfer application T-6645, be converted to an instream transfer to offset the new irrigation use from the Willamette River.
5. On June 26, 2007, the Department issued a Proposed Final Order to approve surface water permit application S-86739 contingent upon the approval of transfer applications T-6646 and T-6645 as instream transfers.
6. On June 26, 2007, application T-6646 was amended, with concurrence from the applicant, to be an instream transfer application.
7. The right to be transferred is as follows:

Certificate: 13772 in the name of ROY E. WILL (perfected under Permit S-13625)
Use: IRRIGATION of 52.0 ACRES
Priority Date: APRIL 27, 1939
Rate: 0.65 CUBIC FOOT PER SECOND (CFS)
Limit/Duty: ONE-EIGHTIETH cfs per acre, not to exceed 2.5 acre-feet (AF) per acre per year
Source: OLD CHANNEL OF WILLAMETTE RIVER, tributary to
 WILLAMETTE RIVER

Authorized Point of Diversion (POD):

Twtp	Rng	Mer	Sec	Q-Q	GLot	Survey Coordinates
5 S	3 W	WM	23	SE SW	1	UNSPECIFIED BY CERTIFICATE
5 S	3 W	WM	26	NE NE	1	UNSPECIFIED BY CERTIFICATE
5 S	3 W	WM	26	NW NE	2	UNSPECIFIED BY CERTIFICATE

Authorized Place of Use:

Twtp	Rng	Mer	Sec	Q-Q	GLot	Acres
5 S	3 W	WM	23	SE SW	1	20.00
5 S	3 W	WM	26	NE NE	1	9.10
5 S	3 W	WM	26	NW NE	2	22.90

8. A total of 130.0 acre-feet of water may be beneficially used annually under the existing right.
9. There are two ground water registrations (GR-3567 and G-3568) appurtenant to the same place of use as described for Certificate 13772. On November 5, 2007, the applicant submitted affidavits to partially abandon these ground water registrations.

10. On March 13, 2008, the applicant requested that the proposed instream use be protected as follows:

Purpose: Instream use for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values.

Location: Create an instream use at the POD located as follows:

Twp	Rng	Mer	Sec	Q-Q	GLot	Survey Coordinates
5 S	3 W	WM	26	NE NE	1	UNSPECIFIED BY CERTIFICATE

11. On December 20, 2007, the Department's Watermaster visited the site and identified that the above point of diversion is more accurately located at approximately Latitude 45.11582 degrees North and Longitude 123.02448 degrees West.
12. Notice of the application as an instream transfer was published pursuant to ORS 540.520 and OAR 690-380-4000 on September 4, 2007. No comments were filed in response to this notice.
13. On February 15, 2008, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-6646 to the applicant. The draft Preliminary Determination set forth a deadline of March 15, 2008, for the applicant to respond. On March 13, 2008, the applicant concurred with the findings of the draft Preliminary Determination and requested that the Department proceed with issuance of a Preliminary Determination.
14. On March 25, 2008, the Department issued a Preliminary Determination proposing to approve Transfer Application T-6646 and mailed a copy to the applicant. Additionally, notice of the Preliminary Determination for the transfer application was published in the Department's weekly notice on April 1, 2008, and in Statesman Journal on April 4, 11, and 18, 2008, pursuant to ORS 540.520 and OAR 690-380-4020. No comments or protests were filed in response to the Department's weekly notice or to the newspaper notice.

Instream Transfer Review Criteria (OAR 690-77-0075 and 690-380-4010)

15. Evidence was submitted with the application indicating that water has been used within the last five years according to the terms and conditions of the right. The condition of the diversion structure and ditches for the lands to which the right is appurtenant suggest that there have been extended periods of time during which the right was not exercised. However, the information in the record is not sufficient to initiate cancellation proceedings under ORS 540.631.
16. This instream transfer application (T-6646) is being processed in conjunction with instream transfer application T-6645. Transfer application T-6645 proposes to transfer Certificate 13774 (max rate of 0.73 CFS) to instream use and transfer application T-6646 proposes to transfer Certificate 13772 (max rate of 0.65 CFS) to instream use. If flows were protected instream at the full rates allowed by each right over the full irrigation season (March 1 through October 31) the max duty allowed by each right would be exceeded.

17. In addition, if flows were protected at the max quantity allowed for each right proposed for transfer under T-6645 and T-6646, estimated average natural flows for the area would be exceeded. Estimated average natural flows may not be exceeded except in those instances where periodic flows are significant for the requested instream use.
18. Based upon Findings of Fact #16 and #17, on March 13, 2008, the applicant requested that the proposed instream use be protected as follows:

Period	Rate (cfs)	Volume (acre-feet)
March 1 through March 31	0.39	23.98
April 1 through April 30	0.26	15.47
May 1 through May 31	0.18	11.07
June 1 through June 30	0.13	7.74
July 1 through July 31	0.07	4.30
August 1 through August 31	0.04	2.46
September 1 through September 30	0.08	4.76
October 1 through October 31	0.19	11.68
	Total AF	81.46

19. The proposed change would not result in enlargement of the right.
20. The proposed change would not result in injury to other water rights.
21. The amount of the proposed instream flow and the timing of the proposed instream flow is allowable within the limits and use of the original water right.
22. The protection of flows at the authorized point of diversion (described in Finding of Fact #10 and further defined in Finding of Fact #11) is appropriate, considering:
- a) The instream water right begins at the recorded point of diversion;
 - b) The location of confluences with other streams downstream of the point of diversion;
 - c) There are known areas of natural loss of streamflow to the river bed downstream from the point of diversion; and
 - d) Any return flows resulting from the exercise of the existing water right would re-enter the river downstream of the point of the instream water right.
23. There are no existing instream water rights for the same point as that proposed for the new instream water right.
24. If any instream water rights are established in the future, an instream use created as a result of this transfer may replace a portion of any existing instream rights established pursuant to ORS 537.346 (minimum streamflow conversion) and ORS 537.341 (state agency instream

application process), with an earlier priority date. Any instream use created as a result of this transfer may also add to any other instream water rights created for the same location pursuant to ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process).

25. The total monthly quantities of water to be protected under the proposed instream right at a point (as described in Findings of Fact #18) will provide for a beneficial purpose and, together with the proposed instream quantities under transfer application T-6645, do not exceed the estimated average natural flow.

Partial Abandonment of Ground Water Registrations

26. There are existing (layered) ground water registrations, GR-3567 and GR-3568, appurtenant to the lands on which Certificate 13772 is proposed for transfer to instream use. Changes in place of use and/or character of use may only be made if concurrent changes are also made to other layered water rights. If other layered water rights are not included as part of the transfer application, then they may also be cancelled/abandoned.
27. Consistent with OAR 690-380-2240, on October 4, 2007, the Department provided notice to the applicants of the layered ground water registrations. Within 30 days of this notification the applicant submitted affidavits certifying that the affected portions of the ground water registrations had been abandoned. The abandonment of these ground water registrations is contingent upon the approval of this instream transfer application.

28. The portion of the first Ground Water Registration to be abandoned is as follows:

Registration: Registration Number GR-3567 (Certificate Number GR-3276) in the name of Cecil LeRoy Will

Use: Irrigation

Tentative Priority Date: April, 1939

Quantity: 71.4 Gallons per Minute (GPM)

Acres: 20.0 acres

Source: Pump Well, within the Willamette River Basin

Original POD:

Township		Range		Meridian	Sec	¼ ¼	Location
5	S	3	W	W.M.	23	NE SW	1095 FEET SOUTH AND 720 FEET WEST FROM CENTER OF SECTION 23

Original Place of Use:

Township		Range		Meridian	Sec	¼ ¼	Tax Lot	Acres
5	S	3	W	WM	23	SE SW	600	20.0

29. The portion of the second Ground Water Registration to be abandoned is as follows:
Registration: Registration Number GR-3568 (Certificate Number GR-3277) in the name of Cecil LeRoy Will

Use: Irrigation

Tentative Priority Date: October, 1941

Quantity: 302.7 Gallons per Minute (GPM)

Acres: 32.0 acres

Source: Pump Well, within the Willamette River Basin

Original POD:

Township		Range		Meridian	Sec	¼ ¼	Location
5	S	3	W	W.M.	26	NW NE	1240 FEET EAST AND 6 FEET SOUTH FROM NE CORNER OF SECTION 26

Original Place of Use:

Township		Range		Meridian	Sec	¼ ¼	Tax Lot	Acres
5	S	3	W	WM	26	NE NE	800	9.1
5	S	3	W	WM	26	NW NE	800	22.9

30. The affidavits to abandon a portion of a ground water registration will be placed in the appropriate registration files. A final determination on the abandonment of these ground water registrations will occur in an adjudication proceeding under ORS 537.670 to 537.695.

Conclusions of Law

The changes in character of use and place of use to instream use proposed in application T-6646 are consistent with the requirements of ORS 540.505 to 540.580, ORS 537.348, OAR 690-380-5000, and OAR 690-077-0075 and the partial abandonment of the Ground Water Registrations should be recognized. The approval of the application and abandonment of the Ground Water Registrations shall be contingent up the final approval of a permit under Application S-86739.

Now, therefore, it is ORDERED:

1. The changes in character of use and place of use to instream use proposed in application T-6646 are approved.
2. The partial abandonment of Ground Water Registration GR-3567 (Certificate of Registration GR-3276) and of Ground Water Registration GR-3568 (Certificate of Registration GR-3277) is recognized. Recognition of the partial abandonment shall not be construed as a final determination of the right to appropriate ground water under the registrations. Such a determination will occur in an adjudication proceeding under ORS 537.670 to 537.695.
3. Water right certificate 13772 is cancelled. A new certificate confirming the instream water right shall be issued.

4. The instream water right shall provide for the protection of streamflows for a point located at:

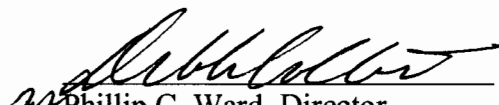
Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
5 S	3 W	WM	26	NE NE	APPROXIMATELY LOCATED AT LATITUDE 45.11582 DEGREES NORTH AND LONGITUDE 123.02448 DEGREES WEST.

5. The quantities of water to be protected under the instream water right are:

Period	Rate (cfs)	Volume (acre-feet)
March 1 through March 31	0.39	23.98
April 1 through April 30	0.26	15.47
May 1 through May 31	0.18	11.07
June 1 through June 30	0.13	7.74
July 1 through July 31	0.07	4.30
August 1 through August 31	0.04	2.46
September 1 through September 30	0.08	4.76
October 1 through October 31	0.19	11.68
	Total AF	81.46

6. Water rights upstream of the original point of diversion shall not be subject to regulation for flows in excess of the quantities to which this instream water right is entitled at the original points of diversion.
7. The instream right established by this transfer shall replace a portion of instream water rights established pursuant to ORS 537.341 or 537.346 and be in addition to instream water rights established pursuant to ORS 537.348 or 537.470 unless otherwise specified by an order approving a new instream water right under these statutes.
8. The right to the 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 13772 and any related decree.
9. The former place of use of the transferred water shall no longer receive water as part of this right.

Dated at Salem, Oregon this 23rd day of June, 2008.


Phillip C. Ward, Director

Mailing date: JUN 23 2008