

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

In the Matter of Allocation of Conserved )  
Water Application CW-28, )  
Umatilla County )  
 )  
 )

FINAL ORDER OF APPROVAL ON  
COMPLETION AND FINALIZATION  
ALLOCATION OF CONSERVED WATER  
CW-28

**Applicant**  
Earl Brown & Sons, Inc.  
PO Box 249  
Milton-Freewater, OR 97862

**Applicant**  
Jim Waliser Orchards, Inc.  
c/o Jennifer Jackson  
52967 Sunquist Road  
Milton-Freewater, OR 97862

**Applicable Law**

Any person or group of persons holding a water use subject to transfer as defined in ORS 540.505 may submit an application for an Allocation of Conserved Water to the Water Resources Commission for a conservation project that has not yet been implemented or was implemented within five years prior to the submission of the application. ORS 537.465. Under the Allocation of Conserved Water Program, a portion of the water proposed to be conserved by an applicant may be used on additional lands, put to a different use, or be leased or sold to another user. OAR 690-018-0010. A portion of the water conserved is allocated to the state to be converted to an instream water right or to revert to the public for appropriation by other water users. ORS 537.470(3).

An application for an allocation of conserved water shall include: (a) A description of the measure as implemented and the date on which the measure was implemented; (b) A description of the diversion facilities before the conservation measure was implemented and the amount of water that was diverted at the facilities before the conservation measure was implemented; (c) The amount of water needed to supply existing rights after implementation of the conservation measure; (d) The amount of water conserved by implementing the conservation measure; (e) The proposed allocation and use of the conserved water if different from the allocation specified in ORS 537.470; (f) The intended use of any water allocated to the applicant and the proposed location of use; (g) The applicant's choice of priority date for the conserved water; (h) Evidence that the measure was implemented within five years prior to the date of filing the application;

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.

and (i) Any other information the commission considers necessary to evaluate the application. ORS 537.465.

After determining any quantity of water needed to mitigate the effects on other water rights, 25-percent of the conserved water shall be allocated to the state and 75-percent to the applicant unless the applicant proposes a higher allocation to the state or more than 25-percent of the funds used to finance the conservation measures comes from federal or state sources not subject to repayment. ORS 537.470(3).

If an application for the allocation of conserved water is approved, the Department shall issue orders describing the changes in the original water rights. Once the conservation project is finalized, the Department shall issue new certificates preserving the previously established-priority date of the rights to reflect the unaffected portion of the water rights. ORS 537.470(6).

ORS 537.455 to 537.500 authorize and establish the process by which a water right holder may submit a request for an allocation of conserved water. OAR Chapter 690, Division 18, implements the statutes and provides the Department's procedures and criteria for evaluating allocation of conserved water applications. OAR Chapter 690, Division 077 provides additional criteria for evaluating proposed instream water rights.

### Findings of Fact

1. On July 30, 2003, Earl Brown and Sons, Inc. filed an application for an allocation of conserved water under Certificates 13126, 13088, and 12768. The Department assigned the application number CW-28.
2. Allocation of Conserved Water Application CW-28 was placed on hold pending the completion of the HB-3201 District mapping process. The HB-3201 process was completed in May 2017.
3. On May 5, 2017, confirming Certificate 92440 in the name of Earl Brown and Sons, Inc. was issued to replace Certificates 12768 and 13126, as well as portions of Certificates 12565, 12567, 12603, 12637, 12687, 12836, 13164, 31669, 88073, and T-7642 (13128).
4. On May 5, 2017, confirming Certificate 92473 in the name of Jim Waliser Orchards, Inc. was issued to replace Certificate 13088.
5. On April 20, 2018, Earl Brown & Sons, Inc., and Jim Waliser Orchards, Inc. filed an amended application under Certificate 92473 and a portion of Certificate 92440.
6. The conservation project involves piping of open ditches to eliminate seepage losses and converting from flood irrigation to micro-sprinkler irrigation. The piping of open ditches and conversion from flood to sprinkler irrigation are proven technologies for conserving water.
7. Application CW-28 proposes rate reductions of approximately 0.065 cubic foot per second (cfs) under Certificate 92440 and 0.063 cfs under Certificate 92473.



Conserved Water Description						
		Certificate		Needed		Conserved Water
Originating Certificate	Priority	Maximum CFS	CFS/AC	Maximum CFS	CFS/AC	Maximum CFS
12768/92440	1898	0.089	0.0370	0.060	0.025	0.029
13126/92440	1898	0.111	0.0370	0.075	0.025	0.036
13088/92473	1886	0.188	0.0375	0.125	0.025	0.063
Totals		0.388		0.260		0.128

8. The portion of the first right to be modified by CW-28 is as follows:

**Certificate:** 92440 in the name of Earl Brown & Sons, Inc. (confirmed by the Walla Walla Decree)  
**Use:** IRRIGATION of 5.41 ACRES  
**Priority Dates:** 1898  
**Rate:** 0.20 CUBIC FOOT PER SECOND (CFS)  
**Limit/Duty:** The use is limited to 1.5 MINER'S INCHES PER ACRE, or its equivalent in case of rotation, measured at the point of diversion from the source.  
**Source:** Little Walla Walla River, tributary of the Walla Walla River  
**Authorized Point of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
5 N	35 E	WM	12	SW NE	1030 FEET NORTH AND 900 FEET EAST FROM THE CENTER OF SECTION 12

**Authorized Place of Use:**

IRRIGATION							
Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres	Prior Cert.
6 N	35 E	WM	35	SW NW	1400	2.41	12768
6 N	35 E	WM	35	SW NW	1300	3.00	13126
Total						5.41	

9. The portion of the second right to be modified by CW-28 is as follows:

**Certificate:** 92473 in the name of Jim Waliser Orchards, Inc. (confirmed by the Walla Walla Decree)  
**Use:** IRRIGATION of 5.0 ACRES  
**Priority Dates:** 1886  
**Rate:** 0.188 CUBIC FOOT PER SECOND (CFS)  
**Limit/Duty:** The use is limited to 1.5 MINER'S INCHES PER ACRE, or its equivalent in case of rotation, measured at the point of diversion from the source.  
**Source:** Little Walla Walla River, tributary of the Walla Walla River  
**Authorized Point of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
5 N	35 E	WM	12	SW NE	1030 FEET NORTH AND 900 FEET EAST FROM THE CENTER OF SECTION 12

**Authorized Place of Use:**

IRRIGATION							
Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres	Prior Cert.
6 N	35 E	WM	35	NW SW	700	5.0	13088

10. Certificates 92440 and 92473 do not list a period of use. Based on the Walla Walla River Decree, the existing water right has a year-round season of use without a specified duty limitation. However the existing rights are subject to beneficial use without waste in accordance with ORS 536.310. Use of the existing rights at the full amounts allowed year-round would exceed the amount necessary to accomplish the existing beneficial uses. Consistent with recent practices by water users and irrigation districts within the basin, a maximum of 8.4 acre-feet per acre (AF/acre) can be beneficially diverted for the existing use.
11. For purposes of this allocation of conserved water application the season of use is April 1 through October 31, and such other times when agricultural diversion are being exercised.
12. Water has been used within the five-year period prior to submission of the allocation of conserved water application, and no evidence is available that would demonstrate that the right is subject to forfeiture under ORS 540.610.
13. A pump, pipeline, and 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 the application.
14. The Applicants request the conserved water be allocated as follows:

Certificate Priority	State's Portion		Applicant's Portion		Conserved Water	
	Percentage	Maximum Rate (CFS)	Percentage	Maximum Rate (CFS)	Percentage	Maximum Rate (CFS)
1898	61%	0.040	39%	0.025	100%	0.065
1886	61%	0.038	39%	0.025	100%	0.063
	Totals	0.078		0.050		0.128

15. The Applicants propose that their portion of the conserved water be allocated for an out-of-stream use within the S½ SWNW of Section 35, Township 6 North, Range 35 East, W.M.
16. The Applicants request that the priority date for any conserved water be the same as the originating right.
17. The Applicants funded 100% of the conservation project.
18. The Applicants submitted a completed Land Use Form from Umatilla County with the original application, which indicated the proposed use was allowed outright or is not regulated by Umatilla County's comprehensive plan.



19. The implementation of the conservation measures began no earlier than 2002. The original application was filed within 5 years of implementation of the conservation measures. The Applicants request the allocation be finalized upon approval of this application.
20. The Applicants propose that any instream water right created be for the purposes of conservation, maintenance, and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat, and other ecological values.
21. The Applicants requested the Department protect the new instream water right created from the conserved water under Certificates 92473 and 92440 from the authorized points of diversion where water is diverted for the Little Walla Walla River from the Walla Walla River at approximately River Mile (RM) 50 to the Oregon-Washington state line at approximately RM 44.5. The topographic map the Department now utilizes shows the authorized point of diversion located at approximately RM 45.4 and the Oregon-Washington state line at approximately RM 40.0.
22. The project is complete and no additional time is needed for finalization.
23. The application meets the requirements of OAR 690-018-0040.
24. The original application included a letter from the Oregon Department of Fish and Wildlife (ODFW) supporting the application stating the water allocated to instream use will benefit sensitive fish species in the Walla Walla basin.
25. Notice of the proposed conservation project was published in the Department's weekly notice on November 18, 2003, and in the Valley Herald newspaper on November 7, 14, and 21, 2003, as required under OAR 690-018-0050(1)(a) and (2). No comments were filed in response to the notices. On October 9, 2018, the Department issued a Preliminary Determination proposing to approve Allocation of Conserved Water application CW-28, and mailed a copy to the Applicant on October 10, 2018. No protests were filed within 60 days from the date of mailing the Preliminary Determination. OAR 690-018-0050(6).

***Allocation of Conserved Water Review Criteria [OAR 690-018-0050]***

26. The proposed allocation of conserved water will result in a reduced diversion of the uses allowed under the existing rights pursuant to OAR 690-0018-0050(4)(a). (Finding of Fact #7).
27. On August 31, 2018, the District #5 Watermaster performed a review of the proposed Allocation of Conserved Water Project. The Watermaster's review indicated the existence of seepage losses from the authorized PODs, commonly referred to as the Little Walla Walla River diversion headgate, at approximately RM 45.4 to the Oregon-Washington state line at approximately RM 40.0. Enlargement could occur unless the instream water right allows for this seepage loss. In addition, the Watermaster determined the conservation project could harm other water rights if it was not conditioned to limit the maximum amount of water necessary to accomplish the existing beneficial uses.

Harm to other water rights can be mitigated by not protecting more water in the Walla Walla River than is legally available at the point of diversion. Harm can also be mitigated by limiting the period when water is being protected instream to April 1 through October 31 of each year, and other times when agricultural diversion are being exercised. Therefore, as conditioned, no quantity of conserved water is needed to mitigate for harm to other water rights. OAR 690-018-0050(4)(d).

- 28. The conservation project is consistent with the local comprehensive land use plan requirements established in OAR 690-005-0045. (Finding of Fact #18). OAR 690-018-0050(4)(c).
- 29. Pursuant to OAR 690-018-0050(4)(e), the new reduced rates for the existing uses involved in Allocation of Conserved Water Application CW-28 under Certificates 92440 and 92473 are as follows:

Certificate	Priority	Rate	
		Maximum CFS	CFS/AC
92440	1898	0.135	0.025
92473	1886	0.125	0.025

(Finding of Fact #7).

- 30. Pursuant to OAR 690-018-0050(4)(e), the rates allocated to the State for instream use are as follows:

Priority	Maximum Rate (CFS)
1891	0.040
1886	0.038

(Finding of Fact #14).

- 31. As required by OAR 690-018-0050(4)(f), the Department has determined that the instream right created will support public benefits. The proposed flows are necessary as the flow currently being left instream for fish benefits is unprotected. The proposed instream water right would allow the instream flow to be protected by priority date. (Finding of Fact #24).
- 32. Pursuant to ORS 537.470(3) and OAR 690-018-0050(4)(g), the amount of water allocated to the Applicants does not need to be adjusted because the Applicants funded 100% of the project. (Finding of Fact #17). The rates allocated to the Applicants are as follows:

Certificate	Priority	Maximum Rate (CFS)
92440	1898	0.025
92473	1886	0.025

(Finding of Fact #14)

- 33. The new instream water right created will be protected in the Walla Walla River from the authorized POD, known as the Little Walla Walla River diversion headgate, at approximately



River Mile (RM) 45.4 to the Oregon-Washington state line at approximately RM 40.0 for the conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values. OAR 690-018-0050(4)(h); OAR 690-077-0015(8).

34. The instream right shall allow the use and protection of flows as follows:

From the authorized POD as described below, at approximately RM 45.4.

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
5 N	35 E	WM	12	SWNE	1030 FEET NORTH AND 900 FEET EAST FROM THE CENTER OF SECTION 12

To the Oregon-Washington state line, at approximately RM 40.0 as follows:

The instream right shall allow the use and protection of flows at a point as follows:

Priority Date	Period	Rate (cfs)
1898	April 1 through October 31	0.040
1886	April 1 through October 31	0.038
Total		0.078

35. The amount and timing of the proposed instream flow is allowable within the limits and use of the original water right. OAR 690-077-0015(10).
36. The protection of flows at the authorized point of diversion is appropriate, considering:
- The instream water use begins at the recorded point of diversion;
  - The location of confluences with other streams downstream of the point of diversion.
  - There are areas of natural loss of streamflow to the river bed downstream from the point of diversion; and
  - 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.  
OAR 690-077-0015(8).
37. The combination of instream rights for the proposed reach on the Walla Walla River does not exceed the amount needed to provide increased public benefits, and do not exceed the estimated average natural flow or level occurring from the drainage system. OAR 690-077-0015(4) and (11).
38. There are no existing instream water rights on the Walla Walla River established pursuant to ORS 537.341 (minimum flow conversion) or ORS 537.336 (state agency process) at the point to be protected. By adding to other instream water rights established pursuant to ORS 537.348 (instream transfer process) and ORS 537.470 (allocation of conserved water process) located within the proposed reach, any new instream water rights established by this conserved water project would provide protection for additional flows identified as necessary for conservation, maintenance, and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat, and other ecological values. OAR 690-077-0015(11).

40. The proposed areas within which the conserved water is proposed to be used for out-of-stream uses are within the S½ SWNW of Section 35, Township 6 North, Range 35 East, W.M. (Finding of Fact #15. OAR 690-018-0050(4)(h).

41. The Applicants propose to utilize their portion of conserved water as follows:

**Use:** Irrigation of 2.0 acres  
**Priority:** 1898 and 1886  
**Rate:** 0.050 CFS measured at the point of diversion from the source, being 0.025 cfs under the 1898 priority, and 0.025 cfs under the 1886 priority.

**Source:** Little Walla Walla River, Tributary of the Walla Walla River

**Authorized Point of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
5 N	35 E	WM	12	SWNE	1030 FEET NORTH AND 900 FEET EAST FROM THE CENTER OF SECTION 12

**Authorized Place of Use:**

IRRIGATION							
Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres	Priority
6 N	35 E	WM	27	SW NW	1400	1.0	1898
6 N	35 E	WM	27	SW NW	1400	1.0	1886

42. The project is complete. No additional time is required for finalization. (Finding of Fact #22). OAR 690-018-0050(4)(i).

43. As conditioned in Finding of Fact #27, no other conditions or limitations are needed to prevent or mitigate for harm to existing water rights. (Finding of Fact #27). OAR 690-018-0050(4)(j).

**Conclusions of Law**

The project described in Allocation of Conserved Water Application CW-28, is consistent with the criteria in ORS 537.455 to 537.500, and OAR Chapter 690, Divisions 018 and 077.

1. The proposed change will result in a reduced diversion for the uses allowed under the original water right. Findings of Fact #7 and #29.
2. The proposed allocation of conserved water, as conditioned, will not harm existing water rights. Findings of Fact #27 and #43.
3. The application is consistent with the requirements established in OAR 690-005-0045. Findings of Fact #18 and #28.

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

1. The changes proposed in CW-28 are approved.



2. The quantities of water conserved and allocated are as follows:

Certificate Priority	State's Portion		Applicants' Portion		Conserved Water	
	Percentage	Maximum Rate (CFS)	Percentage	Maximum Rate (CFS)	Percentage	Maximum Rate (CFS)
1898	61%	0.040	39%	0.025	100%	0.065
1886	61%	0.038	39%	0.025	100%	0.063
	Totals	0.078		0.050		0.128

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 92440, 92473, and any related decree.
4. Water Right Certificate 92440 is cancelled. A new certificate will be issued for that portion of the water right not affected by this Allocation of Conserved Water application, and a superseding Certificate will be issued for the existing use and place of use at the reduced rate and duty as follows:

**Originating**

**Certificate:** 92440 in the name of Earl Brown & Sons, Inc. confirmed by the Walla Walla Decree)

**Use:** IRRIGATION of 5.41 ACRES

**Priority Dates:** 1898

**Rate:** 0.135 CUBIC FOOT PER SECOND (CFS)

**Limit/Duty:** The use is limited to ONE MINER'S INCH PER ACRE, or its equivalent in case of rotation, measured at the point of diversion from the source.

**Source:** Little Walla Walla River, tributary of the Walla Walla River

**Authorized Point of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
5 N	35 E	WM	12	SW NE	1030 FEET NORTH AND 900 FEET EAST FROM THE CENTER OF SECTION 12

**Authorized Place of Use:**

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres
6 N	35 E	WM	35	SW NW	1400	2.41
6 N	35 E	WM	35	SW NW	1300	3.00
Total						5.41

5. Water Right Certificate 92473 is cancelled. A new certificate will be issued for that portion of the water right not affected by this Allocation of Conserved Water application, and a superseding Certificate will be issued for the existing use and place of use at the reduced rate and duty as follows:

**Originating**

**Certificate:** 92473 in the name of Jim Waliser Orchards, Inc. confirmed by the Walla Walla Decree)

**Use:** IRRIGATION of 5.0 ACRES  
**Priority Dates:** 1886  
**Rate:** 0.125 CUBIC FOOT PER SECOND (CFS)  
**Limit/Duty:** The use is limited to ONE MINER'S INCHES PER ACRE, or its equivalent in case of rotation, measured at the point of diversion from the source.  
**Source:** Little Walla Walla River, tributary of the Walla Walla River  
**Authorized Point of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
5 N	35 E	WM	12	SW NE	1030 FEET NORTH AND 900 FEET EAST FROM THE CENTER OF SECTION 12

**Authorized Place of Use:**

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres
6 N	35 E	WM	35	NW SW	700	5.0

6. Water use measurement conditions:
  - a. Before the use of the Applicants' portion of conserved water, the water user shall install a totalizing flow meter, or, with prior approval of the Director, another suitable measuring device, at each point of diversion and where water is diverted into the bulge.
  - b. The water user shall maintain the meters or measuring devices in good working order.
  - c. The water user shall allow the Watermaster access to the meters or measuring devices; provided however, where the meters or measuring devices are located within a private structure, the Watermaster shall request access upon reasonable notice.
7. The project is complete and no additional time is needed for finalization.
8. The proposed areas within which the Applicants' portion of conserved water is to be used for out-of-stream uses are within Sections 27 and 35, Township 6 North, Range 35 East, W.M., more specifically described as Tax Lot 200 in the NESW of Section 27, T6N, R35E, W.M.
9. The Applicants' portion of conserved water may be utilized at the following location and quantity until such time as a subsequent Notice of Use and Disposition form is filed, as follows:

**Use:** Irrigation of 2.0 Acres  
**Priority:** 1898 and 1886  
**Rate:** 0.050 CFS measured at the point of diversion from the source, being 0.025 cfs under the 1898 priority, and 0.025 cfs under the 1886 priority.  
**Source:** Little Walla Walla River, Tributary of the Walla Walla River  
**Authorized Point of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
5 N	35 E	WM	12	SWNE	1030 FEET NORTH AND 900 FEET EAST FROM THE CENTER OF SECTION 12



**Authorized Place of Use:**

IRRIGATION							
Twp	Rng	Mer	Sec	Q-Q	Tax Lot	Acres	Priority
6 N	35 E	WM	27	SW NW	1400	1.0	1898
6 N	35 E	WM	27	SW NW	1400	1.0	1886

10. The Department shall issue a new instream water right certificate for the conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values in the Walla Walla River from the authorized POD as described below, also known as the Little Walla Walla headgate diversion at approximately River Mile 45.4:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
5 N	35 E	WM	12	SWNE	1030 FEET NORTH AND 900 FEET EAST FROM THE CENTER OF SECTION 12

To the Oregon-Washington state line at approximately RM 40.0. The instream right shall allow the use and protection of flows as follows:

Priority Date	Period	Rate (cfs)
1898	April 1 through October 31	0.040
1886	April 1 through October 31	0.038

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 point of diversion.

Within the specified stream reach, the amount of water to which this right is entitled shall not exceed the quantity of water legally available at the original point of diversion. The stream channel losses and gains will be calculated based on available data and the use of water by senior appropriators will determine the amount of water to which the right is entitled downstream from the original point of diversion within the specified stream reach.

The instream right established by this conserved water application shall replace a portion of instream water rights established pursuant to ORS 537.341 or 537.346 and shall be in addition to instream water rights established pursuant to ORS 537.348 or 537.470 unless otherwise specified by a subsequent order establishing a new instream water right.

Dated at Salem, Oregon this 20<sup>th</sup> day of December, 2018.

  
 Dwight French, Water Rights Services Administrator for  
 THOMAS M. BYLER, DIRECTOR



Mailing Date: DEC 21 2018