

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

In the Matter of the Proposed Allocation of) FINAL ORDER APPROVING
Conserved Water submitted by Oregon Water) ALLOCATION OF
Trust on behalf of Deborah Thompson) CONSERVED WATER
(Gadberry) and William Morgan, Certificates)
17163, 17164, 17170 and 17165, Jackson)
County, Oregon)

Application History

On June 25, 2004, the Oregon Water Trust on behalf Deborah Thompson (Gadberry) and William Morgan, filed an application for the allocation of conserved water for certificates 17163, 17164, 17170 and 17165. The Department assigned this conserved water application number C-19.

The conservation project, located in Jackson County, was completed in September 2002. The project consists of moving the point of diversion downstream (previously approved under Transfers 8829 and 8830), removing the Bieberstadt dam, eliminating usage of the associated ditch, installing a pump in Little Butte Creek, delivering water via pipes and applying it with sprinklers. The application proposes to allocate 100 percent of the conserved water to the State for instream use.

On October 5, 2004, the Department published notice inviting public comments on the application. On October 5, 12, and 19, 2004, the Upper Rogue Independent newspaper published notice inviting public comments on the application. No comments were received.

On December 13, 2004, Steve Parrett, of the Oregon Water Trust, verbally amended the application to exclude the 3.2 acres of Certificate 17165 not involved in Transfer 8830.

Applicable Law

Under ORS 537.465 (2003 HB 2456), any person holding a water use subject to transfer as defined in ORS 540.505 may submit an application to the Water Resources Commission for approval of an allocation of conserved water that was implemented within five years prior to submission of the application. 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, may be 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.

This is a final order in other than 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.

Under ORS 537.470(3) (2003 HB 2456), 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.

If an application for the allocation of conserved water is approved, the Department shall issue orders for proposed new certificates covering the changes in the original water rights and once the conservation project is completed separate new certificates preserving the previously established priority of rights shall be issued to cover the unaffected portion of the water rights and separate new certificates describing the right created by the allocation of conserved water. ORS 537.470(6).

Under ORS 537.455 to 537.500 and OAR 690-018-0010 to 690-018-0090, the Department has considered the application, and makes the following:

Findings of Fact

1. The applicant undertook a conservation project affecting certificates 17163, 17164, 17170, and a portion of certificate 17165. The project consisted of moving the point of diversion (POD) downstream (previously approved under Transfers 8829 and 8830), removing the Bieberstadt dam, eliminating usage of the associated open ditch, installing a pump in Little Butte Creek, and delivering the water via pipes and applies it with sprinklers.
2. The application was amended to exclude the 3.2 acres of Certificate 17165 not involved in T-8830, and not part of this allocation of conserved water. These acres are located in the NW ¼ NW ¼, Section 5, Township 36 S, Range 1 East, W.M., and were determined to be in Tract 3, with a 1908 priority date.
3. Certificates 17163, 17164, and 17170 were cancelled by Special Order Volume 56, page 40, approving Transfer 8829. Certificate 17165 was cancelled by Special Order Volume 56, page 353, approving Transfer 8830. This allocation of conserved water modifies the allowable rate of diversion for the inchoate rights.
4. The application, as amended, will result in reduced diversions for the uses allowed under the original right. The reduced amounts and the requested allocation of conserved water are:

Water Right	Priority Date	Acres	Before Project (cfs)	After Project (cfs)	Conserved Water (cfs)
Special Order Vol. 56, Pg. 40 (formerly Certificate 17163)	1885	3.0 (tract 1)	0.08	0.04	0.04
	1908	7.5 (tract 2)	0.19	0.095	0.095
Special Order Vol. 56, Pg. 40 (formerly Certificate 17164)	1885	32.0	0.80	0.40	0.40
Special Order Vol. 56, Pg. 40 (formerly Certificate 17170)	1885	1.5 (tract 1)	0.04	0.02	0.02
	1908	10.0 (tract 2)	0.25	0.125	0.125

Special Order Vol. 56, Pg. 353 (formerly Certificate 17165)	1885	10.0 (tract 1)	0.25	0.125	0.125
	1908	10.8 (tract 3)	0.27	0.135	0.135

There is no duty limitation on these water rights.

5. The applicants have obtained the required land use approvals.
6. Transfers 8829 and 8830 changed the original POD from the SE ¼ NW ¼, Section 5, Township 36 S, Range 1 East, W.M.; 1950 Feet South and 1820 Feet East from the NW Corner, Section 5 to the new POD located within the NW ¼ NW ¼, Section 5, Township 36 S, Range 1 East, W.M.; 250 Feet South and 660 Feet East from the NW Corner, Section 5.
7. The applicant proposes to protect the conserved water from the original POD (SE ¼ NW ¼, Section 5, Township 36 S, Range 1 East, W.M.; 1950 Feet South and 1820 Feet East from the NW Corner, Section 5) to the mouth of Little Butte Creek during the period of April 1 to October 1.
8. Little Butte Creek flows through a floodplain composed of alluvial soil. Irrigation water applied in excess of crop usage rapidly returns to Little Butte Creek and is available to other water rights. Therefore, the conserved water can be protected from the original POD to the new POD, described in Finding of Fact #6, without causing injury or enlargement. However, since return flows would have been available to other users downstream of the new POD 100 percent of the conserved water is needed to prevent injury and enlargement between the new POD and the portion of the proposed reach to the mouth of Little Butte Creek.
9. In consultation with the Departments of Fish and Wildlife, Environmental Quality, and Parks and Recreation, the Department has determined that conserved water is needed to support instream uses.
10. There are the following instream water rights on Little Butte Creek:

Application	Permit	Certificate	Transfer	Priority Date
-	-	76147	T8073	1895
MF262	-	59820	-	May 22, 1959
MF263	-	59818	-	September 29, 1969

11. Under ORS 537.470(3) (2003 HB 2456), after determining the quantity of water needed, if any, 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. The applicant requests that 100 percent of the allocation of conserved water go to the State.

12. The State's portion of the conserved water shall be allocated from April 1 to October 1. It shall be further allocated in the following manner:

Water Right	Priority Date	Rate Limitation (cfs)	Instream Reach
Special Order Vol. 56, Pg. 40 (formerly Certificate 17163)	1885	0.04	From original POD (SE ¼ NW ¼, Section 5, Township 36 S, Range 1 East, W.M.; 1950 Feet South and 1820 Feet East from the NW Corner, Section 5) to the new POD (NW ¼ NW ¼, Section 5, Township 36 S, Range 1 East, W.M.; 250 Feet South and 660 Feet East from the NW Corner, Section 5)
	1908	0.095	
Special Order Vol. 56, Pg. 40 (formerly Certificate 17164)	1885	0.40	
Special Order Vol. 56, Pg. 40 (formerly Certificate 17170)	1885	0.02	
	1908	0.125	
Special Order Vol. 56, Pg. 353 (formerly Certificate 17165)	1885	0.125	
	1908	0.135	
Total	1885	0.585	
	1908	0.355	

13. Under ORS 537.485 the priority of any right to the use of conserved water, including an in-stream water right, shall be either the same as or one minute after the priority of the water right held by the person implementing the conservation measures. The applicant has requested that the conserved water be assigned the same priority date of the existing rights.
14. The applicant has completed the conservation project, which was completed within five years prior to the date of filing the application, and has requested that the project be finalized.
15. No other conditions or limitations are needed to prevent or mitigate for harm to existing water rights.

Ultimate Findings of Fact

The ultimate findings of fact that the Department must make are described in OAR 690-018-0050.

- A. The allocation of conserved water will result in a reduced diversion for the uses allowed under the original water rights.
- B. The proposed allocation of conserved water will not harm existing water rights.
- C. The application is consistent with local land use plans.
- D. No water is needed to mitigate for harm to existing water rights between the original POD and the new POD. One-hundred percent of the conserved water is needed to mitigate for harm between the new POD and the instream reach that was proposed by the applicant.

E. The new rate for the existing water rights shall be:

Water Right	Priority Date	After Project (cfs)
Special Order Vol. 56, Pg. 40 (formerly Certificate 17163)	1885	0.04
	1908	0.095
Special Order Vol. 56, Pg. 40 (formerly Certificate 17164)	1885	0.40
Special Order Vol. 56, Pg. 40 (formerly Certificate 17170)	1885	0.02
	1908	0.125
Special Order Vol. 56, Pg. 353 (formerly Certificate 17165)	1885	0.125
	1908	0.135

There is no duty associated with these rights.

F. The conserved water allocated to the State is needed to support instream uses.

G. One-hundred percent of the conserved water will be allocated to the State. The conserved water shall be allocated from April 1 to October 1. It shall be further allocated in the following manner:

Water Right	Priority Date	Rate Limitation (cfs)	Instream Reach
Special Order Vol. 56, Pg. 40 (formerly Certificate 17163)	1885	0.04	From original POD (SE ¼ NW ¼, Section 5, Township 36 S, Range 1 East, W.M.; 1950 Feet South and 1820 Feet East from the NW Corner, Section 5) to the new POD (NW ¼ NW ¼, Section 5, Township 36 S, Range 1 East, W.M.; 250 Feet South and 660 Feet East from the NW Corner, Section 5)
	1908	0.095	
Special Order Vol. 56, Pg. 40 (formerly Certificate 17164)	1885	0.40	
Special Order Vol. 56, Pg. 40 (formerly Certificate 17170)	1885	0.02	
	1908	0.125	
Special Order Vol. 56, Pg. 353 (formerly Certificate 17165)	1885	0.125	
	1908	0.135	
Total	1885	0.585	
	1908	0.355	

H. The applicant has completed the conservation project and has requested finalization of the allocation of the conserved water.

I. No other conditions or limitations are needed to prevent or mitigate for harm to existing water rights.

Conclusion of Law

The project described in the application C-19 for allocation of conserved water is consistent with the criteria in ORS 537.455 to 537.500, as amended by 2003 HB 2456, and OAR Chapter 690, Division 018.

Now, therefore, it is ORDERED:

1. The authorized rate of diversion for the water right described in Special Order Volume 56, Page 40, which was originally described as Certificate 17163, shall be reduced and on final proof the issuance of a confirming certificate shall not exceed the following:

Priority Date	Rate (cfs)	Acres
1885	0.04	3.0 (Tract 1)
1908	0.095	7.5 (Tract 2)

The season of use is April 1 to October 1. All other conditions and limitations of the water right use approved under Transfer 8829, which was originally described as Certificate 17163, shall be included in any confirming right certificate issued under Transfer 8829.

2. The authorized rate of diversion for the water right described in Special Order Volume 56, Page 40, which was originally described as Certificate 17164, shall be reduced and on final proof the issuance of a confirming certificate shall not exceed the following:

Priority Date	Rate (cfs)	Acres
1885	0.40	32

The season of use is April 1 to October 1. All other conditions and limitations of the water right use approved under Transfer 8829, which was originally described as Certificate 17164, shall be included in any confirming right certificate issued under Transfer 8829.

3. The authorized rate of diversion for the water right described in Special Order Volume 56, Page 40, which was originally described as Certificate 17170, shall be reduced and on final proof the issuance of a confirming certificate shall not exceed the following:

Priority Date	Rate (cfs)	Acres
1885	0.02	1.5 (Tract 1)
1908	0.125	10.0 (Tract 2)

The season of use is April 1 to October 1. All other conditions and limitations of the water right use approved under Transfer 8829, which was originally described as Certificate 17170, shall be included in any confirming right certificate issued under Transfer 8829.

4. The authorized rate of diversion for the water right described in Special Order Volume 56, Page 353, which was originally described as Certificate 17165, shall be reduced and on final proof the issuance of a confirming certificate shall not exceed the following:

Priority Date	Rate (cfs)	Acres
1885	0.125	10.0 (Tract 1)
1908	0.135	10.8 (Tract 3)

The season of use is April 1 to October 1. All other conditions and limitations of the water right use approved under Transfer 8830, which was originally described as Certificate 17165, shall be included in any confirming right certificate issued under Transfer 8830.

5. A remaining right shall be issued for those lands not involved Transfer 8830 or the allocation of conserved water application, being:

Priority Date	Rate (cfs)	Acres
1888	0.25	10.2 (Tract 2)
1908	0.08	3.2 (Tract 3)

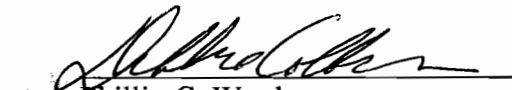
The season of use is April 1 to October 1. All other conditions and limitations of the water right, which was originally described as Certificate 17165, shall be included in any remaining right certificate.

6. A new instream water right certificate, Certificate 81571, shall be issued to replace a portion of any existing instream water rights established pursuant to ORS 537.341 or 537.346 and be in addition to any instream water rights established pursuant to ORS 537.348 or 537.470. The new right shall be issued with the following conditions:

The conserved water shall be allocated from April 1 to October 1. It shall be further allocated in the following manner:

Priority Date	Rate (cfs)	Instream Reach
1885	0.585	SE ¼ NW ¼, Section 5, Township 36 S, Range 1 East, W.M.; 1950 Feet South and 1820 Feet East from the NW Corner, Section 5 to NW ¼ NW ¼, Section 5, Township 36 S, Range 1 East, W.M.; 250 Feet South and 660 Feet East from the NW Corner, Section 5
1908	0.355	

Dated at Salem, Oregon this 13th day of October 2005.


 For Phillip C. Ward
 Director

Date of Mailing: OCT 19 2005