

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

In the Matter of Proposed Allocation of) FINAL ORDER APPROVING
Conserved Water Application) ALLOCATION OF CONSERVED
CW-52, Jackson County) WATER

Authority

ORS 537.455 to 537.500 as amended by 2003 HB 2456, authorize and establish the process in which a water right holder may submit a request for an allocation of conserved water. OAR Chapter 690, Division 018 implements the statutes and provides the Department's procedures and criteria for evaluating allocation of conserved water applications.

Applicant

MORRIS HARDY PENZER and
DANIELLE CHALMET PENZER
10825 WEST EVANS CREEK ROAD
ROGUE RIVER, OR 97537-9755

Agent

NORMAN E. DAFT
245 GLENOAK LANE
GRANTS PASS, OR 97526

Findings of Fact

1. On August 8, 2007, MORRIS HARDY PENZER and DANIELLE CHALMET PENZER filed an allocation of conserved water application. The Department assigned the application number CW-52.
2. The application requests an allocation of conserved water under Certificate 44382 in the name of Ditch Creek Ranch.
3. The applicants had previously submitted Transfer Application T-9393, which proposes to change the point of diversion, place of use, and character of use associated with Certificate 44382. Without mitigating the effects of Transfer Application T-9393, an instream water right would be injured. Allocation of conserved water application CW-52 is proposed as mitigation for Transfer Application T-9393.
4. Water has been used within the last five years according to the terms and conditions of the right, and no evidence is available that would demonstrate that the right is subject to forfeiture under ORS 540.610.
5. A diversion structure and ditch sufficient to use the full amount of water allowed under the existing right are present.

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.

6. The right involved in the allocation of conserved water is as follows:

Certificate: 44382 in the name of DITCH CREEK RANCH (confirmed by Rogue River decree)

Use: IRRIGATION of 84.59 ACRES

Priority Date: 1877

Rate: 1.28 CUBIC FEET PER SECOND (cfs)

Source: DITCH CREEK, tributary to PLEASANT CREEK

Authorized Points of Diversion (POD):

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
34 S	4 W	WM	29	SE SW	125 FEET NORTH AND 140 FEET WEST FROM THE N1/4 CORNER OF SECTION 32*
34 S	4 W	WM	33	SW NW	2040 FEET SOUTH AND 230 FEET EAST FROM THE NW CORNER OF SECTION 33**

* This point of diversion is known as POD #1.

** This point of diversion is known as POD #3.

Authorized Place of Use (prior to T-9393):

Twp	Rng	Mer	Sec	Q-Q	Acres
34 S	4 W	WM	32	NE NE	18.98
34 S	4 W	WM	32	NW NE	4.40
34 S	4 W	WM	32	SE NE	3.40
34 S	4 W	WM	33	NW NW	9.20
34 S	4 W	WM	33	SW NW	17.80
34 S	4 W	WM	33	SE NW	29.01
34 S	4 W	WM	33	NE SW	1.80

7. Certificate 44382 was issued to confirm the change in POD and place of use authorized by the order approving Transfer Application T-2469, as well as a portion of the water right confirmed by prior Certificate 16138 not modified by the order approving Transfer Application T-2469. Certificate 44382 does not differentiate the diversions serving the respective lands. However, the order approving Transfer Application T-2469 authorized the establishment of a new point of diversion in Section 33 to serve a portion of the right. The final proof survey identifies the following lands as served by the new POD, being POD #3:

Twp	Rng	Mer	Sec	Q-Q	Acres
34 S	4 W	WM	32	NE NE	10.80
34 S	4 W	WM	32	SE NE	4.40
34 S	4 W	WM	33	NW NW	9.20
34 S	4 W	WM	33	SW NW	17.80
34 S	4 W	WM	33	SE NW	29.01
34 S	4 W	WM	33	NE SW	1.80
<i>Total</i>					72.01

The remaining acres are authorized from the existing POD, being POD #1:

Twp	Rng	Mer	Sec	Q-Q	Acres
34 S	4 W	WM	32	NE NE	8.18
34 S	4 W	WM	32	NW NE	4.40

Twp	Rng	Mer	Sec	Q-Q	Acres
Total					12.58

8. Transfer Application T-9393 proposes to move the authorized point of diversion for the 72.01 acres described in Finding of Fact #7. The new point of diversion will be located at:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
34 S	4 W	WM	29	SW SE	POD #2: 35 FEET NORTH AND 155 FEET EAST FROM THE N1/4 CORNER OF SECTION 32

The POD for the 12.58 acres is also proposed to be moved under Transfer Application T-9393, but while these acres are involved in the allocation of conserved water application, the POD change for these acres is not part of the allocation of conserved water application.

9. The applicant has indicated that of the 1.28 cfs authorized under Certificate 44382, POD #1 has a maximum diversion of 0.19 cfs, and POD #3 has a maximum diversion of 1.09 cfs.
10. The conservation project proposes to consolidate diversions (part of Transfer Application T-9393), pipe water into a 90 acre-foot reservoir, and deliver water via enclosed pipeline (either by gravity or pump if necessary), and sprinkler irrigation.
11. Notice of the proposed allocation of conserved water application was published by the Department on August 28, 2007, and in the Rogue River Press on September 5, 12, and 19, 2007. No comments were received.
12. On November 1, 2007, the Department issued a Notice of Determination and Proposed Final Order proposing to approve Allocation of Conserved Water Application CW-52 and mailed a copy to the applicants, their agent, and the Oregon Department of Fish and Wildlife.
13. On November 5, 2007, the applicants indicated that the instream reach should be to West Evans Creek Road, not East Evans Creek Road. The applicant's also requested that the monitoring condition be modified or eliminated.
14. On December 10, 2007, the applicants indicated that water should be protected from POD #1 and #2.
15. On December 17, 2007, the Department e-mailed a red-lined Draft Final Order to the applicants, their agent, and the Oregon Department of Fish and Wildlife which addresses Findings of Fact #13 and #14.
16. Pursuant to ORS 537.485, the applicants request that the priority dates of the conserved water be the same as the originating right.
17. The proposed allocation of conserved water will result in a reduced diversion for the uses allowed under the original right and as part of Transfer Application T-9393 of 0.217 cfs (being 0.028 cfs from POD #1 and 0.189 cfs from POD #2), with a priority date of 1877.

18. The proposed allocation of conserved water will not harm existing rights.
19. The Department has provided notification of the proposed action to Jackson County.
20. Since no harm will occur to other water rights, no reduction in the quantity of conserved water to be allocated is required to mitigate for effects on other water rights.
21. After the allocation of conserved water, the water right held by the applicants will allow use of the following quantities of water:

Certificate	Priority Date	POD	Before Project Rate (cfs)	After Project Rate (cfs)	Conserved Water Rate (cfs)
44382	1877	#1	0.19	0.162	0.028
		#2	1.09	0.901	0.189
<i>Total</i>			<i>1.28</i>	<i>1.063</i>	<i>0.217</i>

22. In consultation with the Oregon Department of Fish and Wildlife (ODFW), Department of Environmental Quality, and Oregon Parks and Recreation Department, the Department has determined that conserved water is needed to support instream uses in Ditch Creek to provide for the conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values.
23. Pursuant to OAR 690-018-0012(1), the applicants propose that 100 percent of the conserved water be allocated to the State for an instream water right.
24. The amounts of water to be allocated to the state for an instream water right and the stream reaches for state's instream water right are:

Reach 1 for 0.028 cfs:

From POD #1 to POD #2, both described below:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
34 S	4 W	WM	29	SE SW	POD #1: 125 FEET NORTH AND 140 FEET WEST FROM THE N1/4 CORNER OF SECTION 32
34 S	4 W	WM	29	SW SE	POD #2: 35 FEET NORTH AND 155 FEET EAST FROM THE N1/4 CORNER OF SECTION 32

Reach 2 for 0.217 cfs:

From POD #2 to where Ditch Creek intersects West Evans Creek Road

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
34 S	4 W	WM	33	NE SW	600 FEET SOUTH AND 10 FEET WEST FROM THE CENTER OF SECTION 33

The instream use shall allow the use and protection of flows from April 1 through October 31.

25. There is an existing instream water right in Ditch Creek, Certificate 72675, in the reaches described in Finding of Fact #24. Certificate 72675 was applied for by the ODFW. The requested flows, along with the amounts approved are shown below, in cubic feet per second, for the irrigation season of April through October.

	April*	May	June	July	August	September	October*
Requested 1 st 1/2	15.0	15.0	9.0	6.0	6.0	6.0	6.0
Requested 2 nd 1/2	15.0	9.0	9.0	6.0	6.0	6.0	9.0
Certificate 72675**	5.62	1.98	0.62	0.18	0.1	0.09	0.21
*Instream flows for November – March were also requested and approved.							
**This is also the 50 percent availability flow.							

26. Ditch Creek is in an ODFW flow restoration priority watershed for July through September. Pursuant to OAR 690-077-0015(5), it is presumed that flows that exceed the estimated average natural flow are significant for the applied public use for July through September.
27. The proposed instream water right to be created by Allocation of Conserved Water CW-52 when added to Certificate 72675 does not exceed the instream water right application requested by ODFW, and does not exceed the amount of water needed to provide increased public benefits.
28. The proposed instream water right to be created by Allocation of Conserved Water CW-52 shall be additive to the Certificate 72675.
29. The project is completed with the approval of Transfer Application T-9393. The applicants request that the project be finalized and do not request additional time to finalize the project.
30. 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 CW-52 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. Water will be conserved that can be allocated without harming other water rights.

Now, therefore, it is ORDERED:

1. The changes proposed in CW-52, as modified by the applicant, are approved.

2. Water Right Certificate 44382 is cancelled.
3. When satisfactory proof of the completed changes under Transfer Application T-9393 is received, a new certificate confirming the right transferred and the allocation of conserved water will be issued. The priority date, points of diversion, place of use, and use for the inchoate water right is that described in the order approving Transfer Application T-9393. Approval of this allocation of conserved water reduces the amount of water lawfully available under the right by 0.217 cfs (being 0.028 cfs from POD #1 and 0.189 cfs from POD #2. The 0.189 cfs originally came from POD #3, but the POD was changed as part of Transfer Application T-9393.) The maximum per acre rate associated with these rights is 1/80 cfs/ac.
4. When required by the Department, 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.

All other conditions and limitations of the existing water right shall be included in the superseding certificate.

5. A new instream certificate shall be issued for conservation, maintenance and enhancement of aquatic and fish life, wildlife, fish and wildlife habitat and other ecological values in Ditch Creek, tributary to Pleasant Creek. The date of priority is 1877. The amount of water to which this right is entitled is limited to an amount actually beneficially used and shall not exceed the quantities described below:

Season	Instream Water Right	
	Reach 1	Reach 2
April 1 through October 31	0.028 cfs	0.217 cfs

The description of the stream reaches in which flows are to be maintained are as follows:

Reach 1: From the location of the upstream diversion authorized previously under Certificate 44382, located at:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
34 S	4 W	WM	29	SE SW	125 FEET NORTH AND 140 FEET WEST FROM THE N1/4 CORNER OF SECTION 32

to the location of the new point of diversion authorized under Transfer Application T-9393, located at:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
34 S	4 W	WM	29	SW SE	35 FEET NORTH AND 155 FEET EAST FROM THE N1/4 CORNER OF SECTION 32

Reach 2: From the location of the point of diversion authorized under Transfer Application T-9393, located at:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
34 S	4 W	WM	29	SW SE	35 FEET NORTH AND 155 FEET EAST FROM THE N1/4 CORNER OF SECTION 32

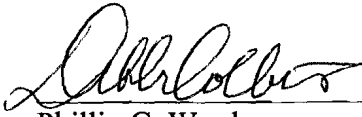
to where Ditch Creek intersects West Evans Creek Road at approximately

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
34 S	4 W	WM	33	NE SW	600 FEET SOUTH AND 10 FEET WEST FROM THE CENTER OF SECTION 33

The instream right established by this Allocation of Conserved Water shall be in addition to any instream water rights established pursuant to ORS 537.341, 537.346, 537.348 or 537.470, unless otherwise specified by a subsequent order establishing a new instream water right. The rights shall allow for the use and protection of flows from April 1 through October 31.

6. If the order approving Transfer Application T-9393 does not take effect due to a protest and is not ultimately approved then this order does not become final.

Dated at Salem, Oregon this 28th day of January, 2008.


 #r Phillip C. Ward
 Director

Date of Mailing: JAN 31 2008

