

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

In the Matter of Transfer Application)
T-10923, Marion County)
)
)

FINAL ORDER APPROVING A
CHANGE IN POINT OF
APPROPRIATION AND ADDITIONAL
POINTS OF APPROPRIATION

Authority

ORS 537.705 and 540.505 to 540.580 establish the process in which a water right holder may submit a request to transfer the point of appropriation, 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

SBE, INC.
11880 LAUREN LANE
NEWBERG, OR 97132

Findings of Fact

Background

1. On June 30, 2009, SBE, INC. filed an application for a change in point of appropriation and additional points of appropriation under Certificates 27212 and 33762. The Department assigned the application number T-10923.
2. On May 21, 2010, the applicant submitted a revised map, correcting typographical errors in the map originally submitted.
3. The portion of the first right to be transferred is as follows:
Certificate: 27212 in the name of MILO SCHNEIDER (perfected under Permit G-288)
Use: IRRIGATION of 73.0 ACRES
Priority Date: JULY 10, 1956
Rate: 0.91 CUBIC FOOT PER SECOND
Limit/Duty: ONE-EIGHTIETH cfs per acre, not to exceed 2.5 acre-feet per acre per year

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.

Source: A WELL in the WILLAMETTE RIVER BASIN

Authorized Point of Appropriation:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
4 S	2 W	WM	8	NW SW	66	AUTHORIZED WELL 1 (MARI 1125): 15 CHAINS EAST AND 11.8 CHAINS NORTH OF THE EXT L CORNER ON THE SOUTH LINE OF DLC 66

Authorized Place of Use:

IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
4 S	2 W	WM	7	SE NE	66	0.6
4 S	2 W	WM	8	SW NW	66	21.2
4 S	2 W	WM	8	SE NW	66	3.5
4 S	2 W	WM	8	NE SW	66	20.3
4 S	2 W	WM	8	NW SW	66	27.4

4. Transfer Application T-10923 proposes to replace the authorized well (MARI 1125, which has been abandoned) with a replacement well (MARI 1112) and add five additional points of appropriation all within approximately 1,500 feet from the original point of appropriation:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
4 S	2 W	WM	8	NE SW	66	REPLACEMENT WELL 1 (MARI 1112): 800 FEET NORTH AND 1620 FEET EAST FROM THE MOST SOUTHERLY SW CORNER OF DLC 66
4 S	2 W	WM	7	SE NE	66	WELL 2 (MARI 1103): 1420 FEET NORTH AND 280 FEET WEST FROM THE MOST SOUTHERLY SW CORNER OF DLC 66
4 S	2 W	WM	7	SE NE	66	WELL 3 (MARI 1109): 1420 FEET NORTH AND 310 FEET WEST FROM THE MOST SOUTHERLY SW CORNER OF DLC 66
4 S	2 W	WM	7	SE NE	66	WELL 4: 1420 FEET NORTH AND 260 FEET WEST FROM THE MOST SOUTHERLY SW CORNER OF DLC 66
4 S	2 W	WM	8	SW NW	66	WELL 5: 1210 FEET NORTH AND 450 FEET EAST FROM THE MOST SOUTHERLY SW CORNER OF DLC 66
4 S	2 W	WM	8	NE SW	66	WELL 6: 470 FEET NORTH AND 2440 FEET EAST FROM THE MOST SOUTHERLY SW CORNER OF DLC 66

5. The portion of the second right to be transferred is as follows:

Certificate: 33762 in the name of MILO SCHNEIDER (perfected under Permit G-2524)

Use: PRIMARY IRRIGATION of 65.6 ACRES and SUPPLEMENTAL IRRIGATION of 73.0 ACRES

Priority Date: OCTOBER 28, 1963

Rate: 1.13 CUBIC FEET PER SECOND

Limit/Duty: ONE-EIGHTIETH cfs per acre, not to exceed 2.5 acre-feet per acre per year

Source: A WELL in the WILLAMETTE RIVER BASIN

Authorized Point of Appropriation:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
4 S	2 W	WM	7	SE NE	66	WELL 2 (MARI 1103): 1420 FEET NORTH AND 280 FEET WEST FROM THE MOST SOUTHERLY SW CORNER OF DLC 66

Authorized Place of Use:

IRRIGATION							
Twp	Rng	Mer	Sec	Q-Q	GLot	DLC	Acres
4 S	2 W	WM	7	NE NE		74	8.0
4 S	2 W	WM	7	NE NE		66	2.1
4 S	2 W	WM	7	NW NE		74	1.3
4 S	2 W	WM	7	NW NE		66	0.4
4 S	2 W	WM	7	SW NE		66	10.2
4 S	2 W	WM	7	SW NE	2		0.2
4 S	2 W	WM	7	SE NE		66	35.6
4 S	2 W	WM	7	NE SE		66	1.0
4 S	2 W	WM	7	NW SE		66	0.5
4 S	2 W	WM	7	NW SE	2		0.1
4 S	2 W	WM	8	SW NW		66	6.2

SUPPLEMENTAL IRRIGATION						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
4 S	2 W	WM	7	SE NE	66	0.6
4 S	2 W	WM	8	SW NW	66	21.2
4 S	2 W	WM	8	SE NW	66	3.5
4 S	2 W	WM	8	NE SW	66	20.3
4 S	2 W	WM	8	NW SW	66	27.4

6. Transfer Application T-10923 proposes to retain authorized Well 2 (MARI 1103) and add five additional points of appropriation all within approximately 3,000 feet from the existing point of appropriation:

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
4 S	2 W	WM	8	NE SW	66	REPLACEMENT WELL 1 (MARI 1112): 800 FEET NORTH AND 1620 FEET EAST FROM THE MOST SOUTHERLY SW CORNER OF DLC 66
4 S	2 W	WM	7	SE NE	66	WELL 3 (MARI 1109): 1420 FEET NORTH AND 310 FEET WEST FROM THE MOST SOUTHERLY SW CORNER OF DLC 66
4 S	2 W	WM	7	SE NE	66	WELL 4: 1420 FEET NORTH AND 260 FEET WEST FROM THE MOST SOUTHERLY SW CORNER OF DLC 66

Twp	Rng	Mer	Sec	Q-Q	DLC	Measured Distances
4 S	2 W	WM	8	SW NW	66	WELL 5: 1210 FEET NORTH AND 450 FEET EAST FROM THE MOST SOUTHERLY SW CORNER OF DLC 66
4 S	2 W	WM	8	NE SW	66	WELL 6: 470 FEET NORTH AND 2440 FEET EAST FROM THE MOST SOUTHERLY SW CORNER OF DLC 66

7. The application requests to add five additional points of appropriation to the one authorized point of appropriation for each right, stating that “the existing wells produce sand and their production drops off significantly late in the irrigation season.”
8. Notice of the application for transfer was published on July 14, 2009, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
9. On April 20, 2010, the Department mailed to the applicant a copy of the draft Preliminary Determination proposing to approve Transfer Application T-10923, with the inclusion of a condition to install meters on all the wells. The draft Preliminary Determination cover letter set forth a deadline of May 20, 2010, for the applicant to respond.
10. On April 30, 2010, Steve Schneider responded by email with questions about the time allowed for completion of the changes, the legal authority of the Department to change conditions of original certificates (specifically to add a condition to require measuring devices), and a question about whether all the proposed well locations were considered to be in the same aquifer. The Department sent an email in reply on May 5, 2010.
11. The applicant’s agent Greg Kupillas responded May 20, 2010 by email to request that the Department correct several clerical errors in the document, and conveyed comments from the applicant which included a request to extend the date for completion of the changes to October 1, 2015, because no more than one additional well per year is planned in order to see if the additional well is adequate to give the full water right available at the end of the irrigation season. Because of budget issues, even this schedule may be unattainable. Steve Schneider also requested the Department to remove the following proposed language from the document: *“Before water use may begin under this order, the water user shall install a totalizing flow meter, or, with prior approval of the Director, another suitable measuring device, at each point of appropriation.”*
12. On May 26, the Department sent an email agreeing to correct the clerical errors and to extend the completion deadline.
13. On June 16, 2010, representatives of the Department met with applicant Steve Schneider and his agent Greg Kupillas to discuss Mr. Schneider’s concerns about the proposed condition to require measuring devices on all the wells. It was determined that the next step in processing the transfer application would be to issue a revised Preliminary Determination.
14. The clerical errors in the original draft Preliminary Determination have been corrected in this document and the Department considers extension of the completion date to October 1, 2015

to be reasonable. The completion date has since been revised to 2016, due to the time that has elapsed since issuance of the original draft Preliminary Determination. The condition requiring meters on all the wells was removed from the revised draft Preliminary Determination at the applicant's request.

15. On July 14, 2010, the Department mailed to the applicant a copy of a revised draft Preliminary Determination proposing to deny Transfer Application T-10923, because without provision for measuring the quantity of water appropriated under the right, the Department could not make a positive determination that the addition of points of appropriation would not result in enlargement of the right or injury to other rights. The revised draft Preliminary Determination cover letter set forth a deadline of August 16, 2010, for the applicant to respond and offered options for resolving the potential for enlargement and injury which could allow the Department to approve the transfer.
16. Steve Schneider responded with a letter dated August 5, 2010 that was received by email on August 5 and by postal mail on August 9, 2010. Mr. Schneider took issue with the Department's Findings of Fact #19 and #20 in the revised draft Preliminary Determination in respect to the potential for enlargement of the right and possible injury to other rights as a result. However, he indicated agreement to install meters on all the wells in order to have the transfer approved.
17. On August 23, 2010, the Department sent a copy of the draft Preliminary Determination to the Oregon Department of Justice (DOJ) for review in light of the issues raised. Jesse Ratcliffe of the DOJ then offered the following comments (Findings of Fact #18-#21).
18. In order to approve a point of appropriation transfer, the Water Resources Commission must find "that a proposed change can be effected without injury to existing water rights." ORS 540.530(1)(a). This finding must be supported by a preponderance of the evidence—in other words, the Commission must find that the evidence shows that it is more likely than not that the proposed change will not injure existing water rights. The Commission may not simply assume that no injury will occur.
19. In this case, the transfer application calls for an increase in the total number of wells authorized for appropriation, and there is no evidence that the wells will be unable to appropriate water at a higher rate than allowed under Certificates 27212 and 33762.
20. The installation of meters will allow OWRD to ensure that the certificated rate is not being exceeded, and provide the evidence the commission requires to determine that injury will not occur on that basis.
21. The Commission's authority to condition approval of the transfer on the installation of meters derives from the Commission's duty to find that the transfer will not cause injury to existing water rights. If the Commission is unable to find that injury will not occur unless conditions are imposed on the transfer, it may approve the transfer only if the conditions are included in its approval.

22. The fundamental question in evaluating whether a transfer is injurious is, “Will the proposed transfer result in any other water right receiving less water than it would if the exercise of the transferred water right was maximized?” The Department evaluates the proposed change to determine whether the impacts of the change on other water rights from the same source (or hydraulically connected sources) are greater than the impacts that would result from efficient and intensive use within the limit of the existing right. Without a way to measure the total appropriation under a water right with multiple points of appropriation, it may not be possible to know whether or not the maximum allowed rate is being exceeded. Without assurance that enlargement of the transferred right would not occur, the Department would be unable to find that other surrounding groundwater rights accessing the same aquifer would not be injured.
23. On November 29, 2010, the Department issued a Preliminary Determination proposing to approve Transfer T-10923 and mailed a copy to the applicants. Additionally, notice of the Preliminary Determination for the transfer application was published on the Department’s weekly notice on November 30, 2010, and in The Newberg Graphic newspaper on December 22 and 29, 2010 and January 5, 2011, pursuant to ORS 540.520 and OAR 690-380-4020. No protests were filed in response to the notice.

Transfer Review Criteria (OAR 690-380-4010)

24. Water has been used within the last five years prior to the submittal of Transfer Application T-10923 according to the terms and conditions of the rights. There is no information in the record that would demonstrate that the rights are subject to forfeiture under ORS 540.610.
25. 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 Transfer Application T-10923.
26. Based on Findings of Fact #7 and #11, the transfer proposes to add wells in order to access the full amount of water allowed under the right, which could represent an increase over what is currently accessible due to the limitations imposed by physical conditions at the authorized wells. This in itself would not represent enlargement or injury to other rights. However, unless there is a way to measure the increase and be sure that it does not exceed the limits of the right, enlargement could occur, which could in turn result in injury to other water rights. The ability to measure the total quantity diverted from the several wells is a necessary condition for approval of the transfer application.
27. The applicant’s installation of meters on the wells will give the capability to measure the combined diversion from all of the wells to ensure that the allowed rate and duty are not exceeded. Therefore, if conditioned to require meters on all the wells, so that management of the right within the allowed rate and duty can be accomplished, the proposed change would NOT result in enlargement beyond what is legally allowed under the right.

28. The applicant's installation of meters on all the wells will give the capability of demonstrating that the proposed change would not result in enlargement. Therefore the proposed change would NOT result in injury to other water rights.

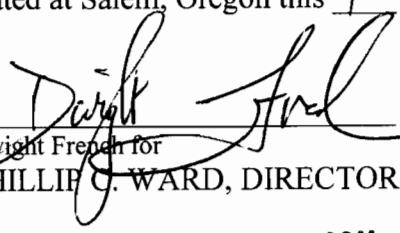
Conclusions of Law

The change in point of appropriation and additional points of appropriation proposed in Transfer Application T-10923, with installation of meters on all the wells, is consistent with the requirements of ORS 537.705 and 540.505 to 540.580 and OAR 690-380-5000.

Now, therefore, it is ORDERED:

1. The change in point of appropriation and additional points of appropriation proposed in application T-10923 are approved.
2. 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 Certificates 27212 and 33762 any related decree.
3. Water right certificates 27212 and 33762 are cancelled. New certificates will be issued describing those portions of the rights not affected by this transfer.
4. The quantity of water diverted at the additional points of appropriation, together with that diverted at the replacement points of appropriation, shall not exceed the quantity of water lawfully available at the original points of appropriation.
5.
 - a. Before water use may begin under this order, the water user shall install a totalizing flow meter, or, with prior approval of the Director, another suitable measuring device, at each point of appropriation.
 - 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.
6. Water shall be acquired from the same aquifer (water source) as the original point of appropriation.
7. The approved changes shall be completed and full beneficial use of the water shall be made on or before **October 1, 2016**. A Claim of Beneficial Use prepared by a Certified Water Right Examiner shall be submitted by the applicant to the Department within one year after the deadline for completion of the changes and full beneficial use of the water.
8. When satisfactory proof of the completed changes is received, new certificates confirming the rights transferred will be issued.

Dated at Salem, Oregon this 7 day of February 2011.


Dwight French for
PHILLIP C. WARD, DIRECTOR

Mailing Date: FEB 08 2011