

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

In the Matter of Transfer Application)
T-11521, Umatilla County)
)
) **FINAL ORDER APPROVING A CHANGE
IN POINT OF DIVERSION TO REFLECT
HISTORIC USE AND PARTIAL
CANCELLATION OF A WATER RIGHT**

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.

ORS 540.621 establishes the process for the owner of land to which a water right is appurtenant to certify under oath that the water right, or a portion thereof, has been abandoned and to voluntarily request that it be cancelled.

Applicants

RICHARD E. BANISTER
CLIFFORD W. BANISTER
43794 HOEFT RD.
PENDLETON, OR 97801

Findings of Fact

Background

1. On January 7, 2013, Richard Banister and Clifford Banister filed a transfer application for authorization of an historic point of diversion under a portion of Certificate 54769. The Department assigned the application number T-11521.
2. Notice of the application for transfer was published on January 15, 2013, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.

This is a final order in other than a 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 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.

3. On September 12, 2013, the Department mailed a copy of a draft of the Final Order to the applicant proposing to approve transfer application T-11521 to the applicants. The cover letter accompanying the draft Final Order set forth a deadline of October 13, 2013, for the applicants to respond. In response to the cover letter, the applicants requested the Domestic use portion of the water right be cancelled and is further described below in Findings of Fact No. 16. On October 25, 2013, the applicants came into the Water Resources Department field office in Pendleton to hand deliver the affidavit, Proof of Service and provided the necessary information to demonstrate that they are authorized to pursue the transfer.

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

Certificate: 54769 in the name of LOUIS MALE (confirmed by Umatilla River)

Use: IRRIGATION of 48.0 ACRES and STOCK USE

Priority Dates: 1867 and 1908

Rate: 0.61 CUBIC FOOT PER SECOND, subject to the provisions of Paragraph 33 of Umatilla River Decree

Source: BIRCH CREEK, tributary to the UMATILLA RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
1 N	32 E	WM	34	NW NE	none given

Authorized Place of Use:

IRRIGATION and STOCK (1867)					
Twp	Rng	Mer	Sec	Q-Q	Acres
1 N	32 E	WM	22	SW SE	6.0

IRRIGATION and STOCK (1908)					
Twp	Rng	Mer	Sec	Q-Q	Acres
1 N	32 E	WM	22	SE SW	5.0
1 N	32 E	WM	22	SW SE	19.0
1 N	32 E	WM	27	NW NE	10.0
1 N	32 E	WM	27	NE NW	8.0

5. Certificate 54769 does not describe the location of the point of diversion for this water use. However information is available from the Birch Creek map of the Umatilla River basin adjudication indicating that the original point of diversion on Birch Creek is better described and located as follows:

Twp	Rng	Mer	Sec	Q - Q	Diversion
1 N	32 E	WM	27	SW SE	-- PRIVATE DITCH

6. Transfer Application T-11521 proposes to change the point of diversion for the above described lands to reflect historical use approximately 6200 feet downstream from the authorized point of diversion to:

Twp	Rng	Mer	Sec	Q - Q	Measured Distances
1 N	32 E	WM	22	SW SE	670 FEET NORTH AND 768 FEET EAST FROM THE S¼ CORNER OF SECTION 22

7. The Oregon Department of Fish and Wildlife (ODFW) has determined that a fish screening and/or by-pass device is necessary at the new point of diversion to prevent fish from entering the diversion and/or safely transport fish back to the body of water from which the fish were diverted and that the diversion is currently equipped with an appropriate fish screening and/or by-pass device.
8. The Department has determined that the use of water for domestic use under Certificate 54769 has not been exercised and asked the landowner to concur. The “evidence of use” form and map accompanying the application did not describe the domestic use and/or identify a delivery system describing such use. This portion of the water right should likely be cancelled. To accomplish this, the Department has provided to the landowners a “Partial Cancellation of a Water Right” voluntary cancellation affidavit for their concurrence.

Transfer Review Criteria (ORS 540.532 and OAR 690-380-2120)

9. Pursuant to OAR 690-380-2120(2)(a), evidence has been submitted that the actual, current point of diversion for the water right in question, as described in Finding No. 3, has been in use for more than 10 years.
10. Pursuant to OAR 690-380-2120(2)(c), the Watermaster provided a statement that to his knowledge there has been no complaint of injury due to the use of water at the actual, current point of diversion, prior to the transfer request.
11. Pursuant to OAR 690-380-2120(3), the Department provided the applicant a list of the affected water right and a copy of the notice to be provided to the affected water right holder. On October 25, 2013, the applicant hand delivered to the Department written proof of service of notice of the proposed transfer on the affected water right holder.
12. Water has been used within the last five years according to the terms and conditions of the right. There is no evidence 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 right are present.
14. The proposed change would not result in enlargement of the right.
15. The proposed change would not result in injury to other water rights.

Partial Cancellation of a Water Right

16. On October 25, 2013, the Department received a voluntary cancellation affidavit from Richard Banister and Clifford Banister requesting to cancel a portion of Certificate 54769 appurtenant to Tax Lot 1800, within Sections 22 and 27, T 1 N, R 32 E, W.M. The request is to cancel only the use, and no quantity of water associated with it.

The portion of the right proposed to be cancelled is described as follows:

Certificate: 54769 in the name of LOUIS MALE (decree of the circuit court of the State of Oregon for Umatilla County)

Use: DOMESTIC USE

Priority Date: 1867 AND 1908

Source: BIRCH CREEK, a tributary to the Umatilla River

Authorized Use to be Cancelled:

DOMESTIC USE				
Twp	Rng	Mer	Sec	Q - Q
1 N	32 E	WM	22	SE SW
1 N	32 E	WM	22	SW SE
1 N	32 E	WM	27	NW NE
1 N	32 E	WM	27	NE NW

Conclusions of Law

The proposed change in point of diversion to reflect historical use in Transfer Application T-11521 is consistent with the requirements of ORS 540.505 to 540.580, and OAR 690-380-5000 and the abandoned water right portion should be cancelled.

Now, therefore, it is ORDERED:

- 1. The change proposed in Transfer Application T-11521 is approved and effective immediately.*
- 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 Certificate 54769 and any related decree.*
- 3. Water right Certificate 54769 is cancelled. Certificate 88996 will be issued to describe the change in point of diversion for the portion of the right included in T-11521. Certificate 88997 shall be issued to describe the portion of Certificate 54769 not modified by this order. Together, the new Certificates shall supersede Certificate 54769.*
- 4. The quantity of water diverted at the new point of diversion shall not exceed the quantity of water lawfully available at the original point of diversion.*

5. *Water use measurement conditions:*

- 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 the new point of diversion.*
- b. The water user shall maintain the meter or measuring device in good working order.*
- c. The water user shall allow the Watermaster access to the meter or measuring device(s); provided however, where the meter or measuring device is/are located within a private structure, the Watermaster shall request access upon reasonable notice.*

6. *Prior to diverting water, the water user shall install an approved fish screen at the new point of diversion and shall provide to the OWRD a written statement from Oregon Department of Fish and Wildlife (ODFW) that the installed screen meets the state's criteria, or that ODFW has determined a screen is not necessary.*

The water user shall operate and maintain the fish screen at the new point of diversion consistent with ODFW's operational and maintenance standards. If ODFW determines the screen is not functioning properly, and is unsuccessful in working with the water user to meet ODFW standards, ODFW may request that OWRD regulate the use of water until OWRD receives notification from ODFW that the fish screen is functioning properly.

Dated at Salem, Oregon this 29th day of November 2013.



Dwight French, Water Right Services Administrator, for
PHILLIP C. WARD, DIRECTOR

Mailing date: DEC 03 2013