

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

In the Matter of Transfer Application) FINAL ORDER APPROVING
T-10582, Deschutes County) CHANGES IN POINT OF DIVERSION,
) PLACE OF USE, AND CHARACTER
) OF USE

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.

Applicant

MILLER TREE FARM, LLC
110 NE GREENWOOD AVENUE
BEND, OREGON 97701

Findings of Fact

Background

1. On March 28, 2008, Miller Tree Farm, LLC filed an application to change the character of use and place of use under Certificates 76320, 76321, 76322, and 76323. The Department assigned the application number T-10582.
2. On June 24, 2008, the applicant submitted a revised map and revised application showing the following modifications:
 - Inclusion of a point of diversion change request in the revised Transfer Application.
 - Correction of the certificate number for Certificate 76321 in Supplemental Form A for Certificate 76320.
 - Supplemental Form A pages for both Certificates 76321 and 76323 indicating that a point of diversion change is requested and showing an updated location of those points of diversion.
 - Correction of tax lot numbers for the S½ of the N½ of Section 35 on Supplemental Forms A for both Certificates 76321 and 76323.

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.

- Correction of the application map to more precisely show the point of diversion locations and changes, as well as the conceptual location of the canal to fill the proposed Storage Area #2.

3. The first right to be transferred is as follows:

Certificate: 76320 in the name of WILLIAM E. MILLER (perfected under Permit R-6892)

Use: STORAGE OF WATER IN EAST JONES PIT RESERVOIR FOR IRRIGATION USE

Priority Date: FEBRUARY 12, 1973

Rate: 31.0 ACRE FEET

Source: CITY OF BEND WASTE WATER, tributary to TUMALO CREEK

Authorized Place of Use:

STORAGE FOR IRRIGATION USE				
Twp	Rng	Mer	Sec	Q-Q
17 S	11 E	WM	36	NW NW

4. Certificate 76320 does not describe the location of the point of diversion for the right, however information is available from the final proof map indicating that the point of diversion from the source is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
17 S	11 E	WM	34	SW SE	CITY OF BEND WASTE WATER DIVERSION - 1014 FEET NORTH AND 174 FEET EAST OF THE S¼ CORNER OF SECTION 34

5. Transfer Application T-10582 proposes to change the character of use to Storage for Quasi-Municipal Use.

6. Transfer Application T-10582 proposes to change the place of use of the right to:

STORAGE FOR QUASI-MUNICIPAL USE					
Twp	Rng	Mer	Sec	Q-Q	AREA
17 S	11 E	WM	34	SW SE	STORAGE AREA #1
17 S	11 E	WM	34	NE SE	STORAGE AREA #2

7. The second right to be transferred is as follows:

Certificate: 76321 in the name of WILLIAM E. MILLER (perfected under Permit S-42781)

Use: IRRIGATION OF 42.0 ACRES

Priority Date: FEBRUARY 12, 1973

Rate: 0.60 CUBIC FOOT PER SECOND (CFS)

Limit/Duty: ONE-SEVENTIETH of one cubic foot per second per acre, or its equivalent for each acre irrigated and shall be further limited to a diversion of not to exceed 2.5 acre-feet per acre for each acre irrigated during the irrigation season of each year from direct flow and storage from East Jones Pit

Reservoir constructed under Permit R-6892 and shall not carry with it the right to compel the continuance of waste water.

Sources: CITY OF BEND WASTE WATER AND EAST JONES PIT RESERVOIR, tributaries to TUMALO CREEK

Authorized Points of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
17 S	11 E	WM	34	SW SE	CITY OF BEND WASTEWATER DIVERSION - 1014 FEET NORTH AND 174 FEET EAST FROM THE S¼ CORNER OF SECTION 34
17 S	11 E	WM	36	SW NW	EAST JONES PIT - NO COORDINATES GIVEN

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
17 S	11 E	WM	35	SE NE	0.1
17 S	11 E	WM	36	NE NW	1.8
17 S	11 E	WM	36	NW NW	15.1
17 S	11 E	WM	36	SW NW	21.4
17 S	11 E	WM	36	SE NW	3.6

8. The East Jones Pit Reservoir was constructed under Permit R-6892. Certificate 76321 does not describe the location of the East Jones Pit Reservoir point of diversion, however information is available from the application indicating that the point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
17 S	11 E	WM	36	NW NW	EAST JONES PIT - 1371 FEET NORTH AND 906 FEET EAST OF THE W¼ CORNER OF SECTION 36.

9. Transfer Application T-10582 proposes to change the authorized point of diversion at East Jones Pit to the two proposed City of Bend wastewater storage areas approximately 1.5 miles southwest to:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
17 S	11 E	WM	34	SW SE	STORAGE AREA #1 - 974 FEET NORTH AND 372 FEET EAST FROM THE S¼ CORNER OF SECTION 34.
17 S	11 E	WM	34	NE SE	STORAGE AREA #2 - 2266 FEET NORTH AND 1800 FEET EAST FROM THE S¼ CORNER OF SECTION 34.

10. Transfer Application T-10582 proposes to change the character of use to Quasi-Municipal.

11. Transfer Application T-10582 proposes to change the place of use of the right to:

QUASI-MUNICIPAL				
Twp	Rng	Mer	Sec	Q-Q
17 S	11 E	WM	27	SE SE
17 S	11 E	WM	34	NE NE
17 S	11 E	WM	34	NW NE
17 S	11 E	WM	34	SW NE
17 S	11 E	WM	34	SE NE
17 S	11 E	WM	34	SE NW
17 S	11 E	WM	34	NE SW
17 S	11 E	WM	34	NW SW
17 S	11 E	WM	34	SW SW
17 S	11 E	WM	34	SE SW
17 S	11 E	WM	34	NE SE
17 S	11 E	WM	34	NW SE
17 S	11 E	WM	34	SW SE
17 S	11 E	WM	34	SE SE
17 S	11 E	WM	35	SW NE
17 S	11 E	WM	35	SE NE
17 S	11 E	WM	35	SW NW
17 S	11 E	WM	35	SE NW
17 S	11 E	WM	35	NE SW
17 S	11 E	WM	35	NW SW
17 S	11 E	WM	35	SW SW
17 S	11 E	WM	35	SE SW
17 S	11 E	WM	35	NE SE
17 S	11 E	WM	35	NW SE
17 S	11 E	WM	35	SW SE
17 S	11 E	WM	35	SE SE

12. The third right to be transferred is as follows:

Certificate: 76322 in the name of WILLIAM E. MILLER (perfected under Permit R-6893)

Use: STORAGE OF WATER IN NORTH RIDGE RESERVOIR FOR IRRIGATION USE

Priority Date: FEBRUARY 12, 1973

Rate: 2.7 ACRE FEET

Source: CITY OF BEND WASTE WATER, tributary to TUMALO CREEK

Authorized Place of Use:

STORAGE FOR IRRIGATION				
Twp	Rng	Mer	Sec	Q-Q
17 S	11 E	WM	36	SW NW

13. Certificate 76322 does not describe the location of the point of diversion for the right, however information is available from the final proof map indicating that the point of diversion from the source is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
17 S	11 E	WM	34	SW SE	CITY OF BEND WASTE WATER DIVERSION - 1014 FEET NORTH AND 174 FEET EAST OF THE S¼ CORNER OF SECTION 34

14. Transfer Application T-10582 proposes to change the character of use to Storage for Quasi-Municipal Use.

15. Transfer Application T-10582 proposes to change the place of use of the right to:

STORAGE FOR QUASI-MUNICIPAL USE					
Twp	Rng	Mer	Sec	Q-Q	AREA
17 S	11 E	WM	34	SW SE	STORAGE AREA #1
17 S	11 E	WM	34	NE SE	STORAGE AREA #2

16. The fourth right to be transferred is as follows:

Certificate: 76323 in the name of WILLIAM E. MILLER (perfected under Permit S-42782)

Use: IRRIGATION OF 42.0 ACRES

Priority Date: SEPTEMBER 19, 1974

Rate: 0.6 CUBIC FOOT PER SECOND (CFS)

Limit/Duty: ONE-SEVENTIETH of one cubic foot per second per acre, or its equivalent for each acre irrigated and shall be further limited to a diversion of not to exceed 2.5 acre-feet per acre for each acre irrigated during the irrigation season of each year from direct flow and storage from East Jones Pit Reservoir constructed under Permit R-6892 and shall not carry with it the right to compel the continuance of waste water.

Source: CITY OF BEND WASTE WATER AND NORTH RIDGE RESERVOIR, tributary to TUMALO CREEK

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
17 S	11 E	WM	34	SW SE	CITY OF BEND WASTEWATER DIVERSION - 1014 FEET NORTH AND 174 FEET EAST FROM THE S¼ CORNER OF SECTION 34
17 S	11 E	WM	36	NW NW	NORTH RIDGE RESERVOIR - NO COORDINATES GIVEN

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
17 S	11 E	WM	35	SE NE	0.1
17 S	11 E	WM	36	NE NW	1.8
17 S	11 E	WM	36	NW NW	15.1

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
17 S	11 E	WM	36	SW NW	21.4
17 S	11 E	WM	36	SE NW	3.6

17. The North Ridge Reservoir was constructed under Permit 42782. Certificate 76322 does not describe the location of the North Ridge Reservoir point of diversion, however information is available from the application indicating that the point of diversion is located as follows:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
17 S	11 E	WM	36	SW NW	NORTH RIDGE RESERVOIR - 670 FEET NORTH AND 984 FEET EAST OF THE W¼ CORNER OF SECTION 36

18. Transfer Application T-10582 proposes to change the character of use to Quasi-Municipal.
19. Transfer Application T-10582 proposes to change the place of use of the right to:

QUASI-MUNICIPAL USE				
Twp	Rng	Mer	Sec	Q-Q
17 S	11 E	WM	27	SE SE
17 S	11 E	WM	34	NE NE
17 S	11 E	WM	34	NW NE
17 S	11 E	WM	34	SW NE
17 S	11 E	WM	34	SE NE
17 S	11 E	WM	34	SE NW
17 S	11 E	WM	34	NE SW
17 S	11 E	WM	34	NW SW
17 S	11 E	WM	34	SW SW
17 S	11 E	WM	34	SE SW
17 S	11 E	WM	34	NE SE
17 S	11 E	WM	34	NW SE
17 S	11 E	WM	34	SW SE
17 S	11 E	WM	34	SE SE
17 S	11 E	WM	35	SW NE
17 S	11 E	WM	35	SE NE
17 S	11 E	WM	35	SW NW
17 S	11 E	WM	35	SE NW
17 S	11 E	WM	35	NE SW
17 S	11 E	WM	35	NW SW
17 S	11 E	WM	35	SW SW
17 S	11 E	WM	35	SE SW
17 S	11 E	WM	35	NE SE
17 S	11 E	WM	35	NW SE
17 S	11 E	WM	35	SW SE
17 S	11 E	WM	35	SE SE

20. The water rights proposed for transfer are currently leased instream under L-481, which will terminate December 31, 2008. Since water may not be leased instream and also used on the land within the same season, if Transfer Application T-10582 is approved, use under the terms of the order may not be made until after L-481 has expired (i.e. January 1, 2009).

21. Notice of the application for transfer was published on April 8, 2008, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
22. On August 6, 2008, the Department mailed a copy of the draft Preliminary Determination proposing to approve Transfer Application T-10582 to the applicant. The cover letter for the draft Preliminary Determination set forth a deadline of September 8, 2008, for the applicant to respond. The applicant requested that the Department proceed with issuance of a Preliminary Determination and before the deadline provided the necessary information to demonstrate that the applicant is authorized to pursue the transfer.
23. On September 3, 2008, the Department issued a Preliminary Determination proposing to approve Transfer T-10582 and mailed a copy to the applicant. Additionally, notice of the Preliminary Determination for the transfer application was published on the Department's weekly notice on September 9, 2008, and in The Bulletin newspaper on September 9, 18 and 25, 2008, pursuant to ORS 540.520 and OAR 690-380-4020. No protests were filed in response to the notices.

Transfer Review Criteria [OAR 690-380-4010(2)]

24. Water has been used within the last five years according to the terms and conditions of the rights, and there is no information in the record that would demonstrate that the rights are subject to forfeiture under ORS 540.610.
25. A diversion structure and ditch 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-10582.
26. Considering current knowledge about water rights and their impact on the hydrology of the Deschutes Basin, the Department is unable to conclude that the change from irrigation of crops on 42.0 acres to quasi-municipal use on approximately 803.1 acres would not result in an increase in water use, with potential injury to instream water rights relying on return flows, unless the use is measured and limited to prevent an increase in use.
27. Limiting the maximum annual volume of water allowed for quasi-municipal use on the proposed place of use from all sources under these rights to 105.0 acre-feet (2.5 acre-feet per acre multiplied by 42.0 acres), diverted at the original diversion rates of the rights, would be sufficient to ensure that other water rights are not injured.
28. The proposed changes, as conditioned, would not result in enlargement of the rights.
29. The proposed changes, as conditioned, would not result in injury to other water rights.

Conclusions of Law

The changes in point of diversion, character of use and place of use proposed in Transfer Application T-10582 are consistent with the requirements of ORS 540.505 to 540.580 and OAR 690-380-5000.

Now, therefore, it is ORDERED:

1. Effective January 1, 2009, the changes in point of diversion, character of use and place of use proposed in Transfer Application T-10582 are approved and water right certificates 76320, 76321, 76322, and 76323 are cancelled.
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 76320, 76321, 76322, and 76323 and any related decree.
3. The quantity of water diverted at the new storage area points of diversion, together with that diverted at the original Bend Wastewater point of diversion, shall not exceed the quantity of water lawfully available at the original points of diversion.
4. The former place of use of the transferred rights shall no longer receive water under the rights.
5. Prior to diverting water, the water user shall install a headgate to control and regulate the quantity of water diverted. The type and plans of the headgate must be approved by the Department prior to beginning construction and shall be installed under the general supervision of the Department. The water user shall maintain the headgate as required by the Department.
6. Prior to diverting water, the water user shall install an in-line flow meter or other suitable device for measuring and recording the quantity of water diverted. The type and plans of the measuring device must be approved by the Department prior to beginning construction and shall be installed under the general supervision of the Department. The water user shall maintain and operate the measuring device as required by the Department.
7. The approved changes shall be completed and full beneficial use of the water shall be made on or before **October 1, 2020**. A Claim of Beneficial Use prepared by a Certified Water Rights 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 28th day of October 2008.


Phillip C. Ward, Director

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Mailing date: NOV 03 2008