

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

In the Matter of Transfer Application)
T-10954, Klamath County)
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)
)

FINAL ORDER APPROVING AN
ADDITIONAL POINT OF
APPROPRIATION AND CHANGES IN
PLACE OF USE AND CHARACTER OF
USE

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

KENO WATER CO., c/o GENE COX
PO BOX 771
KENO OR 97627

Findings of Fact

Background

1. On September 21, 2009, KENO WATER CO. filed an application for an additional point of appropriation and to change the place of use and to change the character of use under Certificate 85625. The Department assigned the application number T-10954.
2. The right to be transferred is as follows:

Certificate: 85625 in the name of KENO WATER CO. (perfected under Permit G-5924)
Use: DOMESTIC USE for 96 LOTS
Priority Date: SEPTEMBER 19, 1973
Rate: 0.33 CUBIC FOOT PER SECOND, BEING 0.165 CFS FROM EACH WELL
Source: TWO WELLS in the KLAMATH BASIN

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.

Authorized Points of Appropriation:

Well	Twp	Rng	Mer	Sec	Q-Q	GLot	Measured Distances
1	40 S	8 E	WM	6	NE NW	4	SOUTH 76 DEGREES 5 MINUTES 7 SECONDS EAST, 1511 FEET FROM THE NW CORNER OF SECTION 6
2	40 S	8 E	WM	6	SE NW	5	SOUTH 41 DEGREES 54 MINUTES 24 SECONDS EAST, 3392 FEET FROM THE NW CORNER OF SECTION 6

Authorized Place of Use:

Twp	Rng	Mer	Sec	Q-Q	GLot
40 S	8 E	WM	6	NE NW	4
40 S	8 E	WM	6	NW NW	
40 S	8 E	WM	6	SW NW	
40 S	8 E	WM	6	SE NW	5

3. Transfer Application T-10954 proposes an additional point of appropriation approximately 1000 feet from the existing points of appropriation to:

Well	Twp	Rng	Mer	Sec	Q-Q	GLot	Measured Distances
3	40 S	8 E	WM	6	SE NW	5	2,088 FEET SOUTH AND 1,420 FEET EAST FROM THE NW CORNER OF SECTION 6

4. Transfer Application T-10954 proposes to change the character of use to quasi-municipal.
5. Transfer Application T-10954 also proposes to change the place of use of the right to:

Twp	Rng	Mer	Sec	Q-Q	GLot
39S	7E	WM	24	SE SE	
39S	7E	WM	25	NE NE	
39S	7E	WM	25	SE NE	
39S	7E	WM	25	NE SW	
39S	7E	WM	25	NW SW	
39S	7E	WM	25	SW SW	
39S	7E	WM	25	SE SW	
39S	7E	WM	25	NE SE	
39S	7E	WM	25	NW SE	
39S	7E	WM	25	SW SE	
39S	7E	WM	25	SE SE	
39S	7E	WM	26	NE SE	
39S	7E	WM	26	SW SE	
39S	7E	WM	26	SE SE	
39S	7E	WM	26	SE SW	
39S	7E	WM	35	NE NE	
39S	7E	WM	35	NW NE	
39S	7E	WM	36	NE NE	
39S	7E	WM	36	NW NE	6
39S	7E	WM	36	SW NE	6 & 9

Twp	Rng	Mer	Sec	Q-Q	GLot
39S	7E	WM	36	SE NE	7 & 9
39S	7E	WM	36	NE NW	5
39S	7E	WM	36	NW NW	4
39S	7E	WM	36	SW NW	3
39S	7E	WM	36	SE NW	10
39S	7E	WM	36	NE SW	11
39S	7E	WM	36	NW SW	2
39S	7E	WM	36	SW SW	1 & 13
39S	7E	WM	36	SE SW	12
39S	7E	WM	36	NE SE	7 & 8
39S	7E	WM	36	NW SE	
39S	7E	WM	36	SW SE	
39S	7E	WM	36	SE SE	
39S	8E	WM	30	NW SW	
39S	8E	WM	30	SW SW	
39S	8E	WM	31	SW NE	
39S	8E	WM	31	NE NW	
39S	8E	WM	31	NW NW	
39S	8E	WM	31	SW NW	
39S	8E	WM	31	SE NW	
39S	8E	WM	31	NE SW	
39S	8E	WM	31	NW SW	
39S	8E	WM	31	SW SW	
39S	8E	WM	31	SE SW	
39S	8E	WM	31	NE SE	
39S	8E	WM	31	NW SE	
39S	8E	WM	31	SE SE	
39S	8E	WM	32	NW SW	
39S	8E	WM	32	SW SW	
40S	7E	WM	1	NE NE	
40S	7E	WM	1	NW NE	
40S	7E	WM	1	SW NE	
40S	7E	WM	1	SE NE	
40S	7E	WM	1	NE NW	
40S	7E	WM	1	NW NW	
40S	7E	WM	1	SW NW	
40S	7E	WM	1	SE NW	
40S	7E	WM	1	NE SE	
40S	7E	WM	1	SE SE	
40S	7E	WM	12	NE NE	
40S	7E	WM	12	NW NE	
40S	7E	WM	12	SE NE	
40S	7E	WM	12	NE SE	
40S	7E	WM	12	SE SE	
40S	8E	WM	6	NE NW	
40S	8E	WM	6	NW NW	
40S	8E	WM	6	SW NW	
40S	8E	WM	6	SE NW	6
40S	8E	WM	6	NW SW	
40S	8E	WM	6	SW SW	7
40S	8E	WM	7	NE NW	

Twp	Rng	Mer	Sec	Q-Q	GLot
40S	8E	WM	7	NW NW	
40S	8E	WM	7	SW NW	
40S	8E	WM	7	NW SW	
40S	8E	WM	7	SW SW	

6. Notice of the application for transfer was published on September 29, 2009, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
7. On January 26, 2010, the Department mailed a copy of the Preliminary Determination proposing to approve Transfer Application T-10954 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of February 26, 2010, for the applicant to respond.
8. On February 23, 2010, the applicant's agent requested that the Department put the transfer application on administrative hold for up to 180 days, in order to review options based on OWRD's findings. The administrative hold was granted.
9. On April 1, 2010, the Department received a letter from David Anderson, project manager of the Site Response Section – Orphan Cleanup in the Land Quality Division of Oregon Department of Environmental Quality (DEQ). Mr. Anderson commented on the proposed annual limit for quasi-municipal use, stating that the limit proposed in the draft Preliminary Determination (59.7 acre-feet) would hamper or preclude hookup of the Keno Elementary School, several businesses and residences in order to solve a water quality situation. The letter stated DEQ's position that calculation of future need for the quasi-municipal water supply should be based on 130 homes, and it proposed alternative calculations to the annual volume limit. He stated that OAR 340-071-220 specifies a minimum flow requirement of 450 gallons per day per household, which is the threshold for septic systems that DEQ and the county will approve. DEQ's Cleanup program typically estimates a threshold ceiling of 1,500 gallons per day (10% of exempted use) for all uses at residences with wells, when evaluating contamination impacts.
10. On April 30, 2010, Keno Water Company submitted a letter requesting that T-10954 proceed to issuance of a Preliminary Determination, provided the annual volumetric limit would be raised to 72.6 acre-feet (23,652,000 gallons), citing the Department, and the priority date would remain at September 19, 1973. The applicant concurred with all remaining provisions of the Conclusions of Law in the draft.
11. The limit of the water right is based on the maximum beneficial use that could reasonably have been made by domestic uses in 96 homes. Once this maximum quantity is established, the water right, if transferred to quasi-municipal use may not exceed that volume, but the place of use is no longer limited to 96 homes. Based on the upper and lower threshold daily rates suggested by DEQ in Finding #9 above, the maximum threshold for 96 homes would be approximately 52,560,000 gallons (161.3 acre feet) and the minimum would be 15,768,000 gallons (48.4 acre-feet). The applicant's proposed limit of 72.6 acre-feet (23,652,000 gallons), is within this range of values, and seems reasonable. Therefore, the

Department agreed to modify the conditions originally proposed in the draft Preliminary Determination accordingly.

12. The Department found that the draft Preliminary Determination included a completion date of October 1, 2011, however, OAR 690-380-5140(3) states that the completion period for a quasi-municipal use shall be five years plus the time until the next October 1. On May 3, 2010 Doug Adkins requested that the completion date be revised to October 1, 2015, as is reflected in this document.
13. On May 14, 2010, the Department issued a Preliminary Determination proposing to approve Transfer Application T-10954 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 May 18, 2010, and in the Herald and News newspaper on May 26, June 2 and 9, 2010, pursuant to ORS 540.520 and OAR 690-380-4020.
14. No protests were received. However, in response to the notice, on July 8, 2010, comments were filed by Patricia Rickett on behalf of Keno Pines Homeowners Club.¹ The comments stated:
 - a) The new point of appropriation taps a different aquifer than the authorized point of appropriation,
 - b) The citation for DEQ minimum flow requirement figures cited as being in OAR 340-017-220 was inaccurate, and
 - c) The effect of the proposed well on the domestic wells uphill of the proposed point of appropriation was not investigated, because the Department did not perform an aquifer interference test to check the effect on the uphill senior water rights. The commenters stated a concern that the aquifer may be at its limits.
15. In response to the comments, the Department reviewed the findings, proposed action and conditions in the Preliminary Determination in relation to the new information and concluded that:
 - a) Available data indicates the new well will tap the same aquifer, given that all the water well reports (well logs) show that each well obtains groundwater from basalt, the static water levels are similar when elevation is considered, and the wells are relatively close to each other within the same section.
 - b) The citation in Finding of Fact #9 of the Preliminary Determination contained a scrivener's error. The 450 gallon per day minimum is contained in OAR 340-071-220.

1. The comments were intended to be filed in the form of a protest. However, the protest was incomplete because it was not accompanied by "proof of service" to the transfer applicant as required by OAR 690-002-0030(2). Therefore, the submission did not meet the provisions of OAR 690-380-4030(3) and was not considered by the Department as a protest.

- c) The estimated impact on water levels in surrounding wells was modeled using the Theis equation and the best available data. Drawdown at six upland domestic wells on Red Wing Loop, Green Wing Loop and Whispering Pines Drive ranging in depth from 200 to 400 feet was estimated and compared using pumping at either the two currently authorized wells or the proposed well alone, with continuous pumping at the full rate for various lengths of time. This represents a “worst case” scenario, since it is highly unlikely that the full rate would be continuously pumped solely from the proposed well for extended periods of time. While the model showed that even in the extreme case of pumping the full rate from the proposed well alone, drawdown could increase somewhat from current levels, possibly below some of the current pump intakes, it would not lower the water level below the bottoms of the existing wells. Additionally, more aquifer depth is available that could be developed by deepening of wells.

Transfer Review Criteria (OAR 690-380-4010)

16. Water has been used within the last five years according to the terms and conditions of the right. There is no information in the record that would demonstrate that the right is subject to forfeiture under ORS 540.610.
17. A pump, pipeline, and sprinkler system sufficient to use the full amount of water allowed under the existing right was present within the five-year period prior to submittal of Transfer Application T-10954.
18. Certificate 85625 does not state an annual duty for domestic use; however, ORS 540.610 states “beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state.” It is unlikely that the quantity of water, if diverted continuously at the rate of 0.33 cfs for 365 days of the year could have been beneficially used for domestic use.
19. Use of more water per year than could maximally have been beneficially used for the original domestic use would constitute enlargement of the right, which is not allowable. Therefore, to avoid enlarging the right in the conversion to quasi-municipal use, an annual volume limit should be added to the right, based on the best available estimate of the maximum amount of water that could have been beneficially diverted and used for domestic purpose during a year in 96 homes.
20. Oregon DEQ, bases the minimum rate of 450 gallons per day per household, with a maximum ceiling of 1,500 gallons per day as stated above.
21. It seems reasonable to assume that the maximum annual quantity of water that could have been beneficially used for domestic use in 96 homes would be lower than the DEQ ceiling threshold for all uses in a household (1,500 gallons per day per home x 96 homes x 365 days per year = 52,560,000 gallons (161.3 acre feet)), but greater than the minimum use (450 gallons per day per household x 96 homes x 365 days = 45,015,768,000 gallons (48.4 acre-feet)). Therefore, the annual limit of 72.6 acre-feet (23,652,000 gallons) per year proposed by the applicant represents a 50% increase above the minimum threshold and seems a reasonable representation of maximum actual beneficial use under the terms of the right.

22. Provided the total volume of water used for quasi-municipal purposes on the proposed place of use is limited to 72.6 acre-feet (23,652,000 gallons) per year, the change can be made without enlargement of the right.
23. The proposed change would not result in injury to other water rights.

Conclusions of Law

The additional point of appropriation and changes in place of use and character of use proposed in Transfer Application T-10954 are 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 additional point of appropriation and changes in place of use and character of use proposed in application T-10954 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 Certificate 85625 and any related decree.
3. Water right certificate 85625 is cancelled.
4. The quantity of water diverted at the additional point of appropriation, together with that diverted at the original points of appropriation, shall not exceed the quantity of water lawfully available at the original points of appropriation.
5. The right for quasi-municipal use shall be limited to 0.33 cfs, further limited to no more than 72.6 acre-feet (23,652,000 gallons) per year.
6. 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 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.
7. Water shall be acquired from the same aquifer (water source) as the original points of appropriation.
8. The approved changes shall be completed and full beneficial use of the water shall be made on or before **October 1, 2015**. 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.

9. When satisfactory proof of the completed changes is received, a new certificate confirming the right transferred will be issued.

Dated at Salem, Oregon this 30 day of July 2010.


Phillip C. Ward, Director

Mailing date: AUG 02 2010