

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

In the Matter of Transfer Application) FINAL ORDER APPROVING A CHANGE
T-12312, Umatilla County) IN POINTS OF DIVERSION TO REFLECT
) HISTORIC USE

Authority

ORS 540.532 establishes the process in which a water right holder may submit a request for a change in point of diversion to reflect historical use under an existing water right. OAR Chapter 690-380-2120 implements the statute and provides the Department's procedures and criteria for evaluating historic point of diversion/appropriation transfer applications.

Applicant

EDWARD C. BURLINGAME
801 S. MAIN
MILTON-FREEWATER, OREGON 97862

Findings of Fact

1. On March 14, 2016, Edward Burlingame, filed a transfer application for authorization of historic points of diversion under Certificates 5526, 14551, 24511, 24512, 83914 and 84152. The Department assigned the application number T-12312.
2. On August 1, 2017, the agent for the applicant amended and revised the application to reflect the applicant as Edward C. Burlingame, owner of the lands involved in the transfer.
3. Notice of the application for transfer was published on March 22, 2016, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
4. On October 19, 2017, the Department, pursuant to OAR 690-380-2120(3), provided the applicant a list of the affected water rights and a copy of the notice to be provided to each affected water right holder. On November 8, 2017, the agent for the applicant provided written proof of service of notice of the proposed transfer on the affected water right holder.

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.

5. On January 24, 2018, the Department mailed a copy of a draft final order proposing to approve Transfer Application T-12312 to the applicant. The draft Final Order cover letter set forth a deadline of February 23, 2018, for the applicants to respond. On March 19, 2018, the applicants requested the Department continue with the transfer, proceed with issuance of the Final Order and provided the necessary information to demonstrate that they are authorized to pursue the transfer.

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

Certificate: 5526 in the name of SAMUEL LONEY (confirmed by Pine Creek, Umatilla County, (F))

Use: IRRIGATION OF 127.8 ACRES

Priority Date: 1874

Limit/Duty: The amount of water to which such right is entitled, for the purpose of irrigation, is limited to an amount actually used for said purposes, and shall not exceed 1.0 acre-foot per acre during any thirty day period nor 3.0 acre-feet per acre during the irrigation season beginning April 1st and ending October 1st, from Pine Creek for Tract 1; and ONE-EIGHTIETH of one cubic foot per second (cfs) per acre from Swartz Spring Branch for Tract 2.

Source: PINE CREEK FOR TRACT #1, and SCHWARTZ SPRING BRANCH, A TRIBUTARY OF PINE CREEK, FOR TRACT #2.

Authorized Place of Use:

IRRIGATION - TRACT #1					
Twp	Rng	Mer	Sec	Q-Q	Acres
6 N	34 E	WM	17	NE SE	10.4
6 N	34 E	WM	17	NW SE	6.4
6 N	34 E	WM	17	SW SE	12.0
6 N	34 E	WM	17	SE SE	33.4
Total					62.2

IRRIGATION - TRACT #2					
Twp	Rng	Mer	Sec	Q-Q	Acres
6 N	34 E	WM	17	SW NE	7.9
6 N	34 E	WM	17	SE NE	13.7
6 N	34 E	WM	17	NE SE	24.3
6 N	34 E	WM	17	NW SE	19.7
Total					65.6

7. Certificate 5526 does not describe the point of diversion locations on either Pine Creek or Schwartz Spring Branch. However, the Department's 1921 adjudication map identifies diversion dam structures and ditches within Section 21 on Pine Creek, and within Section 17 on Swartz Creek (different spelling on map than Certificate 5526) both within T 6 N, R 34 E, W.M. In addition, information is available from the applicant's map based on a recent field visit and survey indicating that the original points of diversion are located as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
6 N	34 E	WM	21	SW NE	PINE CREEK – 1530 FEET SOUTH AND 270 FEET EAST FROM THE N¼ CORNER OF SECTION 21
6 N	34 E	WM	17	NE SE	SCHWARTZ CREEK – (Low-Young Ditch)

8. Transfer Application T-12312 proposes to change the points of diversion to reflect historic use for the above described right downstream on Pine Creek approximately 1¾ miles and approximately 700 feet on Schwartz Creek, then approximately 2650 feet downstream on Pine Creek to a diversion structure located:

Twp	Rng	Mer	Sec	Q-Q	Measured Distance
6 N	34 E	WM	17	NW SE	HISTORIC POD - 2335 FEET NORTH AND 2575 FEET WEST FROM THE SE CORNER OF SECTION 17

9. The second water right to be transferred is as follows:

Certificate: 14551 in the name of RAYMOND BEVANS (perfected under Permit S-15258)

Use: IRRIGATION OF 28.0 ACRES

Priority Date: APRIL 23, 1942

Rate: 0.35 CUBIC FOOT PER SECOND

Limit/Duty: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, shall be limited to ONE-EIGHTIETH of one cubic foot per second per acre, or its equivalent for each acre irrigated and shall be limited to a diversion of not to exceed 1.0 acre-foot per acre for each acre irrigated during any 30-day period and shall be further limited to a diversion of not to exceed 3.0 acre feet per acre for each acre irrigated during the irrigation season from April 1 to October 1

Source: SWARTZ SPRING CREEK, tributary to PINE CREEK

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
6 N	34 E	WM	16	SE SE	NONE GIVEN

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
6 N	34 E	WM	17	SW NE	15.0
6 N	34 E	WM	17	SE NE	9.0
6 N	34 E	WM	17	NE SE	4.0
Total					28.0

10. Transfer Application T-12312 proposes to change the point of diversion to reflect historic use for the above described right downstream approximately 1¼ miles on Schwartz (Swartz) Creek and downstream ½ mile down Pine Creek to a diversion structure on Pine Creek located:

Twp	Rng	Mer	Sec	Q-Q	Measured Distance
6 N	34 E	WM	17	NW SE	HISTORIC POD - 2335 FEET NORTH AND 2575 FEET WEST FROM THE SE CORNER OF SECTION 17

11. The third water right to be transferred is as follows:

Certificate: 24511 in the name of RAYMOND BEVANS (perfected under Permit S-15257)

Use: IRRIGATION OF 159.26 ACRES

Priority Date: APRIL 23, 1942

Rate: 1.96 CUBIC FEET PER SECOND

Limit/Duty: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, is limited to ONE-SIXTIETH 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 1.0 acre-foot per acre for each acre irrigated during any 30 day period and shall be further limited to a diversion of not to exceed 3.0 acre feet per acre for each acre irrigated during the irrigation season from April 1 to October 1 of each year

Source: PINE CREEK, tributary to the WALLA WALLA RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
6 N	34 E	WM	21	SW NE	NONE GIVEN

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
6 N	34 E	WM	17	NE NW	27.80
6 N	34 E	WM	17	NW NW	25.70
6 N	34 E	WM	17	NE SW	40.60
6 N	34 E	WM	17	NW SW	37.50
6 N	34 E	WM	17	SW SW	0.16
6 N	34 E	WM	17	SE SW	6.80
6 N	34 E	WM	17	NW SE	12.40
6 N	34 E	WM	17	SW SE	8.30
Total					159.26

12. A scrivener's error was identified by the applicant in the authorized place of use description for Certificate 24511. The certificate incorrectly describes the following:

Twp	Rng	Mer	Sec	Q-Q	Acres
6 N	34 E	WM	17	NE NW	27.80
6 N	34 E	WM	17	NW NW	25.70

The correct location, as verified by the final proof map for Certificate 24511, is as follows:

Twp	Rng	Mer	Sec	Q-Q	Acres
6 N	34 E	WM	17	SE NW	27.80
6 N	34 E	WM	17	SW NW	25.70

13. Transfer Application T-12312 proposes to change the points of diversion to reflect historic use for the above described acres downstream approximately 1½ miles on Pine Creek to a diversion structure located:

Twp	Rng	Mer	Sec	Q-Q	Measured Distance
6 N	34 E	WM	17	NW SE	HISTORIC POD - 2335 FEET NORTH AND 2575 FEET WEST FROM THE SE CORNER OF SECTION 17

14. The fourth water right to be transferred is as follows:

Certificate: 24512 in the name of RAYMOND R. BEVANS (perfected under Permit S-16589)

Use: SUPPLEMENTAL IRRIGATION OF 68.4 ACRES

Priority Date: SEPTEMBER 14, 1945

Rate: 0.86 CUBIC FOOT PER SECOND

Limit/Duty: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, shall be limited to ONE-EIGHTIETH 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 1.0 acre foot per acre for each acre irrigated during any 30 day period and shall be further limited to a diversion of not to exceed 3.0 acre feet per acre for each acre irrigated during the irrigation season from April 1 to October 1, and shall also be limited to the water available at the point of diversion, and shall not carry with it the right to compel the continuance of the waste water.

Source: SEEPAGE AND WASTE FROM SWARTZ SPRING BRANCH, tributary to PINE CREEK

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
6 N	34 E	WM	17	NE SE	NONE GIVEN

Authorized Place of Use:

SUPPLEMENTAL IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
6 N	34 E	WM	17	SE NW	12.5
6 N	34 E	WM	17	NE SW	8.1
6 N	34 E	WM	17	NE SE	5.5
6 N	34 E	WM	17	NW SE	19.1
6 N	34 E	WM	17	SW SE	15.5
6 N	34 E	WM	17	SE SE	7.7
Total					68.4

15. Transfer Application T-12312 proposes to change the points of diversion to reflect historic use for the above described acres downstream approximately 500 feet on Schwartz Creek and ½ mile on Pine Creek to a diversion structure on Pine Creek located:

Twp	Rng	Mer	Sec	Q-Q	Measured Distance
6 N	34 E	WM	17	NW SE	HISTORIC POD - 2335 FEET NORTH AND 2575 FEET WEST FROM THE SE CORNER OF SECTION 17

16. The fifth water right to be transferred is as follows:

Certificate: 83914 in the name of RAYMOND BEVANS (perfected under Permit S-19609)
Use: IRRIGATION OF 25.6 ACRES
Priority Date: JULY 11, 1950
Rate: 0.42 CUBIC FOOT PER SECOND
Limit/Duty: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, is limited to a diversion of ONE-SIXTIETH of one cubic foot per second, or its equivalent for each acre irrigated, and shall be further limited to a diversion of not to exceed 3.0 acre-feet per acre for each acre irrigated during the irrigation season of each year.
Source: PINE CREEK, tributary of WALLA WALLA RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
6 N	34 E	WM	21	SW NE	NONE GIVEN

Authorized Place of Use:

IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
6 N	34 E	WM	17	SW SE	19.1
6 N	34 E	WM	17	SE SE	6.5
Total					25.6

17. Transfer Application T-12312 proposes to change the point of diversion to reflect historic use for the above described acres downstream approximately 1½ miles on Pine Creek to a diversion structure located:

Twp	Rng	Mer	Sec	Q-Q	Measured Distance
6 N	34 E	WM	17	NW SE	HISTORIC POD - 2335 FEET NORTH AND 2575 FEET WEST FROM THE SE CORNER OF SECTION 17

18. The sixth water right to be transferred is as follows:

Certificate: 84152 in the name of STATELINE RANCH INC.; ED BURLINGAME (perfected under Permit S-19609)
Use: SUPPLEMENTAL IRRIGATION OF 15.7 ACRES
Priority Date: JULY 11, 1950
Rate: 0.26 CUBIC FOOT PER SECOND
Limit/Duty: The amount of water used for irrigation, together with the amount secured under any other right existing for the same lands, is limited to a diversion of ONE-SIXTIETH 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 3.0 acre-feet per acre for each acre irrigated during the irrigation season of each year.
Source: PINE CREEK, tributary to the WALLA WALLA RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
6 N	34 E	WM	21	SW NE	1530 FEET SOUTH AND 270 FEET EAST FROM N¼ CORNER OF SECTION 21

Authorized Place of Use:

SUPPLEMENTAL IRRIGATION					
Twp	Rng	Mer	Sec	Q-Q	Acres
6 N	34 E	WM	20	NE NE	14.9
6 N	34 E	WM	20	NW NE	0.8
Total					15.7

19. Transfer Application T-12312 proposes to change the point of diversion to reflect historic use for the above described acres downstream approximately 1½ miles on Pine Creek to a diversion structure located:

Twp	Rng	Mer	Sec	Q-Q	Measured Distance
6 N	34 E	WM	17	NW SE	HISTORIC POD - 2335 FEET NORTH AND 2575 FEET WEST FROM THE SE CORNER OF SECTION 17

20. Oregon Department of Fish and Wildlife (ODFW) has determined that a fish screen is necessary at the historic point of diversion to prevent fish from entering the diversion and that the diversion is not currently equipped with an appropriate fish screen. This diversion may be eligible for screening cost-share funds. Listed fish species are not present at the point of diversion, the originating water right diversions are not screened, cost-share funds are not currently available, and the proposed diversion may be eligible for ODFW’s cost-share program. A grace period of two years is appropriate until such time as cost-share funds become available to assist in the construction of a fish screen. If cost-share funds do not become available, the water user must screen within the indicated time period regardless of the availability of cost-share funding.

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

21. 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 Findings No. 7, 9, 11, 13, 15 and 17, has been in use for more than 10 years.
22. 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.
23. Pursuant to OAR 690-380-2120(3), the Department provided the applicant a list of the affected water rights and a copy of the notice to be provided to each affected water right holder. The applicant has provided written proof of service of notice of the proposed transfer on all affected water right holders.
24. Water has been used within the last five years according to the terms and conditions of the rights. There is no evidence available that would demonstrate that the rights are subject to forfeiture under ORS 540.610.

25. Diversion structures, ditches and sprinkler systems sufficient to use the full amount of water allowed under the existing rights are present.
26. The proposed changes would not result in enlargement of the rights.
27. The proposed changes would not result in injury to other water rights.

Conclusions of Law

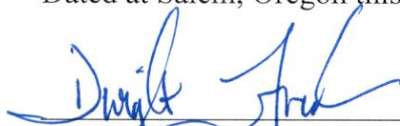
The proposed changes in points of diversion to reflect historical use in transfer application T-12312 are consistent with the requirements of ORS 540.532 and OAR 690-380-2120.

Now, therefore, it is ORDERED:

1. The changes proposed in T-12312 are 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 Certificates 5526, 14551, 24511, 24512, 83914 and 84152 and any related decree.
3. Water Right Certificates 5526, 14551, 24511, 24512, 83914 and 84152 are cancelled.
4. Water Right Certificate 5526 is cancelled. Certificate 93970 will be issued to describe the change in point of diversion for the portion of the right included in T-12312.
5. Water Right Certificate 14551 is cancelled. Certificate 93971 will be issued to describe the change in point of diversion for the portion of the right included in T-12312.
6. Water Right Certificate 24511 is cancelled. Certificate 93972 will be issued to describe the change in point of diversion for the portion of the right included in T-12312. Certificate 93796 shall be issued to describe the portion of Certificate 24511 not modified by this order. Together, the new Certificates shall supersede Certificate 24511.
7. Water Right Certificate 24512 is cancelled. Certificate 93793 will be issued to describe the change in point of diversion for the portion of the right included in T-12312.
8. Water Right Certificate 83914 is cancelled. Certificate 93794 will be issued to describe the change in point of diversion for the portion of the right included in T-12312.
9. Water Right Certificate 84152 is cancelled. Certificate 93795 will be issued to describe the change in point of diversion for the portion of the right included in T-12312 and correct the scrivener's error. Certificate 93789 shall be issued to describe the portion of Certificate 84152 not modified by this order. Together, the new Certificates shall supersede Certificate 84152.

10. The quantity of water diverted at the new points of diversion shall not exceed the quantity of water lawfully available at the original points of diversion. Within the stream reaches from the original points of diversion on both Schwartz Spring Branch and Pine Creeks down to the confluence of both creeks and to the proposed Historic Point of Diversion, the amount of water to which these rights are entitled shall not exceed the quantity of water legally available at the original points of diversion on both Schwartz Spring Branch and Pine Creeks. Stream channel losses and gains calculated based on available data and the use of water by senior appropriators will determine the amount of water to which this right is entitled downstream below the confluence of both creeks at the new proposed Historic Point of Diversion.
11. Prior to October 1, 2019, 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. The water user shall maintain the meter or measuring device in good working order. The water user shall allow the Watermaster access to the meter or measuring device; provided however, where the meter or measuring device are located within a private structure, the Watermaster shall request access upon reasonable notice.
12. Prior to October 1, 2020, the water user shall install an approved fish screen at the new point of diversion. The water user may withdraw water at the new point of diversion without a screen until October 1, 2019. The water user shall provide to 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 maintain and operate 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 JUN 18 2018,



Dwight French, Water Right Services Administrator, for
THOMAS M. BYLER, DIRECTOR

Mailing date: JUN 19 2018