# BEFORE THE WATER RESOURCES DEPARTMENT OF THE STATE OF OREGON

In the Matter of Transfer Application	)	FINAL ORDER APPROVING A
T-9957, Jackson County	)	CHANGE IN POINT OF DIVERSION
-	)	AND PLACE 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**

LEMUEL AND SHARON WORTHINGTON 18040 EAST EVANS CREEK ROAD ROGUE RIVER, OR 97537

# **Findings of Fact**

- 1. On June 15, 2005, LEMUEL AND SHARON WORTHINGTON filed a transfer application to change the place of use and point of diversion under Certificate 75462. The Department assigned the application number T-9957.
- 2. Certificate 75462 was superseded by Certificate 79742 on December 17, 2002.
- 3. A draft Preliminary Determination was mailed to the applicants on December 12, 2006. Subsequently, the applicants notified the Department of a scrivener's error in the number of acres proposed to be moved prompting issuance of a *revised* draft Preliminary Determination on January 26, 2007. The applicants responded via email on January 30, 2007, communicating their concurrence with the findings of fact, determinations and proposed actions contained in the *revised* draft Preliminary Determination.
- 4. The portion of the right to be transferred is as follows:

Certificate: 79742 in the name of W. H. PATILLO (confirmed by Rogue River Decree)
Use: PRIMARY IRRIGATION AND SUPPLEMENTAL IRRIGATION of 0.3 ACRE
Priority Dates: 1892 (PRIMARY IRRIGATION), 1871 (SUPPLEMENTAL IRRIGATION)
Rate: 0.006 CUBIC FOOT PER SECOND FROM BOTH SOURCES, SUBJECT TO THE
PROVISIONS OF PARAGRAPH 79 OF SAID DECREE.

## NOTICE OF RIGHT TO PETITION FOR RECONSIDERATION OR JUDICIAL REVIEW

This is an order 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 137-004-080 and OAR 690-01-005, you may either 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: EAST FORK EVANS CREEK, tributary to the ROGUE RIVER, SUPPLEMENTAL SUPPLY FROM SPIGNET CREEK, tributary to EAST FORK EVANS CREEK.

#### **Authorized Point of Diversion:**

Twp	Rng	Mer	Sec	Q-Q	Ditch Name
34 S	2 W	WM	19	SE NE	BYBEE DITCH

## **Authorized Place of Use:**

PRIMARY IRRIGATION: EAST FORK EVANS CREEK									
Twp	Rng	Mer	Sec	Q-Q	Acres				
34 S	3 W	WM	25	NW NW	0.3				

SUPPLEMENTAL IRRIGATION: SPIGNET CREEK								
Twp	Rng	Mer	Sec	Q-Q	Acres			
34 S	3 W	WM	25	NW NW	0.3			

- 5. Bybee Ditch is no longer in use.
- 6. The original certificate (Certificate 16153) did not list the authorized point of diversion (POD). Subsequent transfers (T-3324, T-3764, T-4799, T-7940, T-8031 and T-8987) resulted in a number of remaining rights which did not modify the authorized point of diversion.
- 7. Nonetheless, Certificate 75462 and Certificate 79742 described the authorized point of diversion as being located in the SENE, Section 19, T34S, R2W, W.M., for all the lands served by Bybee Ditch. Research of the water right maps of record and all associated documents indicate that Bybee Ditch was segmented and had at least two points of diversion that served specific lands. One of the diversion points from Bybee Ditch was a flume that served the southernmost segment of Bybee Ditch. This flume was washed out by a high water event in approximately 1971. Subsequently, a point of diversion was used approximately 400 feet downstream of where the flume was previously located.
- 8. The application map prepared by a Certified Water Rights Examiner (CWRE), Harold L. Center, described the location of the POD for the southernmost segment of Bybee Ditch as shown in the table below:

## POINT OF DIVERSION FOR SOUTHERNMOST SEGMENT OF BYBEE DITCH:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
34 S	3 W	WM	24	NE SW	1660 FEET NORTH AND 2150 FEET EAST FROM THE SOUTHWEST CORNER OF SECTION 24

9. Transfer Application T-9957 proposes to move the authorized point of diversion approximately 0.7 mile downstream from the location described in Findings of Fact #8 to:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
34 S	3 W	WM	25	NW NW	830 FEET SOUTH AND 390 FEET EAST FROM THE NW¼ CORNER OF SECTION 25

10. Transfer Application T-9957 also proposes to change the place of use of the right to:

PRIMARY IRRIGATION									
Twp	Rng	Mer	Sec	Q-Q	Acres	Tax Lot			
34 S	3 W	WM	25	NW NW	0.3	192			

SUPPLEMENTAL IRRIGATION									
Twp	Rng	Mer	Sec	Q-Q	Acres	Tax Lot			
34 S	3 W	WM	25	NW NW	0.3	192			

- 11. Notice of the application for transfer was published on July 5, 2005, pursuant to ORS 540.520 and OAR 690-380-4000. No comments were filed in response to the notice.
- 12. On February 15, 2007, the Department issued a preliminary determination proposing to approve Transfer Application T-9957 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 February 20, 2007 and in the Medford Mail Tribune newspaper on March 3, 10, and 17, 2007, pursuant to ORS 540.520 and OAR 690-380-4020. No protests were filed in response to the notice.
- 13. 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 not currently equipped with an appropriate fish screening and/or by-pass device. This diversion may be eligible for screening cost share funds.
- 14. Water has been used within the last five years according to the terms and conditions of the right, and no evidence is available that would demonstrate that the right is subject to forfeiture under ORS 540.610.
- 15. A pump sufficient to use the full amount of water allowed under the existing right is present.
- 16. The proposed change would not result in enlargement of the right.
- 17. The proposed change would not result in injury to other water rights.

#### Conclusions of Law

The changes in place of use and point of diversion proposed in Transfer Application T-9957 are consistent with the requirements of ORS 540.505 to 540.580, and OAR 690-380-5000.

## Now, therefore it is ORDERED:

- 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 79742 and any related decree.
- 2. Certificate 79742 is cancelled. A new certificate will be issued describing that portion of the right not involved in this transfer.
- 3. The approved changes shall be completed and full beneficial use of the water shall be made on or before **October 1, 2008.** 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.
- 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. The former place of use of the transferred water shall no longer receive water as part of these rights.
- 6. Prior to diverting water, the water user shall install and maintain a headgate, an in-line flow meter, weir, or other suitable device for measuring and recording the quantity of water diverted. The type and plans of the headgate and measuring device must be approved by the Department prior to beginning construction and shall be installed under the general supervision of the Department.
- 7. Prior to diverting water, the water user shall install a fish screening and/or by-pass device, as appropriate, at the new point of diversion consistent with the Oregon Department of Fish and Wildlife's (ODFW) design and construction standards. Prior to installation, the water user shall obtain written approval from ODFW that the required screen and/or by-pass device meets ODFW's criteria. Prior to submitting a Claim of Beneficial Use, the water user must obtain written approval from ODFW that the required screening and/or by-pass device was installed to the state's criteria. The water user shall maintain and operate the fish screen and/or by-pass device, as appropriate, at the point of diversion consistent with ODFW's operational and maintenance standards.
- 8. When satisfactory proof of the completed changes is received, a new certificate confirming the portion of the right transferred will be issued.

Dated at Salem, Oregon this 20th day of 4 2007.

Phillip C. Ward, Director

Mailing Date: APR 2 3 2007