

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

In the Matter of Transfer Application)	FINAL ORDER DENYING A CHANGE IN
T-13386, Josephine County)	PLACE OF USE, CHARACTER OF USE, AND
)	A CHANGE FROM A SURFACE WATER
)	POINT OF DIVERSION TO A
)	GROUNDWATER POINT OF
)	APPROPRIATION

Authority

Oregon Revised Statutes (ORS) 540.505 to 540.580 establish 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. Oregon Administrative Rules (OAR) Chapter 690, Division 380 implement the statutes and provides the Department's procedures and criteria for evaluating transfer applications.

Applicant

HOLLAND LAKE FARMS LLC
PO BOX 454
CUTTEN, CA 95534

Findings of Fact

1. On March 10, 2020, HOLLAND LAKE FARMS LLC filed an application to change the place of use, and to change the character of use under Certificate 8917. The Department assigned the application number T-13386.
2. Notice of the application for transfer was published on March 17, 2020, pursuant to OAR 690-380-4000. No comments were filed in response to the notice.
3. On December 17, 2020, the Department contacted the applicant by written correspondence to notify the applicant and the applicant's agent of deficiencies in the application. Table 1 identifies a proposed point of appropriation, but applicant did not indicate whether they were requesting a change or an additional point of appropriation. Table 2 identified the authorized place of use as being within Sections 4 and 5, T40S, R7W, WM, however, Certificate 8917 authorizes use in only Section 4, and the application did not

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.

include supporting documentation for the Evidence of Use affidavit, as is required by OAR 690-380-3000912). The Department requested that the deficiencies be resolved by January 18, 2021. The applicant's agent submitted a revised Table 1 indicating a change in point of appropriation, and a revised Table 2 identifying only Section 4 as the authorized place of use.

Certificate 8917 was perfected under a surface water permit, so upon reviewing the revised Table 1, the Department determined the appropriate request should be a change from a surface water point of diversion to a groundwater point of appropriation. The Department contacted the agent to see how they wished to proceed.

4. On December 18, 2020, the agent responded with the understanding that a groundwater review is required, and that a change from a surface water point of diversion to a groundwater point of appropriation would be the appropriate request.
5. On February 22, 2021, the Department contacted the applicant by written correspondence to notify the applicant and the applicant's agent of an outstanding deficiency that still needed resolution. The Department was still waiting on submission of supporting documentation for Evidence of Use and affidavit. The Department requested that the deficiency be resolved by March 24, 2021.
6. On March 3, 2021, the agent submitted a signed statement from the applicant attesting to the use of the water under Certificate 8917, resolving the deficiencies.
7. On September 28, 2021, the Department mailed a copy of the draft Preliminary Determination proposing to deny Transfer Application T-13386 to the applicant. The draft Preliminary Determination cover letter set forth a deadline of October 28, 2021, for the applicant to respond.
8. On October 25, 2021, the Department held a meeting with the applicant's agent to discuss resolution to the denial of Transfer Application T-13386. The Department set forth a deadline of November 29, 2021, for the applicant to respond.
9. On December 28, 2021, the applicant's agent submitted a response by written correspondence addressing the amount of water allowed under the change in character of use. The agent did not address the denial of Transfer Application T-13386 based on the change from a surface water point of diversion to a groundwater point of appropriation. The Department also did not receive a report of ownership from a title company, as is required by OAR 690-380-4010(5)(a). Therefore, Transfer Application T-13386 is considered incomplete.

10. On February 1, 2022, the Department issued a Preliminary Determination proposing to deny Transfer T-13386 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 February 8, 2022, pursuant to ORS 540.520 and OAR 690-380-4020. No protests were filed in response to the notice.

11. The right to be transferred is as follows:

Certificate: 8917 in the name of EDWARD L. KENDALL (perfected under Permit S-8622)
Use: DOMESTIC
Priority Date: JULY 30, 1928
Rate: 0.05 CUBIC FOOT PER SECOND
Source: TUNNEL, a tributary of ILLINOIS RIVER

Authorized Point of Diversion:

Twp	Rng	Mer	Sec	Q-Q
40 S	7 W	WM	5	NE SE

Authorized Place of Use:

DOMESTIC				
Twp	Rng	Mer	Sec	Q-Q
40 S	7 W	WM	4	SW NW

12. The Department received information from the applicant that better describes the location of the authorized point of diversion for Certificate 8917 as follows:

Twp	Rng	Mer	Sec	Q-Q	Survey Coordinates
40 S	7 W	WM	5	NE SE	EMERALD TUNNEL: LATITUDE: 42-07-01.12413 (N) LONGITUDE: -123-32-41.33768 (W)

13. Transfer Application T-13386 proposes to change from a surface water point of diversion to a groundwater point of appropriation (well) approximately 475 feet as follows:

Twp	Rng	Mer	Sec	Q-Q	Measured Distances
40 S	7 W	WM	5	SW NE	POA 1/JOES 59742 - 15 FEET NORTH AND 175 FEET WEST FROM THE 1/4 CORNER BETWEEN SECTION 4 AND 5

14. Transfer Application T-13386 also proposes to change the place of use of the right to:

NURSERY						
Twp	Rng	Mer	Sec	Q-Q	DLC	Acres
40 S	7 W	WM	5	SE NE	39	10.0

15. Transfer Application T-13386 proposes to change the character of use to nursery.

16. Certificate 8917 does not specify a total quantity of water to be diverted annually 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." If the domestic use was diverted continuously at the authorized rate of 0.01 cfs for 365 days per year ($0.01 \text{ cfs} \times 60 \text{ sec/min} \times 60 \text{ min/hr} \times 24 \text{ hr/day} \times 365 \text{ days/year} \div 43,560 \text{ square feet per acre} = 7.24 \text{ acre-feet per year}$), is the maximum that could have been diverted. However, water for domestic use is not continuously diverted for 24 hours per day, 365 days per year.
17. Use of more water per year than what could have been used for maximum beneficial use for the original domestic use would constitute enlargement of the right, which is not allowed. Therefore, to avoid enlarging the right under the proposed nursery 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 use during a year.
18. Estimates of in-house domestic use available from agencies such as the United States Geological Survey (USGS), American Water Works Association (AWWA) and Penn State Cooperative Extension indicate an average in-house domestic water use of approximately 70 gallons per person per day, or approximately 0.47 acre-feet per year for a household that includes six people. Therefore, the annual volume limitation to be placed on the domestic use for this right is 0.47 acre-feet per year.

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

19. 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.
20. A diversion structure and buried pipelines sufficient to use the full amount of water allowed under the existing right were present within the five-year period prior to submittal of Transfer Application T-13386.
21. On August 13, 2021, the Department determined the proposed point of appropriation does not meet the requirements of ORS 540.531(2)(C) and OAR 690-380-2130(2)(c). The Department found, "In order for a SW-GW transfer to meet the definition of similarly in OAR 690-380-2130(2)(c) stream depletion must be estimated after 10 days of continuous pumping. Such analysis is not completed here because the hydrogeologic framework of this site does not meet basic assumptions of typically utilized analytical stream depletion models (e.g., Jenkins [1976], Hunt [1999], or Hunt [2003]). Notwithstanding, the proposed POA is found to be hydraulically connected to the original POD *and* its source aquifer, and it is located within the location constraints discussed above in item 1 (item 1 of the Department's Groundwater review). The proposed POA will impact the original surface water source, and the inability to model the system only means that the quantitative definition of similarly cannot be reliably met because of the unconventional hydrologic

system and fractured, heterogeneous aquifer." Therefore, the Department cannot make a positive finding of similarity under ORS 540.531(2)(C) and OAR 690-380-2130(2)(c).

22. The proposed changes, as conditioned, would not result in enlargement of the right.
23. The proposed changes, as conditioned, would not result in injury to other water rights.
24. All other application requirements are met.

Conclusions of Law

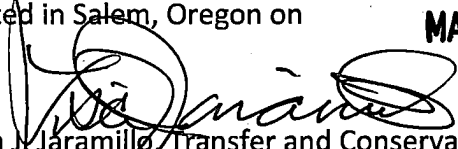
The change from a surface water point of diversion to a groundwater point of appropriation, changes in place of use, and character of use proposed in Transfer Application T-13386 appear to not be consistent with the requirements of ORS 540.531(2)(c) and OAR 690-380-2130(2)(c), because the proposed groundwater point of appropriation does not affect the surface water source similarly.

Now, therefore, it is ORDERED:

Transfer Application T-13033 is denied for failure to meet the requirements under ORS 540.531(2)(C) and OAR 690-380-2130 (2)(c).

Dated in Salem, Oregon on

MAR 30 2022


Lisa J. Jaramillo, Transfer and Conservation Section Manager, for
THOMAS M. BYLER, DIRECTOR
Oregon Water Resources Department

Mailing date: ~~_____~~ **MAR 31 2022**

SSBS 7 - HAM

SSBS 7 - HAM

SSBS 7 - HAM